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WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE: IMPLICATIONS FOR CHILD CUSTODY LITIGATION

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ABSTRACT

The psychotherapist-patient privilege, rooted in both common and statutory law, is predicated upon the public policy goal of protecting the reasonable expectation of privacy of individuals seeking psychotherapy. The privilege is not absolute, however. State and federal courts are far from uniform in determining how and when the privilege should be waived, in whole or in part, through implication, inadvertence or the affirmative action of the parties. In the family law context, the law that has evolved around the exercise of this privilege is even more complex as the needs of children add another wrinkle to the goal of balancing the imperative of confidentiality with the need for useful information that may be provided.

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INTRODUCTION

In family court matters, particularly those involving contested child custody, allegations of impaired mental health or parental unfitness frequently lurk in the background.¹ Since child custody is generally based upon the best interests of the child, allegations of impaired mental health must be addressed.² Furthermore, even where there are no preexisting psychological issues, it is not unusual for warring couples to seek out psychotherapy, which, scholars note, plays a “rehabilitative role in helping family members cope with the changes that divorce inevitably brings [as well as] . . . personal and . . . intrafamilial conflicts.”³ Despite their important role in helping families cope with these issues,⁴ the presence of psychotherapists in the lives of family court litigants creates fertile ground for inquiry when litigation ensues. In both state and federal courts, psychotherapist-patient communications relating to the individual’s diagnosis or treatment enjoy some level of privilege from disclosure in court proceedings.⁵

The psychotherapist-patient privilege is not absolute. Depending upon the court and the circumstances, the privilege may yield to such interests as the court’s need for the information to protect the welfare

¹ Courtney Waits, *The Use of Mental Health Records in Child Custody Proceedings*, 17 J. AM. ACAD. MATRIMONIAL LAW. 159, 159 (2001).

² *Id.* at 159-60.

³ *Id.* at 159.

⁴ *Id.*

⁵ See e.g., MASS. GEN. LAWS ANN. ch. 233, § 20B (West 2000 & Supp. 2011).

of a child;⁶ it may also be compromised by the patient's own waiver, whether voluntary, inadvertent or implied.⁷ This Article provides a multijurisdictional examination of the complex issues surrounding waiver of the psychotherapist-patient privilege and its implications in child custody litigation. It reviews cases in which waiver of the psychotherapist-patient privilege has been implied by such circumstances as disclosure of privileged communications to third parties, by prior testimony, and by the presence of third parties. It examines matters in which courts have found limited, partial, or selective waiver of the privilege. It also discusses the presence of a guardian *ad litem* (GAL) appointed in matters of contested child custody to assess the best interest of the child and its impact on asserting the psychotherapist-patient privilege of both parents and children.

I. IMPLIED WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

In *Jaffee v. Redmond*, the U.S. Supreme Court, in establishing a federal standard for psychotherapist-patient privilege, acknowledged that the success of the psychotherapeutic process requires a high level of confidence and trust in the privacy of communications between psychotherapist and patient.⁸ *Jaffee* specifically analogized the psychotherapist-patient privilege to that of the attorney-client⁹ and spousal¹⁰ privileges, noting that all are "rooted in the imperative need for confidence and trust."¹¹ However, *Jaffee* also acknowledged that, "like other testimonial privileges, the patient may of course waive the

⁶ See, e.g., *id.* § 20B(e).

⁷ See *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996); see also § 20B.

⁸ *Jaffee*, 518 U.S. at 10. Although this article focuses on the contours of the psychotherapist-patient privilege, it should be noted that privileges also exist for individuals who obtain treatment from other licensed mental health providers including social workers, marriage counselors, etc. See *id.* at 15 ("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. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker.").

⁹ Note that under the Federal Rules of Evidence there is a spousal "privilege" (that can be asserted or waived) while in some state courts spouses are "disqualified" from testifying against their spouses, which disqualification cannot be waived. See FED. R. EVID. 501 (advisory committee notes).

¹⁰ Unlike the attorney-client privilege, which originated in common law and exists in all states, the psychotherapist/patient privilege is a creature of statute and thus varies from state to state. See, e.g., MASS. GEN. LAWS ANN. ch. 233, § 20B(e); CONN. GEN. STAT. ANN. § 52-146c(b) (West 2011).

¹¹ *Jaffee*, 518 U.S. at 10 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

protection”¹² of the privilege. Furthermore, because the privilege is not self-executing, it can be inadvertently waived by the patient (but not the psychotherapist)¹³ if not affirmatively asserted and preserved.¹⁴

A. Implied Waiver by Filing a Claim

Implied waiver of the psychotherapist-patient privilege, as the name suggests, does not require that the patient/litigant affirmatively authorize the waiver. Rather, an implied waiver may result if, for example, a party alleges mental injury or emotional distress in her pleadings.¹⁵ Further, even if a party does not make a claim for emotional distress, she may expect discovery of privileged information if subsequent pleadings (such as interrogatories), affidavits, deposition, or other testimony raise issues of mental or emotional injury. The threshold determination of implied waiver of the psychotherapist-patient privilege by filing of a claim is whether a party has put her mental or emotional condition in issue.¹⁶

Not all claims of emotional distress, however, will result in an implied waiver of the psychotherapist-patient privilege. Significantly, some courts distinguish between mere “garden variety”¹⁷ claims of emotional distress that are incidental to the action, and those claims in which a party has genuinely put her mental or emotional condition in issue.¹⁸ In *In re Sims*, the Second Circuit ruled that mere garden-variety claims for emotional distress or general statements about feel-

¹² *Id.* at 15 n.14.

¹³ See *In re Lifschutz*, 467 P.2d 557, 566-67 (Cal. 1970); see also Catharina J.H. Dubbelday, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved*, 34 EMORY L.J. 777, 778 (1985).

¹⁴ *Commonwealth v. Oliveira*, 780 N.E.2d 453, 458 (Mass. 2002); see also *Adoption of Carla*, 623 N.E.2d 1118, 1121 (Mass. 1993) (“Since the existence of the privilege alone does not disqualify a psychotherapist from testifying, a party desiring to exercise the privilege must make an attempt to do so at trial.”); *Adoption of Vartan*, 67 Mass. App. Ct. 1107, No. 06-P-615, 2006 WL 2739698, at *1 (2006) (order pursuant to Rule 1:28) (holding that, where mother failed to object to admission of four psychological evaluations at trial, the mother could not later assert that she had unknowingly waived her patient-psychotherapist privilege).

¹⁵ See *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997) (holding that litigant waived her psychotherapist-patient privilege by placing her emotional or mental health at issue in her pleadings).

¹⁶ See *id.*

¹⁷ *Ruhlmann v. Ulster Cnty. Dep’t of Soc. Servs.*, 194 F.R.D. 445, 449 (N.D.N.Y. 2000).

¹⁸ *Kunstler v. City of New York*, 242 F.R.D. 261, 264 (S.D.N.Y. 2007).

ing anxious or depressed may not waive the party's psychotherapist-patient privilege:

[A] plaintiff does not forfeit [the psychotherapist-patient] privilege by merely stating that he suffers from a condition such as depression or anxiety for which he does not seek damages; . . . a plaintiff may withdraw or formally abandon all claims for emotional distress in order to avoid forfeiting his psychotherapist-patient privilege; and . . . a party's psychotherapist-patient privilege is not overcome when his mental state is put in issue only by another party.¹⁹

In *Commonwealth v. Goldman*, the Massachusetts Supreme Judicial Court held that a party does not relinquish his psychotherapist-patient privilege merely by talking about events that were the subject of a privilege.²⁰ Specifically, the court distinguished between "two distinct scenarios [i]n the first, a witness testifies as to events which happen to have been a topic of a privileged communication[; i]n the second, the witness testifies as to the specific content of an identified privileged communication."²¹ Only in the second scenario would the privilege be waived.²² Similarly, in *Cohen v. Cohen*, a court of appeals in Florida held that the psychotherapist-patient privilege is only pierced when the patient "rel[ies] on his mental or emotional condition as an element of his claim or defense."²³

B. Implied Waiver by Previous Testimony

Implied waiver of the psychotherapist-patient privilege can also occur inadvertently through previous testimony. Depositions are a key example of implied waiver by testimony. Prior to a deposition, the parties often agree that all objections, except those pertaining to the form of a question, should be reserved until trial.²⁴ This "usual

¹⁹ See *In re Sims*, 534 F.3d 117, 134 (2d Cir. 2008).

²⁰ See *Commonwealth v. Goldman*, 480 N.E.2d 1023, 1026 (Mass. 1985).

²¹ *Id.* at 1027.

²² *Id.*

²³ See *Cohen v. Cohen*, 813 So. 2d 1060, 1061 (Fla. Dist. Ct. App. 2002) (emphasis added); see also *Laznovsky v. Laznovsky*, 745 A.2d 1054, 1073 (Md. 2000) (holding that the mere filing of a custody action does not place a parent's mental health into issue such that the psychotherapist-patient would be forfeited).

