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PARENTS, PSYCHOLOGISTS AND CHILD CUSTODY DISPUTES: PROTECTING THE PRIVILEGE AND THE CHILDREN

Marjorie Fine Knowles*

Caroline Chunn McCarthy**

I. Introduction

In *In re Von Goyt*,¹ a case of first impression for the Alabama Court of Civil Appeals, the mother of two infant children challenged the order of the Circuit Court for Tuscaloosa County, which had affirmed the Tuscaloosa County Juvenile Court order terminating her parental rights on grounds of mental incompetence.² The circuit court based its ruling largely on information gleaned from confidential medical records that were admitted into evidence over Ms. Von Goyt's contention that the information concerning her treatment at various mental health facilities was protected by the statutory psychologist-patient privilege.³ On appeal, the court of civil appeals addressed the issue whether "the court may disregard the psychologist-patient privilege in a custody proceeding."⁴

The appellate court's affirmative decision on this issue has concerned Alabama lawyers and psychologists about the possible erosion of testimonial privileges in this state.⁵ This concern is

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1. 461 So. 2d 821 (Ala. Civ. App. 1984).

2. *Von Goyt*, 461 So. 2d at 822.

3. *See id.* The psychologist-patient privilege is codified at ALA. CODE § 34-26-2 (Supp. 1984) (current version at ALA. CODE § 34-26-2 (Supp. 1985)).

4. *Von Goyt*, 461 So. 2d at 823.

5. This Article is limited to a discussion of legally privileged communications between psychologists and patients in Alabama, and does not address ethical issues that may arise with regard to the broader area of confidential communications. For a discussion of confidential communications of psychologists, see generally DeKraai & Sales, *Confidential Communications of Psychotherapists*, 21 PROF. PSYCHOLOGY 293, 293 (1984); Lyman & Roberts,

heightened by the fact that Alabama's psychologist-patient privilege, by its terms, is identical to the attorney-client privilege,⁶ and therefore cases concerning one privilege may have an impact on the interpretation of the other.

This Article first examines the Alabama Court of Civil Appeals' decision, focusing on that court's analysis of the law of other jurisdictions. According to the *Von Goyt* court, the case law dictates that the psychologist-patient privilege must yield automatically in child custody matters.⁷ This Article, however, argues that the cases relied upon by the court can be reconciled with the view that the court can serve the child's best interests in a custody determination without automatically disregarding the parent's right to these privileged communications. Further, the Article suggests a procedure by which courts can protect parents' rights while continuing to serve the paramount interests of the child.

Finally, this Article suggests that both the psychologist-patient privilege and the attorney-client privilege will be compromised if future Alabama courts adhere to the rule imprudently announced by the *Von Goyt* court.

II. *In re Von Goyt*

The initial proceedings arose when a social worker with the Department of Pensions and Security became concerned about the appearance and behavior of Maude Jones, Ms. Von Goyt's four year old daughter. A pediatrician examined Maude at the social worker's request and discovered traces of a tranquilizer in the child's urine sample, whereupon the social worker and her supervisor filed a petition with the Tuscaloosa County Juvenile Court for termination of Ms. Von Goyt's parental rights. The juvenile court found that Ms. Von Goyt, because of her mental state, was unable to fulfill her parental responsibilities and that "she was unable to provide [her children] with a stable environment."⁸ "The juvenile court [then] terminated Ms. Von Goyt's parental rights and

Mental Health Testimony in Child Custody Litigation, 9 LAW & PSYCH. REV. 15 (1985).

6. Compare ALA. CODE § 34-26-2 (1985) (psychologist-patient privilege) with ALA. CODE § 12-21-161 (1975) (attorney-client privilege); see *infra* note 102.

7. *Von Goyt*, 461 So. 2d at 823.

8. *Id.* at 822. At the time of the appeal, Ms. Von Goyt had one daughter, born in 1979, and one son, born in 1982.

awarded custody of the children to the [Department of Pensions and Security] to be placed for adoption."⁹

The Tuscaloosa Circuit Court heard the case de novo on appeal, and admitted into evidence Ms. Von Goyt's medical records from Bryce Hospital and Indian Rivers Mental Health Center.¹⁰ Basing its order largely on information contained in these records, and on the testimony of a counselor at the Indian Rivers facility who clarified and interpreted diagnoses and characterizations of Ms. Von Goyt from her medical records,¹¹ the circuit court affirmed the juvenile court's order. Ms. Von Goyt then appealed to the court of civil appeals, challenging the admission of the medical records into evidence as a violation of the privilege protecting communications between a patient and her psychologist.¹² The Alabama Court of Civil Appeals affirmed the termination of parental rights and the admission of the medical records, stating that

where the state has petitioned our court to terminate a mother's custody of her children because of her mental instability, the court

9. *Id.*

10. "These records encompassed a short period from August 1979 to December 1979 when [Von Goyt] was a patient [at Bryce Hospital] and from December 1979 to 1981 when [she] was not a patient but still made contact with the hospital. Since 1981 there have been no contacts with Bryce hospital [sic] by [Ms. Von Goyt], nor has there been a Bryce admission since 1979." Brief for Appellant at 6, *In re Von Goyt*, 461 So. 2d 821 (Ala. Civ. App. 1984).

Ms. Von Goyt's relationship with the Indian Rivers Mental Health Center is not entirely clear from the facts stated in either party's brief or in the court's opinion. The court's rendition of the facts differs somewhat from those stated in the appellant's brief. For example, the court states that Ms. Von Goyt was re-admitted to Bryce Hospital in 1980, and that she was "in and out of various mental institutions until July 1982. . . ." *Von Goyt*, 461 So. 2d at 822.

11. *Von Goyt*, 461 So. 2d at 824. This Article does not address the issue of whether a counselor affiliated with the licensed practice of psychology or psychiatry, but not herself a licensed psychologist or psychiatrist, should be precluded from testifying under a patient-psychologist privilege. Alabama has provided a statutory privilege between a client and licensed professional counselor or certified counselor associate on the same terms as the privilege provided for licensed psychologists, psychiatrists, and attorneys. ALA. CODE § 34-8A-21 (1985). Arguably the Indian Rivers counselor should have been precluded from testifying under that statute. However, it seems that a counselor working with a psychologist that has the privilege would be in the same category as an investigator working for an attorney under the attorney-client privilege.

The question whether the counselor in *Von Goyt* was qualified to testify as an expert witness is likewise beyond the scope of this Article, although the appellate court affirmed the circuit court's determination that this counselor was a qualified expert. *Von Goyt*, 461 So. 2d at 824.

12. *Von Goyt*, 461 So. 2d at 823.

should be permitted to investigate her mental health records in order to determine whether a termination is necessary.¹³

The court reasoned that "the paramount consideration in a child custody matter is the child's best interests"¹⁴ and that "[a] court cannot determine the best interests of the child without considering whether [the parent] is physically, financially, or mentally able to care for the child."¹⁵ Further, the court noted section 26-18-7 of the Alabama Code,¹⁶ which mandates that a court consider, among other factors, the "[e]motional illness, mental illness or mental deficiency of the parent" in proceedings for the termination of parental rights.¹⁷

The *Von Goyt* court acknowledged that Alabama state courts had never before addressed the issue whether a court, in a custody proceeding, may override the psychologist-patient privilege.¹⁸ Therefore, the court cited several other state court opinions, apparently viewing them as authority for the result it reached.¹⁹ However, the *Von Goyt* court failed to analyze these cases or the statutory privileges as they operate in these other jurisdictions. Thus, the court erred in attempting to apply such an analysis to the case before it and to the operation of the Alabama statutory privilege. The *Von Goyt* case is easily distinguished from the cases the court cited, which in fact do not support the court's holding.

III. The *In re Von Goyt* Court's Analysis of the Law of Other Jurisdictions

In the Florida case *Critchlow v. Critchlow*,²⁰ Ms. Critchlow filed a petition for dissolution of marriage and for custody of the parties' three-and-a-half year old daughter. Critchlow's husband

13. *Id.*

14. *Id.* (citing *Ezell v. Hammond*, 447 So. 2d 766 (Ala. Civ. App. 1984)).

15. *Von Goyt*, 461 So. 2d at 823.

16. *Id.*

17. ALA. CODE § 26-18-7(a)(2) (Supp. 1984) (current version at ALA. CODE § 26-18-7(a)(2) (Supp. 1985)).

18. *Von Goyt*, 461 So. 2d at 823.

19. *Id.* (citing *Critchlow v. Critchlow*, 347 So. 2d 453 (Fla. Dist. Ct. App. 1977); *In re A.J.S.*, 630 P.2d 217 (Mont. 1981); *In re Norwood*, 194 Neb. 595, 234 N.W.2d 601 (1975); *D. v. D.*, 108 N.J. Super., 149, 260 A.2d 255 (1969); *People ex rel. Chitty v. Fitzgerald*, 40 Misc. 2d 966, 244 N.Y.S.2d 441 (Sup. Ct. 1963); *Koump v. Smith*, 25 N.Y. 287, 303 N.Y.S.2d 858, 250 N.E.2d 857 (1969)).

20. 347 So. 2d 453 (Fla. Dist. Ct. App. 1977).

filed a counterpetition which did not challenge his wife's prayer for custody. Later, after Ms. Critchlow voluntarily committed herself to a hospital for mental treatment, Mr. Critchlow amended his counterpetition to include a plea for custody. The parties subsequently agreed to undergo an evaluation by a court-appointed psychiatrist to determine which parent was best suited to provide custodial care for the infant daughter. The psychiatrist recommended that Ms. Critchlow be awarded custody, and counsel for the parties then stipulated that each party could obtain copies of Ms. Critchlow's hospital records. Thereafter, the court authorized Mr. Critchlow to depose three of his wife's treating physicians, including the court-appointed psychiatrist. Ms. Critchlow failed to object to this authorization, and in fact, her counsel appeared at the deposition of the appointed psychiatrist. Following this deposition, the parties stipulated that Mr. Critchlow also could depose his wife's childhood physician. The court subsequently entered an order granting temporary custody to Mr. Critchlow.²¹

In response, Ms. Critchlow filed "a motion for protective order requesting that the depositions [of her two remaining treating physicians and her childhood physician] not be taken, and . . . a motion to set aside the temporary custody order."²² The trial court denied the motion to set aside the temporary custody order, but granted the protective order. Mr. Critchlow appealed the protective order, and the Florida District Court of Appeals reversed.²³

The district court of appeals refused to honor Ms. Critchlow's invocation of Florida's statutory patient-psychiatrist privilege²⁴ on the ground that she had waived the privilege when she failed to object to the order authorizing her husband to depose the three treating physicians and when she stipulated to the deposition of her childhood physician.²⁵ Further, Ms. Critchlow had introduced her mental condition as an element of her custody claim by alleging in her petition for dissolution of marriage "that she [was] a fit and proper person to have custody of [the infant child]."²⁶ By in-

21. *Critchlow*, 347 So. 2d at 454.

22. *Id.*

23. *Id.*

24. FLA. STAT. ANN. § 90.242 (West 1975) (now codified as amended at FLA. STAT. ANN. § 90.503 (Harrison 1979)).

25. *Critchlow*, 347 So. 2d at 454.

26. *Id.*

jecting her own mental condition into the proceedings, the court held, Ms. Critchlow brought her case within a statutory exception to Florida's psychologist-patient privilege that provides: "(3) There shall be no privilege for any relevant communications under this section: . . . (b) In a criminal or civil proceeding in which *the patient* introduces his mental condition as an element of his claim or defense. . . ."27 Ms. Critchlow's petition, along with her agreement to the appointment of a psychiatrist to determine which party could best fulfill custodial responsibilities, introduced her mental condition as an element of her custody claim. Her communications with her treating psychiatrists, therefore, were excluded from the protection of the privilege.²⁸

Finally, the court stated that "the patient-psychiatrist privilege [could not] be invoked under the facts in *this* child custody case."²⁹ The court therefore reversed the protective order, and remanded the case to the trial court

to enter an order authorizing [Mr. Critchlow] to take the depositions of [his wife's] treating physicians; *but limiting the scope of those examinations to communications, diagnosis and treatments insofar as [Ms. Critchlow's] mental and emotional state relates to her fitness as a mother.*³⁰

The *Von Goyt* court cites *Critchlow* as support for the proposition that other state courts have held that the child's right to a proper determination of custody outweighs the right of a party to a custody proceeding to invoke the psychologist-patient privilege.³¹ This blanket proposition goes beyond the confines of the *Critchlow* opinion, which the *Critchlow* court explicitly limited to the facts in that case.³² Further, *Critchlow* contained a number of circumstances that make it inappropriate as support for *Von Goyt*. First, *Von Goyt* involved proceedings instituted by the Department of Pensions and Security to terminate the custodial rights of the child's natural mother and to place the child for adoption. The

27. FLA. STAT. ANN. § 90.242(3)(b) (West 1975) (now codified as amended at FLA. STAT. ANN. § 90.503(4)(c) (Harrison 1979)) (emphasis added).

28. *Critchlow*, 347 So. 2d at 454-55.

29. *Id.* at 455 (emphasis added).

30. *Id.* (emphasis added).

31. *Von Goyt*, 461 So. 2d at 823 (citing *Critchlow v. Critchlow*, 347 So. 2d 453 (Fla. Dist. Ct. App. 1977)).