²⁴ Diana S. Donaldson, *Deposition Essentials: New Basics for Old Masters*, LITIG., Summer 2000, at 25, 26.

stipulation”²⁵ shortens depositions while also allowing a broader range of discovery questions without forfeiting the right to later object. Claims of evidentiary and testimonial privilege, however, are viewed differently from objections and must be affirmatively asserted at every stage of the proceeding or they are waived.²⁶ Thus, a general reservation of deposition objections does not allow a party to later determine that a communication was privileged and therefore claim that it should be retroactively protected. Further, once a witness “waives his [therapeutic] privilege . . . [he] may not withdraw his waiver to prevent matters which he has already gone into from being explored in greater detail.”²⁷

Parties who submit documents or testify in a deposition about certain communications with a psychotherapist can be found to impliedly waive their psychotherapist-patient privilege, even when it occurs during the course of a different legal proceeding. This can occur when a party attempts to assert her privilege either as to *different* communications with the *same* psychotherapist, or as to the *same* communications in a different proceeding.²⁸ As to the latter, in *State v. Langley*, for example, the Oregon Supreme Court held that a defendant waived his psychotherapist-patient privilege when he voluntarily disclosed a significant part of those communications by submitting privileged documents in an earlier trial.²⁹ Thus, where a party voluntarily testifies in a deposition or prior proceeding about conversations, documents, or advice rendered during a presumptively privileged psychotherapeutic session and does not assert his privilege, the court may find that the privilege has been waived.³⁰

As to the former, if a party lists his psychotherapist as a potential expert to be called at trial,³¹ or indicates his intent to admit a psychotherapist’s treatment records into evidence, or discusses some limited

²⁵ *Id.*

²⁶ See Cary B. Cheifetz, *Deposition Strategies: Minding Your Q’s & A’s*, 21 FAM. ADVOC., Fall 1998, at 12, 12.

²⁷ *In re Sims*, 534 F.3d 117, 136 (2d Cir. 2008) (quoting U.S. *ex rel.* Carthan v. Sheriff, 330 F.2d 100, 102 (2d Cir. 1964)).

²⁸ *Matthews v. Super. Ct.*, No. B208007, 2008 Cal. App. Unpub. LEXIS 6976, at *10-12 (2008); *Koch v. Cox*, 489 F.3d 384, 388 (2007).

²⁹ *State v. Langley*, 839 P.2d 692, 704 (Or. 1992).

³⁰ *Heller v. City of New York*, No. 06-CV-2842, 2008 U.S. Dist. LEXIS 117684 (E.D.N.Y. Apr. 11, 2008), *aff’d*, No. 06-CV-2842, 2008 U.S. Dist. LEXIS 59334 (E.D.N.Y. Aug. 1, 2008); *EEOC v. Kidder, Peabody & Co., Inc.*, No. 92-CV-9243, 1993 U.S. Dist. LEXIS 10212, at *2-3 (S.D.N.Y. July 26, 1993).

³¹ See *Simpson v. Univ. of Colo.*, 220 F.R.D. 354, 365 (D. Colo. 2004); *Adams v. Ardcor*, 196 F.R.D. 339, 344 (E.D. Wis. 2000).

aspect of his mental health treatment,³² the court is likely to find that the privilege has been impliedly waived. The reason for implied waiver of the psychotherapist-patient privilege is one of fairness and sometimes referred to as a matter of “sword and shield”: parties cannot admit into evidence that part of a psychotherapist’s communications which are favorable to his position (the “sword”) and thereafter claim privilege (the “shield”) when inquiry upon cross-examination is made into related matters.³³

Privileged material from a psychotherapist may be admitted without objection in one judicial forum, only to resurface in future unrelated litigation where one of the litigants seeks to preserve its privileged status. Indeed, the Oregon Supreme Court concluded that since the “subject matter was the same and a significant part of that subject matter was disclosed when . . . admitted during the earlier trial[,] . . . [the] [d]efendant’s privilege to keep the communications confidential was waived.”³⁴ Therefore, allowing information from a therapeutic source to enter litigation may have broad and permanent implications for the parties, extending far beyond the current litigation. In the federal arena, a similar result can be expected. Rule 35 of the Federal Rules of Civil Procedure specifically contemplates that parties submitting to psychological examinations waive any privileges they may have “in that action or any other action involving the same controversy.”³⁵ Some scholars have interpreted the language of the rule to mean that “[i]n effect, the rule provides that a release to one person regarding the plaintiff’s condition is a release to all regarding the same condition.”³⁶

C. Determination of Waiver

The determination of whether or not a party has waived her psychotherapist-patient privilege, directly or impliedly, is within the sound discretion of the trial judge.³⁷ The standard for appellate re-

³² See, e.g., *Commonwealth v. Clancy*, 524 N.E.2d 395, 396-97 (Mass. 1998).

³³ See *Dillenbeck v. Hess*, 536 N.E.2d 1126, 1132 (N.Y. 1989).

³⁴ *Langley*, 839 P.2d at 704.

³⁵ FED. R. CIV. P. 35(b)(4).

³⁶ See Stuart A. Greenberg, *Personal Injury Examinations in Torts for Emotional Distress*, 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 233, 240 (Alan M. Goldstein & Irving B. Weiner eds., 2003).

³⁷ *Jaffee v. Redmond*, 518 U.S. 1, 17 (explaining that a trial judge must evaluate the “relative importance of the patient’s interest in privacy and the evidentiary need for disclosure.”); see also *In re Von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987).

view of this determination is abuse of discretion.³⁸ A trial court will only be held to have abused its discretion if it “base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”³⁹ This determination may be made by a review of motions or pleadings that specifically address the issue. For example, if a party testifies at a deposition about privileged communications with her psychotherapist, the trial judge may review the deposition transcript (with or without countervailing evidence) and determine whether or not the party has waived the privilege.

There are some circumstances in which implied waiver can only be determined by review of the psychotherapeutic records to determine whether they contain privileged information. In this case, an *in camera* review (outside of the presence of counsel) by the trial judge is generally required.⁴⁰ For example, if a party’s own medical records are put into evidence, and she later alleges that the records contain privileged psychotherapist-patient material, the records may require *in camera* review. In *P.W. v. M.S.*, the Massachusetts appeals court held that, upon assertion by a party that his medical records contain privileged material, the trial judge must review the records *in camera* to determine whether the privilege applies, or if it has been waived.⁴¹ The records in *P.W. v. M.S.* were sought under a provision in the Massachusetts law that pierces the psychotherapist-patient privilege when it is determined that a litigant’s records and the information contained therein are relevant. The provision also requires a finding that, on balance, piercing the privilege is more important to the welfare of the child. The *in camera* review would assess that issue as well.⁴²

D. Limitations on Implied Waivers

The mere fact that privileged records have been successfully accessed by an adverse party does not necessarily mean that the communications lose their privileged status; unintended admission of priv-

³⁸ *Von Bulow*, 828 F.2d at 101.

³⁹ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *see also* *Zervos v. Verizon*, 252 F.3d 163, 169 (2d Cir. 2001).

⁴⁰ *P.W. v. M.S.*, 857 N.E.2d 38, 45 (Mass. App. Ct. 2006); *see also* *United States v. Lowe*, 948 F. Supp. 97, 98-99 (D. Mass. 1996); *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

⁴¹ *P.W.*, 857 N.E.2d at 44-45; *see also* *S.C. v. Guardian ad Litem*, 845 So. 2d 953, 959 (Fla. Dist. Ct. App. 2003) (“Submitting the issue to the trial court for resolution *in camera* and giving the minor the opportunity to be heard is the least restrictive or intrusive means of furthering a compelling state interest in acquiring the privileged information.”).

⁴² *P.W.*, 857 N.E.2d at 45.

ileged communications generally will not result in implied waiver of the psychotherapist-patient privilege. In *Usen v. Usen*, for example, the plaintiff wife's medical and psychiatric records were admitted into evidence pursuant to a statute allowing hospital records to be subpoenaed into court without violating hearsay rules.⁴³ The purpose of the statute was to allow the admission of evidence without requiring hospital personnel to come to court.⁴⁴ However, the records contained material that should have been protected by the psychotherapist-patient privilege.⁴⁵ The Massachusetts Supreme Judicial Court held that privileged records did not lose their privileged status merely because they were admitted as "public records."⁴⁶ Similarly, in *Roberts v. Superior Court*, the defendant in a personal injury action sought discovery of all of the plaintiff's medical records, including her privileged psychiatric records.⁴⁷ The records had earlier been provided to her treating physicians and, through a discovery request (over her objection), were revealed to the defendant.⁴⁸ The defendant thereafter successfully moved to compel production, but the California Supreme Court reversed.⁴⁹ The Court held that the inadvertent exchange of psychotherapy records, intermingled with medical records, was not sufficient to waive the privilege, since release of the privilege requires the knowing and voluntary consent of the privilege-holder.⁵⁰

The decision whether privileged communications, verbal or recorded, should be admitted into evidence to support a claim or defense is a matter for the trial judge. If privileged communications are found to have been partially disclosed, fairness may require waiver of the psychotherapist-patient privilege so as to conduct an effective cross-examination of the issues already raised.⁵¹ The court stated that, "the fairness inquiry focuses on whether there is a 'risk that some independent decision maker will accept [the privilege-holder's] representations without the [adversary's] having adequate opportunity to rebut them.'"⁵²

⁴³ *Usen v. Usen*, 269 N.E.2d 442, 443-44 (Mass. 1971).

⁴⁴ *Id.* at 443 (quoting *Leonard v. Boston Elev. Ry.*, 125 N.E. 593, 593 (1920)).

⁴⁵ *See id.*

⁴⁶ *Id.* at 444.

⁴⁷ *Roberts v. Super. Ct.*, 508 P.2d 309, 311 (Cal. 1973).

⁴⁸ *Id.*

⁴⁹ *Id.* at 312.

⁵⁰ *Id.* at 317.

⁵¹ *Ruhlmann v. Ulster Cnty. Dept. of Soc. Services*, 194 F.R.D. 445, 450 (N.D.N.Y. 2000).

⁵² *In re Sims*, 534 F.3d 117, 132 (alteration in original) (quoting *John Doe Co. v. United States*, 350 F.3d 299, 305 (2d Cir. 2003)).

Even in those cases where privileged communications with a psychotherapist are directly put in issue, there may still be countervailing policy reasons to exclude them. In *In re Daniel C.H.*, a court of appeals in California reviewed a juvenile dependency proceeding in which a father was accused of molesting his son.⁵³ The father, denying the allegations of abuse and seeking to prove that the child's mother coached his disclosure, requested discovery of the child's psychotherapy records.⁵⁴ The court denied the father's discovery request, holding that a child does not put his mental state into issue and thus forfeit his psychotherapist-patient privilege simply by reporting the acts of molestation.⁵⁵

II. LIMITED, PARTIAL OR SELECTIVE WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

A determination by the court that a party has impliedly waived her psychotherapist-patient privilege still requires additional inquiry as to the scope of that waiver. Courts do not agree on whether there can be a less-than-complete waiver of the privilege, and, if so, which testimony or records fairly come within the scope of the waiver. There is also no uniformity among courts as to the proper terminology for a less-than-complete waiver of the psychotherapist-patient privilege, and various courts refer to "limited," "partial," or "selective" waivers of the privilege.⁵⁶

Rule 26 of the Federal Rules of Civil Procedure and its state equivalents provide that discovery will only be compelled for evidence that is relevant to the proceedings or likely to lead to the discovery of admissible evidence.⁵⁷ Courts have been inconsistent in their application of this rule to psychotherapeutic information. For instance, in *Rose v. Vermont Mutual Insurance Co.*, a federal district court in Vermont construed the provision broadly.⁵⁸ After holding that the plaintiff impliedly waived her psychotherapist-patient privilege, it opened discovery of "matters causally or historically related"⁵⁹

⁵³ *In re Daniel C.H.*, 269 Cal. Rptr. 624, 624 (Dist. Ct. App. 1990).

⁵⁴ *Id.* at 629.

⁵⁵ *Id.*

⁵⁶ See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294-302 (6th Cir. 2002) (discussing limited, partial, and selective waiver of the attorney-client privilege).

⁵⁷ FED. R. CIV. P. 26(b)(1).

⁵⁸ *Rose v. Vermont Mut. Ins. Co.*, No. 1:06-CV-211, 2007 U.S. Dist. LEXIS 83029, at *3-4 (D. Vt. Nov. 8, 2007).

⁵⁹ *Id.* at *6 (quoting *Mattison v. Poulen*, 353 A2d 327, 330 (Vt. 1976)).

to the privileged information.⁶⁰ Once the privilege has been waived, the court may allow further discovery, including depositions of treatment providers, to ferret out relevant information, even that which occurred prior or subsequent to the treatment that the patient revealed.⁶¹ In *Mitchell v. Sturm, Ruger & Co.*, a federal district court in Pennsylvania held that waiver of the psychotherapist-patient privilege could extend to all relevant communications on that subject, even to those made to other psychotherapists.⁶²

On the other hand, privilege provisions can also be construed narrowly. In *Commonwealth v. Clancy*,⁶³ for example, the Massachusetts Supreme Judicial Court examined whether and to what extent the following testimony, elicited from the prosecution's witness by the prosecutor during direct examination, waived that witness' psychotherapist-patient privilege:

THE PROSECUTOR: "Now, Mr. Doherty, I'm going to ask you some personal questions now."
 THE PROSECUTOR: "And have you ever been treated for any mental condition?"
 THE WITNESS: "Yes" . . . "I was in and out of mental health units for five or six—five times"
 THE PROSECUTOR: "And do you know what you were being treated for?"
 THE WITNESS: "Nervous breakdown, depression and alcoholism."
 THE PROSECUTOR: "And when were you first treated for alcoholism?"
 THE WITNESS: "1981, I think."
 THE PROSECUTOR: "All right. And when were these hospitalizations you were talking about?"
 THE WITNESS: "July of '82, October of '82, December, I was in the hospital over Christmas, and New Year's, December and part of January. April and May—no, April and June."⁶⁴

The Supreme Judicial Court affirmed the trial court's determination that although the privilege did not protect the fact of a hospitalization,

⁶⁰ *Id.* at *8.

⁶¹ *See, e.g.,* *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 634-35 (E.D.N.Y. 1997).

⁶² *Mitchell v. Sturm, Ruger & Co.*, 842 F. Supp. 158, 160 (E.D. Pa. 1994).

⁶³ *See* *Commonwealth v. Clancy*, 524 N.E.2d 395 (Mass. 1988).

⁶⁴ *Id.* at 397-98 n.3.

the dates of hospitalization, or in some cases, even the purpose of the admission, other information provided during direct examination constituted a partial waiver of the psychotherapist-patient privilege *as to that information*.⁶⁵ The Court also affirmed the trial court's release to defense counsel of the portion of the witness' medical records relating to the disclosed information, but denied access to the remainder of the medical records because "the witness had . . . retained his privilege as to all other communications contained within his medical records."⁶⁶ The Supreme Judicial Court found that this partial waiver and partial limited release of related medical records was consistent with the state's general principle that "a witness does not relinquish all protection by merely testifying to events falling within the subject matter of a privilege."⁶⁷ Similarly, in *Jaffee*, the U.S. Supreme Court intentionally limited the scope of such fishing expeditions:

A preexisting mental health condition does not entitle a defendant access to a plaintiff's entire mental health history to fish for past stressors, trauma, diagnoses, personality disorders, or other facts that could be used to discredit the plaintiff. A defendant must make a specific showing of the relevancy of such past records to a claim or defense asserted by the parties, even if the current treating psychotherapist created the records.⁶⁸

It is important to note that the determination of whether privilege *exists* needs to be addressed as a matter distinct from whether the privileged material is *relevant* to the issues in the litigation.⁶⁹ In *Johnson v. Trujillo*, the defendant in a personal injury claim sought to discover mental health records from a marriage counselor relating to her recent divorce and treatment for depression.⁷⁰ Although the plaintiff had made a "generic" claim in the personal injury action for mental suffering, the Colorado Supreme Court declined to waive her privilege, holding that "relevance alone cannot be the test" in determining whether a claim of the psychotherapist-patient privilege in a prior

⁶⁵ *Id.* at 397-98 (emphasis added).

⁶⁶ *Id.* at 398.

⁶⁷ *Id.*

⁶⁸ Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts*, 58 DEPAUL L. REV. 79, 141 (2008).

⁶⁹ *Commonwealth v. Bishop*, 617 N.E.2d 990, 997 (Mass. 1993); *Commonwealth v. Pelosi*, 771 N.E.2d 795, 801 n.9 (Mass. App. Ct. 2002).

⁷⁰ *Johnson v. Trujillo*, 977 P.2d 152, 154 (Colo. 1999).

action must be forfeited to pursue a subsequent personal injury action.⁷¹

Even if it is determined that the communications between a party and her psychotherapist are protected by the psychotherapist-patient privilege, it still may be possible to admit into evidence the portions of the psychotherapist's records, or other records, that contain information that amounts to "conclusions based on objective indicia rather than on any communications from the [patient]."⁷² Such collateral information may include the fact that treatment was rendered, the dates of treatment, certain diagnostic information, billing, and insurance records.⁷³ Often the essential issue is whether such records disclose or reflect upon "patient communications," and such determinations are subject to varying state rules regarding privilege.⁷⁴

III. VOLUNTARY DISCLOSURE OF PRIVILEGED COMMUNICATION TO, OR IN THE PRESENCE OF, THIRD PARTIES

Voluntary waiver of the psychotherapist-patient privilege may occur in a number of ways. The first and most obvious is through a knowing and voluntary execution of a release form. The second is through a verbal authorization to disclose to third parties confidential communications related to treatment.⁷⁵ Under these circumstances there is no longer an expectation of privacy, and the policy reasons that support the psychotherapist-patient privilege no longer apply.