32. *Critchlow*, 347 So. 2d at 455.

Critchlow case, on the other hand, was a custody dispute between the natural parents of the infant child. *Von Goyt* therefore involves a result which is inherently more drastic than any possible outcome in the *Critchlow* dispute, for the court ordered the removal of the Von Goyt children from the custody of their natural parent, and the placement of the children for adoption, so that the whole of the natural family structure was permanently disrupted, and Ms. Von Goyt's parental rights were terminated forever.³³

Additionally, the appealing party in *Critchlow* failed to object at the trial level to the depositions of her physicians,³⁴ while Ms. Von Goyt exercised every opportunity to challenge the admission of her medical records into evidence.³⁵ Although the *Critchlow* court determined that Ms. Critchlow's failure to object amounted to a waiver of the privilege,³⁶ the *Von Goyt* court explicitly found that Ms. Von Goyt had not waived her privilege.³⁷

Finally, and most significantly, the Florida privilege statute includes specific stated exceptions to the protection of communications between psychiatrist and patient. That privilege does not extend to civil or criminal proceedings "in which the *patient* introduces his mental condition as an element of his claim or defense. . . ."³⁸ Ms. Critchlow brought her case within Florida's statutory exception by virtue of her own actions.³⁹ Alabama's privilege statute contains no such stated exceptions.⁴⁰ And even if it did, the issue of Ms. Von Goyt's mental condition was raised not by Ms. Von Goyt herself, but by the Department of Pensions and Security.⁴¹

33. See R. SLOVENKO, *PSYCHIATRY AND LAW* 371 (1973).

34. *Critchlow*, 347 So. 2d at 454.

35. See *Von Goyt*, 461 So. 2d at 823. Appellee alleges that Ms. Von Goyt failed to object to a counselor's testimony at an earlier hearing. Brief for Appellee at 13, *In re Von Goyt*, 461 So. 2d 821 (Ala. Civ. App. 1984). The court's opinion does not address this allegation.

36. *Critchlow*, 347 So. 2d at 454.

37. *Von Goyt*, 461 So. 2d at 823.

38. FLA. STAT. ANN. § 90.242(3)(b) (West 1975) (now codified as amended at FLA. STAT. ANN. § 90.503(4)(c) (Harrison 1979)) (emphasis added). The language of the statute indicates that a waiver of the privilege occurs only when the patient himself introduces his mental condition into the case. *Id.*

39. See *supra* notes 23-26 and accompanying text.

40. See ALA. CODE § 34-26-2 (1985).

41. *Von Goyt*, 461 So. 2d at 822. "In January 1984 Ms. Pitts [a social worker at the Alabama Department of Pensions and Security] and her supervisor filed a petition in the Tuscaloosa County Juvenile Court for termination of Miss Von Goyt's parental rights, alleg-

The *Von Goyt* court also cites a Montana case as support for the proposition that the psychologist-patient privilege must yield in child custody proceedings. In *In re A.J.S.*,⁴² D.S., the mother of a seventeen-year-old mentally retarded epileptic, A.J.S., appealed the order of the district court that had awarded custody of the child to the Department of Social and Rehabilitation Services pursuant to a finding that A.J.S. was a youth in need of care. At trial, the Department of Social and Rehabilitation Services had presented evidence tending to show that A.J.S. was an abused and neglected child who had suffered numerous unexplained injuries, and that D.S. was not adequately concerned for A.J.S.'s cleanliness and hygiene. Further, a clinical psychologist who had conducted a court-ordered psychological examination of D.S. had testified that D.S. had "some organic brain damage as well as a personality disorder termed 'inadequate personality,'"⁴³ which interfered with her ability to "deal adequately and care for A.J.S. over the long term."⁴⁴

On appeal to the Montana Supreme Court, D.S. challenged the admission of the psychologist's testimony as violative of the psychologist-patient privilege.⁴⁵ The supreme court rejected her argument and in fact determined that no psychologist-patient privilege existed between D.S. and the court-appointed psychologist. The supreme court reached this conclusion on the basis of the lan-

ing that her mental condition prevented her from properly caring for her children and that she was unable to provide them with a stable environment." *Id.*

42. ___ Mont. ___, 630 P.2d 217 (1981).

43. *A.J.S.*, ___ Mont. at ___, 630 P.2d at 220.

44. *Id.*

45. D.S. also raised three other issues on appeal:

1. Was the evidence sufficient to support the finding that AJS is a youth in need of care?

* * * *

3. Did the admission of psychologists' testimony resulting from a court-ordered psychological evaluation violate DS's constitutional right of privacy?

4. Does the delay in the adjudication of this matter necessitate reversal?

Id. at 219.

The court responded that:

- (1) clear and convincing evidence of child's unexplained physical injuries and mother's inadequate concern for cleanliness and hygiene of child supported trial court's findings; . . . (3) mother could not raise for first time on appeal contention that psychologist's testimony resulting from court ordered psychological evaluation violated her constitutional right of privacy; and (4) delay of 20 months from removal of child from mother's home to trial court's final order did not necessitate reversal.

Id. at 217-18.

guage of Montana's privilege statute,⁴⁶ which "places the relationship of psychologist and client on the same status as attorney and client."⁴⁷ A client in the attorney-client context is entitled to claim the privilege with regard to communications made to a lawyer who was, at the time the communication was made, acting as the client's "legal advisor for the purpose of securing professional advice or aid upon the subject of the client's rights and liabilities."⁴⁸ The court reasoned that, because the lower court had ordered the psychological evaluation, D.S. had not initiated the relationship for purposes of "securing professional assistance."⁴⁹ Therefore, the privilege did not extend to the communications made in the course of that evaluation.⁵⁰

The court reached this decision in spite of the fact that D.S. had had previous contacts with the court-appointed psychologist in an unrelated matter. Even assuming *arguendo* that the prior contacts established a psychologist-patient relationship, the court stated that "[i]n some instances, the best interests of the child require some degree of flexibility in procedure to insure that all evidence pertaining to the best interests of the child may be considered."⁵¹

The facts of *Von Goyt* are easily distinguishable from those of *A.J.S.* Most notably, the communications at issue in *A.J.S.* were made in response to a court order. Since the court appointed the psychologist to evaluate D.S. within the context of the allegations made by the Department of Social and Rehabilitation Services in its petition to gain custody of A.J.S., D.S. reasonably could not expect that such communications would be entitled to the protection of the Montana privilege statute.⁵² To extend the privilege to such communications would frustrate the court's purpose in ordering the evaluation. Conversely, in *Von Goyt*, Ms. Von Goyt had every

46. MONT. CODE ANN. § 26-1-807 (1980) (now codified at MONT. CODE ANN. § 26-1-807 (1985)).

47. *A.J.S.*, ___ Mont. at ___, 630 P.2d at 221.