When a psychotherapist-patient communication is made in the presence of a third party, or is voluntarily disclosed to a third party by the privilege-holder outside the context of litigation, what is the effect of such disclosure on privilege? Little law on the issue exists, as the South Carolina Court of Appeals lamented in *Carpenter v. Burr*:

⁷¹ *Id.* at 157 (quoting *R.K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994)).

⁷² *Adoption of Seth*, 560 N.E.2d 708, 713 (Mass. App. Ct. 1990) (quoting *Adoption of Abigail*, 499 N.E.2d 1234, 1239 (Mass. App. Ct. 1986)).

⁷³ *See, e.g., Adoption of Saul*, 804 N.E.2d 359, 364-65 (Mass. App. Ct. 2004) (holding that diagnostic terms, costs, and dates of treatment are not privileged); *see also P.W. v. M.S.*, 857 N.E.2d 38, 44 (Mass. App. Ct. 2006) (quoting *Adoption of Seth*, 560 N.E.2d at 713) (internal quotation marks omitted).

⁷⁴ *Compare Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006), and *In re Zuniga*, 714 F.2d 632, 640 (6th Cir. 1983), with *In re Grand Jury Subpoenas Duces Tecum*, 638 F. Supp. 794, 797 (D. Me. 1986).

⁷⁵ *See, e.g., Hicks v. Talbott Recovery Sys., Inc.*, 196 F.3d 1226, 1238 (1999) (noting that the authorized release of a patient's clinical record requires a written designation by the patient).

To date, we have found no decisions from the courts of this State addressing the question of whether the “private” nature of communications from a patient to his or her mental health treatment provider is compromised by the presence of a co-participant in the treatment when the communications at issue are made.⁷⁶

In some cases, including *Carpenter*, a privilege-holder may invite a third party to participate in a psychotherapy session. In other cases, a third party may inadvertently overhear a privileged communication. And, in still other cases, a party may voluntarily disclose privileged communications with a psychotherapist to third persons such as friends or family members at a time when no litigation is anticipated or to employers, educational institutions, workers’ compensation carriers or others in the course of an unrelated transaction or litigation.

A general principle, to the extent that one exists, is that privileged communications, when made in the presence of, or voluntarily disclosed to, third parties, result in an implied waiver of the privilege at least as to those specific communications.⁷⁷ The general rule, while found in some statutes⁷⁸ and cases,⁷⁹ is neither universally accepted nor uniformly construed across jurisdictions. When it is applied, it is often narrowly construed, primarily limiting the waiver to those instances in which a third party was present, or the communications were disclosed to a third party.⁸⁰ The reasons for the general rule are twofold: (1) as a matter of policy, the privilege should be waived because the privilege-holder, by permitting the presence of a third party, did not intend that the communications be privileged; and (2) the non-

⁷⁶ *Carpenter v. Burr*, 673 S.E. 2d 818, 824 (S.C. Ct. App. 2009).

⁷⁷ *See, e.g., United States v. Auster*, 517 F.3d 312 (5th Cir. 2008) (holding that the psychotherapist-patient privilege is not absolute but only applicable to those communications made in confidence with the expectation of privacy).

⁷⁸ *See* Miss. R. EVID. 503(a)(4) (2011) (declaring that communications between a physician or psychotherapist are not privileged if disclosed to third parties not participating in diagnosis and treatment).

⁷⁹ As the Court in *Jaffee* pointed out, the psychotherapist-patient privilege is in many ways, analogous to the attorney-client privilege. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). To an extent then, it is not surprising to find that the general principle of implied waiver is similar to the attorney-client privilege. *See In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (“[A]ny voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter.”).

⁸⁰ *See Farrow v. Allen*, 608 N.Y.S.2d 1, 3 (App. Div. 1993) (finding a partial waiver of privilege where patient authorized psychiatrist to send letter to third party revealing certain communications during treatment).

party (to whom the communication was made) has no obligation of confidentiality as to the privileged information and could either freely communicate it to others or could be deposed about the information as a fact witness.⁸¹

An alternate approach to determining whether the presence of, or communication with, a third party destroys the privilege is to ascertain by the totality of the circumstances whether the confidentiality of the information was intended to be preserved. For example, in *United States v. Whitney* a federal district court in Massachusetts held that the presence of a parent during a privileged session between a psychotherapist and a minor child does not destroy the child's privilege.⁸² Similarly, in *Cabrera v. Cabrera*, a Connecticut appeals court held that the presence of family members at an adult psychotherapy session did not waive the patient's privilege.⁸³ And, in *People v. Deadmond*, the Colorado Supreme Court held that the presence of a third party during a medical examination would not destroy the physician-patient privilege if the patient intended that the examination be confidential.⁸⁴ Finally, the psychotherapist-patient privilege is also widely recognized as applicable to communications made in marriage counseling or group therapy sessions where multiple parties are routinely present.⁸⁵

In those cases where privileged psychotherapist-patient information is voluntarily disclosed to third parties for a collateral purpose, some courts have held that the privilege-holder forfeits the privilege

⁸¹ See, e.g., defendant's argument in *Sims v. State*, 311 S.E.2d 161, 164 (Ga. 1984) ("Defendant argues the trial court erred in refusing to allow a psychiatrist to testify to statements made by the victim during joint counseling sessions which both the defendant and the victim attended."); see also appellee Pogue's argument in *Mrozinski v. Pogue*, 423 S.E.2d 405, 408 (Ga. Ct. App. 1992) ("Appellee contends that any communication to Pogue from Mrozinski lost its privileged status when Pogue treated Mrozinski and his daughter jointly.")

⁸² *United States v. Whitney*, No. 05-40005-FDS, 2006 U.S. Dist. LEXIS 74522, at *7, *13-14 (D. Mass. Aug. 11, 2006).

⁸³ *Cabrera v. Cabrera*, 580 A.2d 1227, 1233-34 (Conn. App. Ct. 1990).

⁸⁴ *People v. Deadmond*, 683 P.2d 763, 770-71 (Colo. 1984).

⁸⁵ See, e.g., *Touma v. Touma*, 357 A.2d 25, 29, 30 (N.J. Super. Ct. Ch. Div. 1976), (holding that pursuant to N.J.S.A. 45:8B, the presence of a third party in marriage counseling—the spouse—does not destroy the psychotherapist-patient privilege); see also OR. REV. STAT. ANN, § 40.262(1) (West 2011) ("If both parties to a marriage have obtained marital and family therapy by a licensed marital and family therapist or a licensed counselor, the therapist or counselor shall not be competent to testify in a domestic relations action other than child custody action concerning information acquired in the course of the therapeutic relationship unless both parties consent."); see also *Lovett v. Super. Ct.*, 250 Cal. Rptr. 25, 28-29 (Cal. Ct. App. 1988) (holding that group therapy was privileged since participants were present to further the interests of the treatment).

as to future purposes. For instance, in *John Doe v. Ensey*, a tort action was brought in a federal district court in Pennsylvania against two priests who were accused of sexual abuse.⁸⁶ After the allegations of sexual abuse were made (but before suit was filed), the diocese sent the priests for psychological evaluation with the expectation that the findings of the evaluator would be disclosed to the Bishop and the diocese.⁸⁷ The plaintiffs in *Ensey* sought discovery of the evaluations.⁸⁸ The court denied the defendants' claim of privilege and allowed discovery of the reports because the evaluations were conducted with the expectation that the findings would be disclosed to third persons.⁸⁹ The court specifically noted, however, that discovery of the privileged information is not necessarily dispositive on the issue of whether the material would later be admissible.⁹⁰ In *State of Iowa v. Heemstra*, however, the Supreme Court of Iowa held that "a right as valuable as a psychotherapist privilege should not be deemed to be waived by implication except under the clearest of circumstances [W]aiver in one proceeding is not a valid waiver in another."⁹¹ In *Ex Parte Rudder*, the Alabama Supreme Court held that the psychiatrist-patient privilege was not waived where a patient provided records to the Board of Medical Examiners since her disclosure to the Board was considered confidential.⁹² In *United States v. Hansen*, a federal district court in Montana held that, although a deceased person (through his estate) still maintains his psychotherapist-patient privilege, the privilege would yield to public policy interests in a criminal matter when the defense's need for the privileged records outweighed the defendant's constitutional right to a fair trial.⁹³ The fact that the privilege-holder was deceased was a factor to be considered in weighing the competing needs of the parties.⁹⁴

It is important to note that the wrongful or unauthorized disclosure of privileged information generally does *not* operate to waive a patient's privilege and would not be admissible.⁹⁵ However, this does

⁸⁶ *John Doe v. Ensey*, 220 F.R.D. 422, 423-24 (M.D. Pa. 2004).

⁸⁷ *Id.* at 426-28.

⁸⁸ *Id.* at 428.

⁸⁹ *Id.*; see also *Carrion v. City of New York*, No. 01-CV-02255, 2002 U.S. Dist. LEXIS 5991, at *11 (S.D.N.Y. Apr. 5, 2002) (holding that the plaintiff in a tort action waived his physician-patient privilege as to records that the plaintiff had produced).

⁹⁰ *Ensey*, 220 F.R.D. at 428.

⁹¹ *State v. Heemstra*, 721 N.W.2d 549, 560 (Iowa 2006).

⁹² *Ex parte Rudder*, 507 So. 2d 411, 413 (Ala. 1987).

⁹³ *United States v. Hansen*, 955 F. Supp. 1225, 1226 (D. Mont. 1997).

⁹⁴ *Id.*

⁹⁵ See, e.g., *Roberts v. Super. Ct.*, 508 P.2d 309, 316 (Cal. 1973). By the same token, a psychotherapist cannot refuse to disclose privileged communications

not apply to circumstances in which a party discloses privileged information pursuant to legal mandate, with or without the consent of the privilege-holder. State laws require psychotherapists to report matters of suspected child or elder abuse to state authorities notwithstanding any applicable privileges; additionally, threat of imminent harm to the patient or a third party may require a psychotherapist to disclose privileged information.⁹⁶ In this circumstance, the fact that some privileged information must be disclosed does *not* destroy the privileged nature of the information, nor does it operate to waive the patient's privilege as to other material beyond the scope of the mandated report. In *Menendez v. Superior Court of Los Angeles County*, three audiotapes were seized from the defendants' psychotherapist during a murder investigation.⁹⁷ The defendants sought to quash discovery on the basis that the tapes contained communications protected by their psychotherapist-patient privilege.⁹⁸ The California Supreme Court held that the defendants' psychotherapist-patient privilege was waived because the psychotherapist had reasonable cause to believe that the patients posed a risk of danger to themselves or others.⁹⁹

Menendez follows a long line of case law and statutes that permit, and usually mandate, a psychotherapist to notify authorities when a patient poses an imminent risk of harm to himself or others.¹⁰⁰ The court in *Menendez* also held, however, that the "dangerous patient" exception to the psychotherapist-patient privilege would limit disclosure of privileged communications to those psychotherapy sessions in which the psychotherapist had reasonable cause to believe that disclosure was necessary to prevent future harm.¹⁰¹ Similarly, mandated reporters of child abuse may violate psychotherapist-patient privilege to disclose that information which is necessary to comply with the

under circumstances that the patient's privilege has been waived because he believes it constitutes an unnecessary intrusion in to the patient's privacy. See *In re Marriage of Carol Meteer & Stephen Herr*, No. B154682, 2003 Cal. App. Unpub. LEXIS 2409, at *7 (Mar. 12, 2003).

⁹⁶ Interestingly, the federal circuits are in disagreement as to whether communications made in the absence of a reasonable expectation of confidentiality should nevertheless be privileged from disclosure. See *United States v. Auster*, 517 F.3d 312, 316-17, (5th Cir. 2008) (noting that the Sixth and Ninth Circuits have held that statements made in the absence of a reasonable expectation of privacy are nevertheless privileged, whereas the Tenth Circuit has held that without a reasonable expectation of privacy, the privilege will yield).

⁹⁷ *Menendez v. Super. Ct.*, 834 P.2d 786, 789 (Cal. 1992).

⁹⁸ *Id.* at 789.

⁹⁹ *Id.* at 795, 800.

¹⁰⁰ See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976); see also MASS. GEN. LAWS ANN. ch. 233 § 20B(a) (West 2000 & Supp. 2011).

¹⁰¹ *Menendez*, 834 P.2d at 795-96.

reporting requirements of the state law.¹⁰² But, courts may not allow the mandated report to become the basis of a fishing expedition for other portions of a patient's privileged communications.¹⁰³

As a matter of procedure, the party seeking to establish waiver generally carries the burden of proof. In *Carrion v. City of New York*, for example, a federal district court allowed the plaintiff's request for disclosure of certain workers' compensation records after he produced a note referencing a particular examination in his claim.¹⁰⁴ The court found that the plaintiff had waived his privilege "at least as to the records produced" and thereafter shifted the burden to the defendant to demonstrate that additional records were necessary to "complete the picture."¹⁰⁵

Whether parties can stipulate to limited or partial waivers of the psychotherapist-patient privilege is also an area which has received a noticeable lack of attention from appellate courts. The few courts which have discussed this issue seem to follow a similar course: the privilege is waived as to the stipulated information, and the burden shifts to the opposing party to demonstrate that the waiver should be interpreted more broadly.¹⁰⁶ In *In re Marriage of Trepeck*, a father and mother stipulated that each would undergo a psychological evaluation as part of their child custody litigation. The custody evaluator instructed as follows:

Both parties shall immediately sign any and all releases requested by the evaluator, either for themselves individually or for the children, to enable the evaluator to gather information and/or to permit the evaluator to speak with other persons including, but not limited to, other mental health professionals who have been involved with either party or with the children The parties acknowledge that they have been advised that the psychotherapist-patient privilege does not apply to the evaluation.¹⁰⁷

¹⁰² See, e.g., MASS. GEN. LAWS ANN. ch. 119 § 51A(j) (West 2011).

¹⁰³ See, e.g., *People v. Stritzinger*, 668 P.2d 738, 743-45 (Cal. 1983); see also CAL. PENAL CODE § 11171.2 (West 2011).

¹⁰⁴ *Carrion v. City of New York*, No. 01-CV-02255, 2002 U.S. Dist. LEXIS 5991, at *10 (S.D.N.Y. Apr. 5, 2002).

¹⁰⁵ *Id.* at *7, *11.

¹⁰⁶ See, e.g., *In re Marriage of Trepeck*, No. D048190, 2007 Cal. App. Unpub. LEXIS 2187, at *23-24 (Mar. 20, 2007).

¹⁰⁷ *Id.*

The mother complied with the stipulation and executed a release permitting the evaluator to speak to her psychotherapist.¹⁰⁸ Thereafter, the evaluator had a telephone conversation with the mother's psychotherapist in furtherance of the psychological evaluation.¹⁰⁹ The father then subpoenaed the therapist to testify, arguing that the mother had waived her psychotherapist-patient privilege "in its entirety" by signing the release.¹¹⁰ The trial court disagreed and granted the wife's motion to quash the subpoena, finding that the psychotherapist-patient privilege was "a strong privilege" and that waiver of the privilege could have a significantly chilling effect on therapy if so easily waived.¹¹¹ The California Court of Appeals affirmed the trial court's decision, finding that:

The language of the parties' stipulation acknowledges mother waived the privilege for purposes of [the] evaluation, and no further. In our view, the waiver was limited to the communications between mother's therapist and [the evaluator], matters much more narrow than the discovery sought by father's subpoena. Any broader construction in our view would substantially defeat the privacy afforded by the psychotherapist-patient privilege.¹¹²

Finally, related issues have arisen such as whether discovery requests for privileged psychotherapist-patient records should be subject to a continuing disclosure requirement absent extraordinary circumstances, and whether communications that pertain to the pending litigation itself should be necessarily redacted. To the extent that the psychotherapist-patient privilege was created to promote honest and open therapeutic communications, it is difficult to imagine a more intrusive mechanism to chill an ongoing psychotherapist-patient relationship. In *Vasconcellos v. Cybex International, Inc.*, the defendant sought ongoing discovery of the plaintiff's psychiatric treatment.¹¹³ The federal district court in Maryland granted the plaintiff's motion to

¹⁰⁸ *Id.* at *23.

¹⁰⁹ *Id.* at *27.

¹¹⁰ *Id.* at *23.

¹¹¹ *Id.* at *25-26.

¹¹² *Id.* at *24 (quoting *Roberts v. Super. Ct.*, 508 P.2d 309, 317 (Cal. 1973)) (internal quotation marks omitted).

¹¹³ *Vasconcellos v. Cybex Int'l, Inc.*, 962 F. Supp. 701, 707 (D. Md. 1997).

quash citing “serious concerns that [further] disclosures w[ould] affect . . . [plaintiff’s] psychiatric treatment.”¹¹⁴

Disputes involving matters such as forfeiture of a party’s psychotherapist-patient privilege necessarily involve a large measure of judicial discretion, and there is little consistency in the way courts view the facts. Approaches vary from state to state and require case-by-case determinations that hold little precedential value.

IV. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN THE FAMILY COURT: THE ROLE OF THE GAL

The classic family courtroom drama over psychotherapist-patient privilege often revolves around whether litigants put their mental health at issue,¹¹⁵ or whether privilege should yield to the child’s welfare.¹¹⁶ Contested child custody proceedings often add another wrinkle to the analysis: whether the patient waives her privilege by authorizing the psychotherapist to be interviewed by a guardian *ad litem* (GAL). A GAL is mental health professional or a lawyer appointed by the court on an individual matter to investigate contested issues of custody and visitation and report to the court concerning the best interest of minor children caught in the crossfire. Mental health providers can provide invaluable information for GAL investigations because they are often well aware of clinical information that bears significantly on a parent’s mental wellbeing, capacity to function, and ability to meet their children’s needs.¹¹⁷ Likewise, a child’s mental health provider often holds equally important information about the child, such as whether the child is well settled in her current environment or fears one of her parents.¹¹⁸ Since many GALs are not mental health professionals, the input of psychotherapists who know the family is often invaluable to the investigative and decision-making

¹¹⁴ *Id.* at 708.