48. *Id.* (citing *Bernardi v. Community Hosp. Assoc.*, 166 Colo. 280, ___, 443 P.2d 708, 716 (1968)).

49. *A.J.S.*, ___ Mont. at ___, 630 P.2d at 221.

50. *Id.*; see also *Weihofen, Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53, 80 (1965).

51. *A.J.S.*, ___ Mont. at ___, 630 P.2d at 221 (citing *In re T.E.R.*, 180 Mont. 340, 590 P.2d 1117 (1979)) (emphasis added).

52. See *Guernsey, The Psychotherapist-Patient Privilege in Child Placement: A Relicancy Analysis*, 26 VILL. L. REV. 955, 964-67 (1981).

reason to expect that communications made to the psychiatrists and psychologists who were treating her would remain privileged and confidential. Her relationships with these professionals were strictly for the purpose of treatment. While the court in *Von Goyt* had every chance to order a neutral psychological examination of Ms. Von Goyt, that alternative never appears even as a suggestion within the court's opinion. Moreover, the court never questioned the existence of the privileged relationship in *Von Goyt*, while the *A.J.S.* court specifically held that D.S. and the psychologist had not established such a relationship.⁵³

The *Von Goyt* court errs similarly in relying upon *In re Norwood*⁵⁴ as support for overriding the psychologist-patient privilege in custody proceedings. In *Norwood*, the juvenile court found the five minor Norwood children to be neglected and dependent. The court placed all five children in the custody of the county social services department and took the matter of termination of parental rights under advisement.⁵⁵

Before the trial court could decide the question of parental rights, the Norwoods appealed, assigning as error the admission into evidence of the testimony of two psychiatrists who had treated both parents.⁵⁶ The Nebraska Supreme Court affirmed the juvenile court judgment on the ground that the Nebraska statute excluded communications to a physician from the protection of the privilege⁵⁷ "in any judicial proceedings . . . regarding injuries to children. . . ."⁵⁸ The supreme court found that the term "injury" was

53. *A.J.S.*, ___ Mont. at ___, 630 P.2d at 221.

54. 194 Neb. 595, 234 N.W.2d 601 (1975).

55. *Norwood*, 194 Neb. at ___, 234 N.W.2d at 602.

56. *Id.* Appellants also raised two other issues on appeal: (1) whether section 43-201 R.R.S. (1943) (defining the jurisdiction of the juvenile court) and section 43-209 R.R.S. (1943) (providing for the disposition of children found to be neglected or dependent) are constitutional and (2) whether the evidence was insufficient for a determination that the children were neglected and dependent. *Norwood*, 194 Neb. at ___, 234 N.W.2d at 602. The court held that the Norwoods had waived the issue of constitutionality by failing to raise it at trial and that the trial court had not abused its discretion in finding that the Norwood children were neglected and dependent. *Id.* at ___, 234 N.W.2d at 601.

57. NEB. REV. STAT. § 25-1206 (1943) (repealed and reissued 1975) (current version at NEB. REV. STAT. § 27-504 (1979)).

58. NEB. REV. STAT. § 25-1207 (Supp. 1965). The *Norwood* court cites the pertinent language to "[f]ormer section 25-1207, R.R.S. 1943." *Norwood*, 194 Neb. at ___, 234 N.W.2d at 602. The language discussed in the opinion is actually part of a 1965 amendment to the 1943 statute. That amended version appears at NEB. REV. STAT. § 25-1207 (Supp. 1965) (repealed and reissued 1975) (current version at NEB. REV. STAT. § 27-504 (1979)).

comprehensive and included the neglect experienced by the Norwood children. Thus, the court held that neglect "constitute[s] one of the exceptions referred to in the statute and the [psychiatric] evidence was [therefore] properly admitted."⁵⁹

Thus, the *Von Goyt* court again cited a case from a jurisdiction whose privilege statute is very different from Alabama's.⁶⁰ Nebraska's statute by its terms exempts from the privilege communications to a physician in a number of contexts, including "proceedings under the Separate Juvenile Court Act⁶¹ as regards injuries to children."⁶² The Alabama statute contains no exceptions.

D. v. D.,⁶³ a case which the *Von Goyt* court also relied on without analysis, actually presents an alternative to forcing the psychologist-patient privilege to yield. *D. v. D.* involved divorce proceedings in which both husband and wife sought custody of their two children. Both parties consented to evaluations by a court-appointed psychiatrist to assist the court in resolving the custody dispute. Ms. D. had previously been committed to a mental hospital. Mr. D., in connection with his custody claim, moved prior to trial for leave to depose one of Ms. D.'s physicians, and for an order directing that doctor and the hospital to which Ms. D. had been committed to produce all of her medical records for inspection and copying. Ms. D. invoked the physician-patient privilege⁶⁴ to prevent disclosure of any medical information.⁶⁵

The New Jersey Superior Court granted Mr. D.'s motion to subpoena Ms. D.'s medical records for inspection, but greatly qualified that order to permit inspection only by the court. The court stated that the parties would be informed as to the contents of the records only in the event and to the extent that the court relied on

59. *Norwood*, 194 Neb. at ____, 234 N.W.2d at 603.

60. *Cf. supra* notes 38-41 and accompanying text. The *Von Goyt* court, in its reference to *Critchlow v. Critchlow*, 347 So. 2d 453 (Fla. Dist. Ct. App. 1977), failed to note that the Florida privilege statute contains an exception into which *Critchlow* fell, while Alabama has no similar exception in its privilege statute. *Id.*

61. NEB. REV. STAT. §§ 43-228 to -239 (1943) (current version at NEB. REV. STAT. §§ 43-2111 to -2127 (Supp. 1982)).

62. *Norwood*, 194 Neb. at ____, 234 N.W.2d at 602.

63. 108 N.J. Super. 149, 260 A.2d 255 (1969).