¹¹⁵ *See, e.g., In re Sims*, 534 F.3d 117, 127 (2d Cir. 2008); *see also In re Marriage of Carol Meteer & Stephen Herr*, No. B154682, 2003 Cal. App. Unpub. LEXIS 2409, at *6 (Mar. 12, 2003) (rejecting the “[h]usband’s theory that by filing the marital dissolution petition and requesting child custody, [w]ife waived the psychotherapist-patient privilege”).

¹¹⁶ *See, e.g., MASS. GEN. LAWS ANN. ch. 233 § 20(B)(e)* (West 2000 & Supp. 2011).

¹¹⁷ *See Dana Royce Baerger et al., A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 J. AM. ACAD. MATRIMONIAL LAW. 35, 47-48 (2002).

¹¹⁸ *See Merle H. Weiner, Intolerable Situations and Counsel for Children: Following Switzerland’s Example in Hague Abduction Cases*, 58 AM. U. L. REV. 335, 380 (2008).

process. Thus, in the course of an investigation, a GAL will routinely request access to any mental health providers involved with a family.¹¹⁹ Indeed, it is not unusual for GALs to be quite insistent in requesting access to mental health professionals; lawyers and clients alike may be reluctant not to comply in light of the judicial authority and unique role of the GAL. Because the information such professionals can provide is often so valuable, the GAL may be unsympathetic to a litigant who seeks to preserve the privacy of her therapeutic relationships, even one that is ongoing. Few appellate courts have ruled on whether authorizing one's psychotherapist to be interviewed by the GAL will necessarily result in an involuntary waiver of the psychotherapist-patient privilege as to additional and follow-up information.

At least one appellate court has addressed the issue of waiver of the psychotherapist-patient privilege where a party authorized her therapist to be interviewed by a court-appointed custody evaluator conducting a psychological evaluation of the parties. As discussed above in *In re Marriage of Trepeck*, the father sought to subpoena the mother's psychotherapist based on a waiver of privilege after the mother permitted the court-appointed evaluator to contact her psychotherapist and obtain privileged information for the purposes of the evaluation.¹²⁰ The trial court found that this authorization did not result in a broad waiver of her privilege:

Mother did not place her mental state at issue in this case nor is there any indication [that the evaluator] relied on information from Mother's psychotherapist in making his report. Neither party was deemed to have mental problems that unduly interfered with a strong commitment to their parenting roles. Public policy dictates that the psychotherapist-patient privilege should only be invaded under compelling circumstances which do not exist here.¹²¹

The court noted that the mother's "authorization" had been obtained from the evaluator by means of a "generic form" which is "really designed to protect the evaluator so that he doesn't get in trouble

¹¹⁹ See Dayle D. Deardurff, *Representing the Interests of the Abused and Neglected Child: The Guardian Ad Litem and Access to Confidential Information*, 11 U. DAYTON L. REV. 649, 651 (1986).

¹²⁰ See *In re Marriage of Trepeck*, No. D048190, 2007 Cal. App. Unpub. LEXIS 2187 at *19 (Mar. 20, 2007).

¹²¹ *Id.* at *5-6.

for contacting the therapist.”¹²² The court alluded to, but did not elaborate upon, the coercive circumstances of the authorization.

The New York case *Farrow v. Allen* illustrates a related issue concerning the effect of partial waiver of the psychotherapist-patient privilege.¹²³ In *Farrow*, the patient authorized his psychiatrist to send a letter to a third-party revealing specific, privileged communications made during the course of treatment to be included in a report to the Yale/New Haven Sexual Abuse Clinic.¹²⁴ The court, concluding that waiver of the privilege had occurred by virtue of sending the letter, held that the patient’s authorization to send a letter to a third party “completely unconnected to his or her treatment and who is not subject to any privilege” would cause the communication to “no longer be considered a confidence” and, thus, the privilege was waived.¹²⁵ As to whether the letter constituted a partial or full waiver of the privilege, the Court concluded that since the report was not used in any ongoing litigation that would result in prejudice to another party, partial waiver was the appropriate remedy.¹²⁶

Had the psychiatrist in *Farrow* written a letter to a GAL, the likely result would be that the GAL would seek to interview the psychiatrist. If the patient were unwilling to authorize the interview, the GAL would probably refuse to include the information contained in the letter since the psychiatrist would not be available to provide a complete picture. If the patient were willing to allow the psychiatrist to divulge privileged communications to the GAL, the court would be faced with the issue set forth in *Trepeck*: whether such disclosure to the GAL implicitly waives the psychotherapist-patient privilege, in whole or in part.

A potential risk for a party authorizing a psychotherapist to be interviewed by a GAL is that the party risks putting her mental health in the spotlight where it may not have been previously challenged in the litigation. Indeed, in states such as Massachusetts,¹²⁷ which provide a statutory process for waiving the patient-psychotherapist privilege in child custody cases, there is a risk that revealing treatment by a psychotherapist can result in the court permitting the disclosure of additional information. Massachusetts law provides that the patient-psychotherapist privilege does not apply in child custody cases where the judge determines “that the psychotherapist has evidence bearing

¹²² *Id.* at *25.

¹²³ *Farrow v. Allen*, 608 N.Y.S. 2d 1 (App. Div. 1993).

¹²⁴ *Id.* at 3.

¹²⁵ *Id.*

¹²⁶ *Id.* at 5.

¹²⁷ MASS. GEN. LAWS ANN. ch. 233 § 20(B)(e) (West 2000 & Supp. 2011).

significantly on the patient's ability to provide suitable care or custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between patient and psychotherapist be protected."¹²⁸ In *P.W. v. M.S.*,¹²⁹ a Massachusetts appeals court held that a party seeking visitation or custody of a child could be required to release his records to the GAL, recognizing they eventually may also wind up in the hands of the parties, if relevant to the contested issues.¹³⁰ Cases such as *P.W. v. M.S.* appear to be the exception, however, and courts generally accord substantial deference to the psychotherapist-patient privilege. Absent an inadvertent waiver of the privilege or allegations of serious mental health issues that might impact a parent's ability to care for minor children (present in *P.W. v. M.S.*),¹³¹ the psychotherapist-patient privilege is generally preserved.¹³²

V. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN THE FAMILY COURT: USE OF MENTAL EXAMINATIONS AS AN ALTERNATIVE TO PIERCING THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

A GAL who seeks mental health information concerning one or both parties and does not have the benefit of an available psychotherapist to interview (either because there is no psychotherapist or the privilege has not been waived) may seek to require one, and usually both, parties to undergo a psychological examination or submit to psychological testing to address the mental health concerns. The parties can either stipulate to such an examination, or either party or the GAL can seek an order of the court compelling such an examination. Rule 35 of the Federal Rules of Civil Procedure, and most state and family court equivalents, provide that "[t]he court where the action is pending may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination."¹³³ This rule also provides that "the party examined waives any privilege it

¹²⁸ *Id.*

¹²⁹ See *P.W. v. M.S.*, 857 N.E.2d 38, 45 (Mass. App. Ct. 2006);

¹³⁰ *Id.* (holding that the privilege of a father in a custody dispute as to therapist and related records could nonetheless be waived if the judge determined, after an *in camera* review of the information, that the disclosure would be in the child's best interests).

¹³¹ *Id.* at 40 ("[F]ather suffered from severe emotional difficulties; he attempted suicide in April, 2004.")

¹³² See *Usen v. Usen*, 269 N.E.2d 442, 442 (Mass. 1971).

¹³³ FED. R. CIV. P. 35.

may have—in that action or any other action involving the same controversy—concerning . . . all examinations of the same condition.”¹³⁴ The psychologist administering the testing should specifically advise the patient—and seek acknowledgment—that the test results will not be privileged.¹³⁵

A “mental examination” may consist of a relatively brief clinical evaluation or more comprehensive psychological testing. These evaluations generally provide some useful data to the court about a party’s psychological functioning while avoiding the perils associated with piercing a party’s psychotherapist-patient privilege. It is important to note, however, that if psychological testing were being conducted for purposes of treatment, the examiner would generally consult an ongoing psychotherapist to interpret the objective test results in light of reliable clinical data. However, where the psychological evaluation or testing is conducted pursuant to a court order, a party generally seeks to avoid the participation of a psychotherapist if one even exists. A party would only voluntarily waive her psychotherapist-patient privilege (and allow a consult with her psychotherapist) if doing so were expected to provide some sort of strategic advantage. If, for example, a party presents for mental examination appearing disorganized or even paranoid, an ongoing psychotherapist may be able to provide context for the paranoid or disorganized presentation. On the other hand, a high-functioning, albeit mentally-compromised party may successfully “prepare” for psychological testing and influence the results to appear healthier than she actually is—a finding that a long-term psychotherapist would likely dispute if asked.