64. N.J. STAT. ANN. § 2A:84A-22.2 (West 1968) (current version at *id.* (West 1976 & Supp. 1985)).

65. *D. v. D.*, 108 N.J. Super. at ____, 260 A.2d at 256.

portions of the record to resolve the custody dispute.⁶⁶

The court then denied Mr. D.'s discovery motions to inspect and copy the medical records and to depose his wife's physician. The court reasoned that while "fundamental policy considerations . . . dictate the need for flexibility in applying the technical rules of evidence"⁶⁷ in custody disputes, nevertheless the physician-patient privilege continued to be available to the wife unless her competence could not be ascertained by other means, such as by court-ordered psychiatric examination.⁶⁸ Thus, the court found an alternative to discarding the privilege altogether: even though the interests of the child outweigh the policies promoted by the privilege, the court would respect the privilege unless it saw no reasonable alternative to disclosure.⁶⁹ In weighing the competing values, the court preserved its right to override the privilege in cases in which the proposed alternative might be inadequate:

[S]hould the defending parent refuse to submit to psychiatric evaluation as required by the court, we would be unable to evaluate the fitness of that parent in terms of possible mental illness, although we know that there has been a recent commitment to a mental hospital. Under such circumstances the court may well be compelled to conclude that there is no alternative to permitting discovery of medical evidence notwithstanding the privilege.⁷⁰

The *D. v. D.* court, although its primary concern lay with the best interests of the child, continued to uphold the parents' rights by providing an alternative which served both the child's interests in a proper custody resolution and the patient's right to expect her privileged communications to remain confidential. The *Von Goyt* court, on the other hand, never explored the possibility that both interests could be adequately served by ordering Ms. Von Goyt to undergo a psychiatric examination by a court-appointed neutral psychologist.

The courts in both *D. v. D.* and in *Von Goyt* rely in part on the New York case of *People ex rel. Chitty v. Fitzgerald*.⁷¹ *Fitzger-*

66. *Id.* at ____, 260 A.2d at 257.

67. *Id.*

68. *Id.* at ____, 260 A.2d at 258.

69. *Id.* at ____, 260 A.2d at 257-58.

70. *Id.* at ____, 260 A.2d at 258.

71. 40 Misc. 2d 966, 244 N.Y.S.2d 441 (S. Ct. 1963). The court in *D. v. D.* cites *Fitzgerald* as support for the procedure by which the judge examines the medical reports *in camera*

ald was a custody proceeding instituted by the wife seeking an alteration of the visitation rights granted to her husband if his Veterans Administration Hospital records revealed that he was currently mentally ill. Mr. Chitty, her husband, responded by asserting the physician-patient privilege to prevent disclosure of his medical records and by refusing to undergo any psychological evaluation to determine his current mental condition.⁷²

Under these circumstances, the court ruled that it could read Chitty's medical records, "without making that report part of the record in the proceeding,"⁷³ in order to determine the necessity of any modification of Chitty's visitation rights. In light of the judge's examination of Chitty's medical report, the court denied Chitty any further visitation "unless [he] consents to a psychiatric examination. . . ."⁷⁴

As the *D. v. D.* opinion noted, in *Fitzgerald* "[t]he hospital report was not made part of the record in that proceeding but, instead, the judge himself examined the hospital record to determine its relevancy in the custody controversy."⁷⁵ And the fact that Mr. Chitty was given an opportunity to undergo psychiatric evaluation in *Fitzgerald*, as was Ms. D. in *D. v. D.*, underscores the reluctance of each of these courts to override the patient privilege without first exploring reasonable alternatives in order to protect both the child's best interest and the confidentiality of protected communications.

Koump v. Smith,⁷⁶ the last case cited without analysis by the *Von Goyt* court in support of suspending the privilege in custody proceedings, in fact provides no support at all for that proposition. *Koump* was not a custody suit. It was a negligence action to recover damages for personal injuries sustained in an automobile accident between plaintiff and defendant. The issue of privileged communications arose when the plaintiff applied for a court order directing the defendant to "execute and acknowledge written au-

without making them part of the court record. *D. v. D.*, 108 N.J. Super. at ____, 260 A.2d at 257. The *Von Goyt* court, on the other hand, cites *Fitzgerald*, without any analysis, for the proposition that the psychologist-patient privilege must yield in custody proceedings. *Von Goyt*, 461 So. 2d at 823.

72. *Fitzgerald*, 40 Misc. 2d at ____, 244 N.Y.S.2d at 441-42.

73. *Id.* at ____, 244 N.Y.S.2d at 442 (emphasis added).

74. *Id.* at ____, 244 N.Y.S.2d at 443 (emphasis added).

75. *D. v. D.*, 108 N.J. Super. at ____, 260 A.2d at 257.

76. 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969).

thorization permitting plaintiff or his attorneys⁷⁷ to obtain copies of defendant's hospital records made immediately following the accident. The plaintiff sought these records, over the defendant's objection that the records were privileged communications between a physician and patient, for the purpose of proving that defendant had been intoxicated at the time of the accident and that the collision resulted from defendant's intoxication. The defendant's answer denied these allegations.

The trial court denied plaintiff's application,⁷⁸ and plaintiff appealed. A divided appellate division affirmed the lower court's ruling and "granted leave to appeal certifying the following question: 'Was the order of this court [denying plaintiff's application] . . . properly made?'"⁷⁹ The New York Court of Appeals answered the question affirmatively in an opinion that focused on the issue of whether defendant's mental or physical condition was in controversy within the meaning of a New York statute which excludes medical records and communications relating to conditions in controversy from the physician-patient privilege.⁸⁰ The court of appeals held that a party waives the privilege "by bringing or defending a *personal injury action* in which mental or physical condition is *affirmatively* put in issue."⁸¹ The court elaborated:

We do not hold that the privilege is waived *whenever* a party defends an action in which his mental or physical condition is in controversy. The rule laid down today is limited to cases in which a defendant affirmatively asserts the condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff.⁸²

The defendant in *Koump* did not affirmatively raise his condition, either as a counterclaim or as an excuse for the conduct of which plaintiff complained. The defendant merely had answered the plaintiff's allegations in the negative, and the court accordingly

77. *Koump*, 25 N.Y.2d at ____, 250 N.E.2d at 858, 303 N.Y.S.2d at 860.

78. *Id.* at ____, 250 N.E.2d at 858-59, 303 N.Y.S.2d at 858-59.

79. *Id.* at ____, 250 N.E.2d at 859, 303 N.Y.S.2d at 861.

80. N.Y. CIV. PRAC. LAW § 3121(a) (McKinney 1963) (current version at N.Y. CIV. PRAC. LAW § 3121(a) (McKinney 1970)).

81. *Koump*, 25 N.Y. at ____, 250 N.E.2d at 861, 303 N.Y.S.2d at 864 (emphasis added); *cf. supra* notes 38-39 and accompanying text (explaining how the appellant in *Critchlow v. Critchlow*, 347 So. 2d 453 (Fla. Dist. Ct. App. 1977) affirmatively introduced her mental condition into the controversy).