Psychological testing is generally more rigorous than a clinical examination and involves an assessment of mental and emotional functioning via clinician-administered psychological testing instruments, both written and oral, in addition to self-reports, behavioral observations, and diagnostic interviews.¹³⁶ Commonly used instruments for testing parents include a personality assessment such as the Minnesota Multiphasic Personality Inventory (MMPI),¹³⁷ measures of

¹³⁴ FED. R. CIV. P. 35(b)(4). As noted above, some scholars have interpreted the language of the rule to mean that “in effect, the rule provides that a release to one person regarding the plaintiff’s condition is a release to all regarding the same condition.” See Greenberg, *supra* note 39.

¹³⁵ Commonwealth v. Lamb, 360 N.E.2d 307, 310 (Mass. 1977) (quoting Commonwealth v. Lamb, 311 N.E.2d 47, 51 (1974)); see also *In re Laura L.*, 768 N.E.2d 605, 608-09 (Mass. App. Ct. 2002).

¹³⁶ Gary R. Geffken et al., *Parental Adherence to Child’s Psychologists’ Recommendations from Psychological Testing*, 37 PROF. PSYCHOL. 499, 499 (2006).

¹³⁷ A concise description of the MMPI can be found in the New Jersey District Court case *McKenna v. Fargo*, 451 F. Supp. 1355, 1359-60 (D. N.J. 1978) (“The

cognitive functioning such as intelligence tests,¹³⁸ and sometimes projective testing such as the Rorschach¹³⁹ or the Thematic Apperception Test (TAT).¹⁴⁰ Testing of children may involve the adolescent version of the MMPI, Family Drawing or Kinetic Family Drawing,¹⁴¹ and

[MMPI] consists of approximately 550 numbered statements in booklet form with printed instructions on the cover An individual taking the inventory reads the instructions and proceeds through the test without being observed or questioned by a psychologist. The MMPI is thus described as a self-administered, self-report inventory The individual is instructed to read each statement and to try to decide whether it is true or mostly true or false, or not usually true, as applied to him; items which the individual finds not applicable or on which he has no judgment are left blank. Answers are recorded on a separate answer sheet by marking in true or false columns. The statements in the inventory range over several areas and refer to opinions, attitudes, observable behavior, and feelings which the subject may find applicable to himself. Answers to certain groups of questions are collected according to ten basic scales, each scale representing a personality characteristic, such as paranoia or depression. Scale numbers are listed on a graph or profile for comparison to other subject groups.”)

¹³⁸ Examples include the Woodcock-Johnson Tests of Cognitive Abilities-III and the Stanford-Binet Intelligence Scales V. See Marc J. Ackerman & Tracy Brey Pritzi, *Child Custody Evaluation Practices: A 20 year Follow Up*, 49 FAM. CT. REV. 618, 621 (2011).

¹³⁹ *McKenna* also includes a short summary of the Rorschach test. *McKenna*, 451 F. Supp. at 1360 (“The Rorschach test consists of a set series of pictures of inkblots, usually ten in number. The cards range in color from all black and gray to others having several pastel colors The irregular form of the inkblots permits innumerable interpretations, and the vague shapes are roughly suggestive of things ranging from animals to sexual organs. The responses are analyzed in several ways, including, for example, by content, parts of the blot used, or perception of movement Interpretation of the responses provides information about emotional and personality traits.”).

¹⁴⁰ For a short summary of TAT see *id.* (“[TAT] requires a subject to interpret a picture by telling or writing a dramatic story about what has led up to the event in the picture, what is happening, and what the possible outcome might be The responses are interpreted primarily by analysis of any recurring themes behind the plots, and the way in which the subject uses aspects of the picture to form the story. From a total set of 20 pictures, fewer cards may be used, although different pictures are normally used for men and women.”).

¹⁴¹ See *Irving v. State*, 705 So. 2d 1021, 1023 (Fla. Dist. Ct. App. 1998) (Lawrence, J., dissenting). In this case, a clinical psychologist described the kinetic family drawing test as follows:

The kinetic family drawing test is very simple. The instructions are simply you ask the child to draw me a picture of their family, of them and their family, with everyone doing something and to not draw stick figures. And that’s all. The logic of that is the child tends to project, that’s why we call them projective tests, project concepts of themselves or their attitudes or their concepts of the people involved into various dimensions of the drawing which can be extremely helpful with children.

TAT or Children's Apperception Test (CAT).¹⁴² Parent inventories such as the Parent-Child Relationship Index and custody batteries such as the Ackerman-Schoendorf Scales for Parent Evaluation of Custody (ASPECT)¹⁴³ are increasingly gaining popularity amongst some evaluators,¹⁴⁴ if for no other reason, than to bring another measure of objectivity into the evaluation.

For decades, scholars have noted that "[t]ests that assess psychopathology, emotional functioning, personality styles, and behavior patterns may be of some value in child custody evaluations to the degree that they provide information about the parents' relationships with, and their ability to relate to their children, or provide information about the children's needs."¹⁴⁵ Far from a novel use of these instruments, there is some empirical evidence that psychological testing by custody evaluators is actually used more frequently than collateral contact with psychotherapists. Indeed, a 2001 study done by Quinnell and Bow found that approximately 91 percent of 198 mental health practitioners surveyed performed psychological testing on parents and children as part of completing a child custody evaluation, compared to the 86 percent who contacted the psychotherapist.¹⁴⁶

Increasingly, courts also rely upon psychological testing (rather than privileged psychotherapist-patient communications) in making their custody and visitation determinations. The Family Court of Delaware, for example, dedicated a substantial portion of its 58 page custody opinion in *Martin v. Martin* to reviewing the psychological tests administered to the mother, father, and children in that case to support its decision.¹⁴⁷ The *Martin* court meticulously reviewed the data from the MMPI, human figure drawing, family drawing, Bender Visual/Motor Gestalt test, Rotter Incomplete Sentences—Adult Form, and the Rorschach in support of its allocation of custody, parenting time, and visitation between the mother and the father.¹⁴⁸

¹⁴² Francella A. Quinnell & James N. Bow, *Psychological Tests Used in Child Custody Evaluations*, 19 BEHAV. SCI. & L. 491, 496 (2001).

¹⁴³ ASPECT is "a rating instrument designed to assess parent fitness in custody evaluations. It incorporates many standard intelligence, personality/psychopathology, and academic achievement measures with the examiner's observations and interviews of the parents and children." Randy K. Otto & James N. Butcher, *Computer-Assisted Psychological Assessment in Child Custody Evaluations*, 29 FAM. L. Q. 79, 90 (1995).

¹⁴⁴ Quinnell & Bow, *supra* note 142, at 497.

¹⁴⁵ Otto & Butcher, *supra* note 143.

¹⁴⁶ James N. Bow & Francella A. Quinnell, *Psychologists' Current Practices and Procedures in Child Custody Evaluations: Five Years After American Psychological Association Guidelines*, 32 PROF. PSYCHOL. RES. & PRAC. 261, 264 tbl. 2 (2001).

¹⁴⁷ *Martin v. Martin*, 820 A.2d 410, 416-17 (Del. Fam. Ct. 2002).

¹⁴⁸ *Id.* at 417-18.

Proponents of psychological testing argue that the tests provide objective data upon which to build and support the evaluator's opinions and may help "balance bias and potential errors in clinical interviews."¹⁴⁹ Indeed, the New Jersey Supreme Court commented as follows:

In many cases, information obtained from psychological evaluations prepared for the purpose of litigation is more helpful to the court than would be information obtained from the parents' prior treatment records [because] [s]uch evaluations focus specifically on parental ability, whereas prior therapy may have had nothing to do with parenting.¹⁵⁰

Significantly, such testing permits the GAL to gather psychological data without compromising a party's psychotherapist-patient privilege or jeopardizing the preexisting relationship with the party's mental health provider. In *Adoption of Abigail*, for instance, the Massachusetts Court of Appeals noted that admitting the written report and testimony of two clinical psychologists who examined and tested a mother in connection with a termination of parental rights proceeding did not impinge upon the mother's psychotherapist-patient privilege because the psychologists' conclusions were "based on objective indicia rather than on communications from the mother."¹⁵¹ Courts in California,¹⁵² Connecticut,¹⁵³ Florida,¹⁵⁴ Idaho,¹⁵⁵ Missouri,¹⁵⁶ New

¹⁴⁹ Quinnell & Bow, *supra* note 142, at 491.

¹⁵⁰ Kinsella v. Kinsella, 696 A.2d 556, 579 (N.J. 1997) (citation omitted).

¹⁵¹ *Adoption of Abigail*, 499 N.E.2d 1234, 1239 (Mass. App. Ct. 1986).

¹⁵² See *Simek v. Super. Ct.*, 172 Cal. Rptr. 564, 568-69 (Ct. App. 1981) (preferring court-ordered mental examination over piercing the psychotherapist-patient privilege in a child custody proceeding).

¹⁵³ *Cabrera v. Cabrera*, 580 A.2d 1227, 1233 (Conn. App. Ct. 1990) (expert psychiatric witness was most appropriate source of information regarding parent's mental health rather than records of treating psychologist).