82. *Koump*, 25 N.Y. at ____, 250 N.E.2d at 861, 303 N.Y.S.2d at 864 (emphasis in original).

found that his hospital records remained privileged communications.⁸³

Nowhere in the *Koump* opinion does the court refer to custody disputes. And nowhere in its analysis does the court discuss situations outside of the context of the affirmative waiver in which the privilege must yield. Why the *Von Goyt* court cited *Koump* in support of the exclusion of the privilege in custody cases remains a mystery. The only clue may lie in the *Von Goyt* court's conclusion that

where the issue of the mental state of a party to a custody suit is clearly in controversy, and a proper resolution of the custody issue requires disclosure of privileged medical records, the psychologist-patient privilege must yield.⁸⁴

The *Von Goyt* opinion, however, contains no indication that Ms. *Von Goyt* affirmatively introduced her mental condition into the controversy. The opinion, therefore, fails to bring *Von Goyt* within the *Koump* exclusion, which is based upon a party's affirmative waiver of her privilege. Indeed, the court clearly stated that Ms. *Von Goyt* had not waived her privilege.⁸⁵

Perhaps the court was attempting to fashion a rule that would place inherently "in controversy" the mental condition of a party to a custody dispute, so that the privilege must yield regardless of who raises the issue. Such a rule, however, would seem to require a more reasoned explanation than the single cursory statement made by the *Von Goyt* court, particularly in a case of first impression, because such a rule would carve a deep judicial restriction into the statutory privilege.

The *Von Goyt* court cited *Perry v. Fiumano*⁸⁶ as authority for its general statement that the privilege must yield in custody proceedings in which a party's mental condition is in controversy. The *Fiumano* court did indeed state that "the mental and emotional state of a custodial parent is of great concern to the court regardless of [whether a party affirmatively asserts the issue or not]."⁸⁷

83. *Id.* at ____, 250 N.E.2d at 864-65, 303 N.Y.S.2d at 868-69.

84. *In re Von Goyt*, 461 So. 2d 821, 823 (Ala. Civ. App. 1984) (citing *Perry v. Fiumano*, 61 A.D.2d 512, 403 N.Y.S.2d 382 (App. Div. 1978)).

85. *Id.* at 823.

86. 61 A.D.2d 512, 403 N.Y.S.2d 382 (App. Div. 1978), cited in *Von Goyt*, 461 So. 2d at 823.

87. *Fiumano*, 61 A.D.2d at ____, 403 N.Y.S.2d at 385.

However, the *Fiumano* court acknowledged that the privilege may not be set aside without "a showing beyond 'mere conclusory statements' that resolution of the custody issue *requires* revelation of the protected material."⁸⁸ Presumably, then, a showing by the party seeking the protection of the privilege that other means are available to provide the evidence needed for resolution of the custody issue (a court-ordered psychological evaluation, for example) should operate to salvage the privilege. Of further significance is that the *Von Goyt* court failed to note that *Fiumano* specifically concerned a motion for the disclosure of communications made to a social worker, rather than to a psychiatrist. The New York court noted, however, that the records sought—those of a counseling center—might include evaluations by physicians and psychologists, and so might involve the doctor-patient and psychologist-client privileges peripherally.⁸⁹ And finally, since the *Fiumano* court refused to grant the discovery motion before it, the language quoted by the *Von Goyt* court is dictum.

IV. Factors the Court Should Consider in Proceedings Concerning Child Custody and Termination of Parental Rights

The single controlling consideration in a custody proceeding is "the best interests of the child."⁹⁰ Under Alabama's 1984 Child Protection Act,⁹¹ a court may terminate parental rights if it

finds from clear and convincing evidence, competent, material and relevant in nature, that the parents of a child are unable or unwilling to discharge their responsibilities to and for the child, or that the conduct or condition of the parents is such as to render them

88. *Id.* at _____, 403 N.Y.S.2d at 386 (emphasis added).

89. *Id.* at _____, 403 N.Y.S.2d at 384.

90. *E.g.*, Cook, *Family Law: Surveying 15 Years of Change in Alabama*, 36 ALA. L. REV. 419, 461 (1985) (citing *Brill v. Johnson*, 293 Ala. 435, 436, 304 So. 2d 595, 596 (1974); *Reaves v. Reaves*, 399 So. 2d 311, 312 (Ala. Civ. App. 1981); *Warren v. Warren*, 386 So. 2d 1166, 1168 (Ala. Civ. App. 1980); *Bynum v. Bynum*, 52 Ala. App. 633, 635, 296 So. 2d 722, 724 (Civ. App.), *cert. denied*, 292 Ala. 714, 296 So. 2d 725 (1974)); *Guernsey*, *supra* note 52, at 955 (citing *Bertin & Klein, Pennsylvania's Developing Child Custody Law*, 25 VILL. L. REV. 752, 760 (1980)); *Oster, Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 21 (1965); *Sayre, Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 677-78 (1942); *Comment, Measuring the Child's Best Interests — A Study of Incomplete Considerations*, 44 DEN. L.J. 132, 132-33 (1967); *Comment, Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733, 733 (1977).

91. ALA. CODE §§ 26-18-1 to -10 (Supp. 1985).

unable to properly care for the child and that such conduct or condition is unlikely to change in the foreseeable future. . . .⁹²

The Act enumerates a broad list of factors which the court must consider in the involuntary termination of parental rights and responsibilities:

- (1) That the parents have abandoned the child . . . ;
- (2) Emotional illness, mental illness or mental deficiency of the parent, or excessive use of alcohol or controlled substances, of such duration or nature as to render the parent unable to care for needs of the child;
- (3) That the parent has tortured, abused, cruelly beaten or otherwise maltreated the child, or attempted to torture, abuse, cruelly beat or otherwise maltreat the child, or the said child is in clear and present danger of being thus tortured, abused, cruelly beaten, or otherwise maltreated as evidenced by such treatment of a sibling;
- (4) Conviction of and imprisonment for a felony;
- (5) Unexplained serious physical injury to the child under such circumstances as would indicate that such injuries resulted from the intentional conduct or willful neglect of the parent;
- (6) That reasonable efforts by the department of pensions and security or licensed public or private child care agencies leading toward the rehabilitation of the parents have failed.

(b) Where a child is not in the physical custody of its parent or parents appointed by the court, in addition to the foregoing, shall also consider, but is not limited to the following:

- (1) Failure by the parents to provide for the material needs of the child or to pay a reasonable portion of its support, where the parent is able to do so.
- (2) Failure by the parents to maintain regular visits with the child in accordance with a plan devised by the department, or any public or licensed private child care agency, and agreed to by the parent.
- (3) Failure by the parents to maintain consistent contact or communication with the child.
- (4) Lack of effort by the parent to adjust his circumstances to meet the needs of the child in accordance with agreements reached, including agreements reached with local departments of pensions and security or licensed child-placing agencies, in an administrative review or a judicial review.

(c) In any case where the parents have abandoned a child as

92. *Id.* § 26-18-7.

herein defined and such abandonment continues for a period of six months next preceding the filing of the petition, such facts shall constitute a rebuttable presumption that the parents are unable or unwilling to act as parents.⁹³

Although the court must consider the listed factors, the court may also hear any evidence "which is competent, relevant and material to the issue before it."⁹⁴ In addition to the considerations mandated by the Act, Alabama courts are to consider the following: The emotional, social, moral, material, and educational needs of the child; the environment of the home of the parent seeking custody; the age, character, stability, mental and physical health of the parent; the parent's capacity to and interest in providing for the needs of the child; a move out of state;⁹⁵ the child's preference as to custody;⁹⁶ and mental commitment of the custodial parent.⁹⁷

The purpose of the Alabama 1984 Child Protection Act is to "provide meaningful guidelines to be used by the juvenile court in cases involving the termination of parental rights in such a manner as to protect the welfare of children by providing stability and continuity in their lives, *and at the same time to protect the rights of their parents.*"⁹⁸ Thus, although the Act does not provide specific means by which parental rights are to be observed, except to the

93. *Id.*

94. *Worley v. Jinks*, 361 So. 2d 1082, 1088 (Ala. Civ. App. 1978); *cf.* ALA. CODE § 12-15-65(d),(e) (1975 & Supp. 1985) (Chapter 15 of Title 12 of the Alabama Code is the chapter on juvenile proceedings; the subsections noted allow the court to consider evidence that is competent, relevant, and material in determining the disposition of children who are alleged to be delinquent, dependent, or in need of supervision, as defined by that chapter); *Cook*, *supra* note 90, at 462-65 (discussing various factors that have been considered by Alabama courts in custody proceedings).

95. R. McCURLEY, JR. & P. DAVIS, ALABAMA DIVORCE, ALIMONY AND CHILD CUSTODY § 21-4, at 175 (1982 and Supp. 1984) (citing *Crane v. Crane*, 392 So. 2d 242 (Ala. Civ. App. 1980); *Hallford v. Hallford*, 390 So. 2d 295 (Ala. Civ. App. 1980)).

96. R. McCURLEY, JR. & P. DAVIS, *supra* note 95, § 21-4, at 175 (citing *Rogers v. Rogers*, 345 So. 2d 1368 (Ala. Civ. App. 1977)); *Cook*, *supra* note 90, at 463 (preference is a non-controlling factor in Alabama) (citing *Hattrick v. Hattrick*, 52 Ala. App. 539, 541, 295 So. 2d 260, 261 (Civ. App. 1974)); *see also* Freed & Foster, *Family Law in the Fifty States: An Interview as of September 1982*, 8 FAM. L. REP. (BNA) 4089 (Sept. 28, 1982) (in approximately 18 states the child's preference is considered as a factor in custody determinations).

97. R. McCURLEY, JR. & P. DAVIS, *supra* note 95, § 21-4, at 175 (citing *Quinn v. Quinn*, 351 So. 2d 925 (Ala. Civ. App. 1977)). *But cf.* *Parks v. Parks*, 275 Ala. 613, 157 So. 2d 212 (1963), *cited in* R. McCURLEY, JR. & P. DAVIS, *supra* note 95, § 23-4, at 190, for the proposition that "mental illness may not warrant a change of custody if the children are being credibly cared for." *Id.*

98. ALA. CODE § 26-18-2 (Supp. 1985) (emphasis added).

degree that “[a]ppeals from an order terminating parental rights . . . shall have precedence over all other cases in the court to which the appeal is taken,”⁹⁹ the Act’s statement of purpose clearly indicates that a court is not to disregard the rights of parents in proceedings to terminate parental custody. Arguably, then, even though the primary consideration in a custody proceeding is the child’s best interests, the statutory guidelines governing those proceedings also direct the court to observe a parent’s rights to the fullest extent possible. Both child and parent are entitled to expect the court’s protection, though perhaps not to equal degrees.

V. The Psychologist-Patient Privilege in Custody Proceedings: Alternatives to Automatic Revelation

One right for which a party before any court may expect protection is the right to prevent privileged communications from being involuntarily disclosed. “[F]our fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications”:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Only if these four conditions are present should a privilege be recognized.¹⁰⁰

Alabama has chosen to recognize a number of privileges by statute,¹⁰¹ including a statute that protects confidential communi-

99. *Id.*

100. 8 J. WIGMORE, EVIDENCE § 2285 (McNaughten rev. ed. 1961) (emphasis in original).

101. *See, e.g.*, ALA. CODE § 34-8A-21 (1985) (concerning confidential relations between licensed professional counselors or certified counselor associates and clients); *id.* § 12-21-142 (1975) (exemption of news-gathering persons from disclosing sources); *id.* § 12-21-161 (1975) (attorney-client privilege); *id.* § 12-21-166 (Supp. 1985) (protecting confidential communications made to a member of the clergy).

While there is no statutory doctor-patient testimonial privilege in Alabama, the Ala-

cations between a patient and his or her licensed psychologist or psychiatrist. Section 34-26-12 of the Alabama Code provides:

For the purpose of this chapter, the confidential relations and communications between licensed psychologists and licensed psychiatrists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.¹⁰²

Alabama's attorney-client privilege prevents an attorney from testifying, and the court from compelling him or her to testify, concerning "any matter or thing" of which he has gained knowledge from the client, or concerning any advice given to the client in the course of the attorney-client relationship, or given in anticipation of that relationship, unless the client himself or herself calls the attorney to testify.¹⁰³ Notably, a total of forty-seven jurisdictions provide some form of privilege protection for the psychologist-patient relationship.¹⁰⁴ This widespread adoption of the privilege indicates that courts and legislatures accept the notion that communications between psychotherapist and patient meet the four conditions set out by Wigmore, because the relationship "is one that society desires to foster and protect, and . . . without the confidentiality which the privilege provides, many people will not seek therapeutic help."¹⁰⁵

bama Supreme Court has held that there is an action in tort for a person damaged by a doctor's revelation of communications made to him or her in a professional capacity. *Horne v. Patton*, 291 Ala. 701, 287 So. 2d 824 (1973).

102. ALA. CODE § 34-26-2 (1985). The Alabama psychologist-patient privilege, like that privilege in 15 other jurisdictions, statutorily corresponds to the attorney-client privilege. Dekraai & Sales, *Privileged Communications of Psychologists*, 13 PROF. PSYCHOLOGY 372, 374-75, 377 (1982).

Communications that fall within the protection of the psychologist-patient privilege "include any information gained by the psychotherapist during treatment, either verbally or through observation of the patient." Special Project, *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1540 (1985).