¹⁵⁴ *Roper v. Roper*, 336 So. 2d 654, 656 (Fla. Dist. Ct. App. 1976) (noting that the court has mental examinations as an alternate tool in child custody cases).

¹⁵⁵ *Barker v. Barker*, 440 P.2d 137, 139 (Idaho 1968) (declining to hold psychological-patient privilege waived automatically in child custody litigation, indicating court-ordered psychological examination was proper avenue to obtain this data).

¹⁵⁶ *Husgen v. Stussie*, 617 S.W.2d 414, 416-17 (Mo. Ct. App. 1981) (deciding that proper source of psychological information regarding a parent in a child custody proceeding is a mental examination rather than by piercing the psychologist-patient privilege).

Jersey,¹⁵⁷ and New York¹⁵⁸ have come to the same conclusion. A Florida court specifically commented:

We recognize that in a child custody case the mental health of a parent may be a relevant issue. Where this issue is raised the trial court must maintain a proper balance, determining on the one hand the mental health of the parents as this relates to the best interest of the child, and on the other maintaining confidentiality between a treating psychiatrist and his patient. The court in this case has an alternate tool which may accomplish both purposes. Upon proper motion the court may order a compulsory psychiatric examination.¹⁵⁹

The data generated through psychological testing may be different from that which is offered by a psychotherapist, although ideally, a psychological tester would incorporate information from a treating psychotherapist when available. Whether this “objective” data is more or less useful is subject to debate, but it provides a reasonable alternative to an unauthorized piercing of the psychotherapist-patient privilege.

The benefits of psychological testing in child custody evaluations as a source of valuable information are not universally acclaimed. Skeptics remind us that most psychological testing instruments were developed in the therapeutic context and, as a result, may not generate reliable data in the forensic child custody evaluation context.¹⁶⁰ For example, although the MMPI may detect paranoia,¹⁶¹ it cannot tell the

¹⁵⁷ *Kinsella v. Kinsella*, 696 A.2d 556, 584 (N.J. 1997) (requiring court to examine “whether all other sources of information available to the court are adequate to justify adjudication of the custody and visitation issues without resort to the plaintiff’s therapy records”).

¹⁵⁸ *Perry v. Fiumano*, 403 N.Y.S.2d 382, 386-87 (App. Div. 1978) (requiring a showing that information gleaned from evaluation is inadequate to resolve child custody issue).

¹⁵⁹ *Roper*, 336 So. 2d at 656-57.

¹⁶⁰ Kirk Heilbrun, *The Role of Psychological Testing in Forensic Assessment*, 16 L. & HUM. BEHAV. (SPECIAL ISSUE) 257, 258 (1992).

¹⁶¹ See, e.g., Jean M. Twenge et al., *Birth Cohort Increases in Psychopathology among Young Americans, 1938-2007: A Cross-Temporal Meta-Analysis of the MMPI*, 30 CLINICAL PSYCHOL. REV. 145, 149 (2010). Indeed, since the 1940s, the MMPI has been and continues to be one of the most popular psychological inventories and is used widely not only in child custody disputes, but also in job profiling and correctional contexts because of the MMPI’s validity in “predicting and describing

tester whether that paranoia is justified or reasonable under the circumstances; only a detailed history of the patient's mental health, preferably including data from a patient's mental health provider, can help the evaluator decipher this complex question. Further, psychological testing in lieu of talking to a mental health provider may give only a snapshot of the individual at the time the tests were administered rather than a longitudinal perspective.¹⁶² Additionally, since psychological tests are administered and assessed over a relatively short term (typical of child custody evaluations), they are susceptible to deliberate attempts by the testee to influence or deceive the test, resulting in poor reliability.¹⁶³ Nevertheless, the availability of psychological testing allows courts to obtain necessary data without unnecessarily invading a valuable relationship rooted in privacy and confidentiality.

VI. WAIVER OF A CHILD'S PSYCHOTHERAPIST-PATIENT PRIVILEGE

In the context of child custody evaluations, mental health providers who treat the children involved often can provide insights into the wellbeing and best interests of the children. Of course, such information is also protected by the child's psychotherapist-patient privilege. And while parents generally are the decision makers for their minor child's health needs and have access to the child's medical records,¹⁶⁴ some courts have held that when the child is the subject of the litigation, the parents are no longer the presumptive privilege-holders for their child.¹⁶⁵ As a result, waiver of a child's psychotherapist-patient privilege is often fraught not only with therapeutic complications, but also specific procedural requirements.

psychopathic symptoms, job performance, and countless behaviors and profiles." *Id.* at 148.

¹⁶² See Heilbrun, *supra* note 160, at 263.

¹⁶³ See *id.*

¹⁶⁴ "Where a child is too young or otherwise is unable to engage in meaningful consultation about the merits of waiving a privilege, it is permissible for a court to permit a parent to waive (or refuse to waive) the privilege on the child's behalf." Commonwealth v. Pelosi, 771 N.E.2d 795, 810 (Mass. App. Ct. 2002) (Brown, J., dissenting).

¹⁶⁵ See, e.g., Carney v. Carney, 525 So. 2d 357 (La. Ct. App. 1988) (holding a co-tutor or a legal representative cannot assert a minor child's privilege in custody proceeding to prevent disclosure of child's statement to a professional); Nagle v. Hooks, 460 A.2d 49 (Md. 1983) (holding that a parent could not assert child's psychotherapist-patient privilege in a custody proceeding).

In many states, the family courts have special procedures for determining whether a minor child's psychotherapist-patient privilege will be waived or preserved, thus affecting whether sensitive information held by the child's psychotherapist will be available to the GAL and the court for use in the custody dispute. In Kansas and Maryland, for example, a special GAL is appointed to determine whether the child's psychotherapist privilege should be waived or asserted.¹⁶⁶ The task of this "privilege GAL" varies, but generally it is to assess the following: (1) whether the child is mature enough to appreciate the issue of waiver; (2) if so, the preferences of the child; (3) the benefit of preserving psychotherapeutic confidences, if any; (4) the value of the information held by the psychotherapist to the proceeding; and (5) sometimes, the balance of the child's need for privacy with the court's need for the information.¹⁶⁷ In some cases, the only relevant issue is the preference of a mature child. In states such as New Hampshire, an existing GAL is empowered to make this determination.¹⁶⁸ In other states, there is little or no protection at all for the child's psychotherapist-patient privilege, as the courts routinely grant the GAL broad access to children's mental health records.¹⁶⁹

CONCLUSION

The law recognizes the value of maintaining the privacy of communications between a patient and her psychotherapist which relate to the "diagnosis or treatment" of the individual's "mental or emotional condition."¹⁷⁰ This evidentiary shield applies in court, administrative,

¹⁶⁶ See *In re Zappa*, 631 P.2d 1245, 1251 (Kan. Ct. App. 1981) (child's GAL may assert or waive the child's privilege in a proceeding involving the termination of parental rights); *Nagle*, 460 A.2d at 50 (holding that the court should appoint a GAL to determine if waiver of the child's privilege is in his best interest).

¹⁶⁷ See generally Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J. LAW & FAM. STUD. 43, 58-61 (2011).

¹⁶⁸ *In re Berg*, 886 A.2d 980, 988 (N.H. 2005).

¹⁶⁹ See, e.g., DEL. CODE ANN. tit. 31, § 3610 (2010) ("Upon presentation of the order of appointment by the Court-Appointed Special Advocate, any agency, hospital, school, organization, division or department of the State, doctor, nurse or other health care provider, treatment facility, psychologist, psychiatrist, police department or mental health clinic shall permit the Advocate to inspect and copy any records relating to the child or children and parents involved in the case of appointment without consent of the child or children or parents.").

¹⁷⁰ See, e.g. MASS. GEN. LAWS. ch. 233, § 20B (West 2000 & Supp. 2011), which defines "communications" as including "conversations, correspondence, actions and occurrences relating to diagnosis or treatment before, during or after institutionalization, regardless of the patient's awareness of such conversations, correspond-

or legislative proceedings,¹⁷¹ and is predicated upon the public policy goal of protecting “the justifiable expectations of confidentiality that most individuals seeking psychotherapeutic treatment harbor.” The privilege shields a patient’s “thoughts, feelings, and impressions” as well as the “substance of the psychotherapeutic dialogue”¹⁷² and must be affirmatively asserted or it is waived. The law that has evolved around the exercise of this privilege is complex and far from uniform around the country. In most cases, the goal is to balance the imperative of confidentiality with the need to disclose useful information. While case-by-case determination is often inevitable, a significant body of case law has developed that provides valuable guidance to this important inquiry.

ence, actions and occurrences, and any records, memoranda or notes of the foregoing.”

¹⁷¹ *Commonwealth v. Brandwein*, 760 N.E.2d 724, 728-29 (Mass. 2002) (quoting MASS. GEN. LAWS. ch. 233, § 20B).

¹⁷² *Commonwealth v. Kobrin*, 479 N.E.2d 674, 681 (1985).