103. ALA. CODE § 12-21-161 (1975).

104. See DeKraai & Sales, *supra* note 102, Table 1, at 374; see also Special Project, *supra* note 102, at 1539 n.59 (stating that only Alaska, Iowa, Nebraska, South Carolina, and West Virginia have no form of the psychotherapist-patient privilege). *Contra* ALASKA STAT. § 08.86.200 (1962); see NEB. REV. STAT. § 27-504 (1979) (which is a statutory physician-patient privilege provision including certified psychologists within the definition of "physician").

105. Guernsey, *supra* note 52, at 961 (citing Fisher, *The Psychotherapeutic Profession and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 611 (1964); Slovenko,

The psychologist-patient privilege is particularly necessary in child custody disputes: a party who is involved in or anticipates involvement in such a dispute may be discouraged from seeking help if he or she knows that communications made during treatment will be revealed in court.¹⁰⁶ Moreover, disclosure of such communications might injure the child by inducing his or her parents to forego needed therapy,¹⁰⁷ therapy that in the long run would prove highly beneficial to the child.

In addition to the special justification for the privilege when it is associated with the possibility of custody proceedings, other public policies support the psychologist-patient privilege in general.¹⁰⁸ Traditionally, commentators have urged that the physician and counselor privilege is "necessary to protect society's interest in medical and counseling relationships by encouraging patients to communicate necessary information to health professionals."¹⁰⁹ This "utilitarian justification"¹¹⁰ is particularly relevant in the psychotherapy context, where confidentiality may be the basis of successful treatment,¹¹¹ which, in turn, may depend totally upon a patient's willingness to confide.¹¹²

Psychiatry and a Second Look at the Medical Privilege, 6 WAYNE L. REV. 175, 184 (1960); Comment, *Confidential Communication to a Psychotherapist: A New Testimonial Privilege*, 47 NW. U.L. REV. 384, 386-87 (1952); Comment, *The Psychotherapists' Privilege*, 12 WASHBURN L.J. 297, 302-05 (1973)).

106. See generally Guernsey, *supra* note 52 (a discussion of the psychologist-patient privilege in the context of child custody proceedings).

107. *Id.* at 966.

108. See generally DeKraai & Sales, *supra* note 102; Guernsey, *supra* note 52; Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 619-625 (1980); Slovenko, *supra* note 105; Special Project, *supra* note 102; McCORMICK ON EVIDENCE § 98, at 244-45 (E. Cleary 3d ed. 1984).

109. Special Project, *supra* note 102, at 1542 (citing Slovenko, *supra* note 105, at 186).

110. Special Project, *supra* note 102, at 1542.

111. Saltzburg, *supra* note 108, at 620.

112. The Advisory Committee for the Federal Rules of Evidence recognized the special necessity for confidentiality:

Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to com-

Additionally, some commentators have offered the privacy rationale in support of the privilege.¹¹³ They argue that communications made by patients to psychotherapists raise the constitutionally recognized right of a patient to protect the uncontrolled dissemination of private information about himself or herself.¹¹⁴

Irrespective of which rationale persuaded a particular jurisdiction to adopt the psychologist-patient privilege, the evidence indicates that society as a whole values the protections that the privilege provides. In light of the combined strengths of the justifications offered for the privilege, along with the fact that a vast majority of jurisdictions have seen fit to provide statutorily for some form of the privilege,¹¹⁵ the decision to abrogate the privilege in certain cases deserves grave consideration.¹¹⁶ When a court can obtain the needed information through less intrusive methods, notions of fairness and equity require that the privilege remain intact.¹¹⁷

The starting point for a court, therefore, ought to be a strong presumption against destroying the privilege in any case. Almost any conceivable problem that would be so serious as to jeopardize the best interests of the child would, in all likelihood, have manifested itself in behavior that could be proved without reaching privileged material.

At least with regard to the *Von Goyt* decision, supporters of the privilege might argue that easy cases make bad law, for in that case, the Department of Pensions and Security alleged that the nonmedical evidence, by itself, provided the court with sufficient proof that Ms. Von Goyt's parental rights should have been termi-

municate freely. A threat to secrecy blocks successful treatment.

Proposed Fed. R. Evid. 504, 56 F.R.D. at 242 (1972) (quoting GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT No. 45, at 92 (1960)). The Proposed Rules included a psychiatrist-patient privilege, but no physician-patient privilege; Congress rejected all the rules providing for specific privileges. Pub. L. No. 93-595, 88 Stat. 1926 (approved Jan. 2, 1975). See also M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 272 (1952).

113. Special Project, *supra* note 102, at 1480-83, 1544 (citing Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Rules of Evidence*, 62 GEO. L.J. 61, 92, 117 (1973); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956); Saltzburg, *supra* note 108, at 618-19).

114. Special Project, *supra* note 102, at 1545; see Guernsey, *supra* note 52, at 982-95.

115. *Supra* note 104 and accompanying text.

116. See Guernsey, *supra* note 52, at 995-96.

117. See *id.*

nated.¹¹⁸ Thus, the court in *Von Goyt* probably would have reached the same result without the additional evidence contained in the medical records. Such reasoning, taken one step further, leads to the conclusion that the medical evidence was completely unnecessary for a proper determination of the custody issue. Therefore, the invasion of Ms. Von Goyt's privileged communications did not help the court to serve the children's welfare, but simply compromised Ms. Von Goyt's privacy.

In cases that do not present the court with sufficient nonprivileged evidence upon which to resolve a custody matter, the court should, to insure justice for both child and parent, seek alternative sources for the information necessary to reach a decision that is in the child's best interest.¹¹⁹ Possible alternatives include giving the parent the option of undergoing psychological evaluation by a neutral court-appointed psychotherapist,¹²⁰ who would then report his

118. Brief for Appellee at 19-20, *In re Von Goyt*, 461 So. 2d 821 (Ala. Civ. App. 1984). The brief alleges that both Von Goyt children "spent considerable amounts of time in foster care"; that even after four years of assistance from the Department of Pensions and Security, Ms. Von Goyt was "unable to maintain a consistently stable living arrangement"; that neighbors had reported unusual activity in Ms. Von Goyt's home; and that Maude's day care teacher reported that Maude had suffered an extreme and adverse personality change after she was removed from foster care and returned to Ms. Von Goyt's custody. *Id.*

119. See, e.g., *D. v. D.*, 108 N.J. Super. 149, 260 A.2d 255 (1969); *supra* notes 67-71 and accompanying text.

120. A court's authority to order a psychological examination is widely recognized as inherent to the judicial power. Guernsey, *supra* note 52, at 956 n.7 and accompanying text; Weihofen, *supra* note 50, at 75-76; accord R. SLOVENKO, *supra* note 33, at 361, 371-72.

The Alabama Juvenile Proceedings Act provides the court with the authority to order an examination "of a parent or custodian who gives his consent and whose ability to care for or supervise a child before the court is in issue." ALA. CODE § 12-15-69 (1975).

One source of authority that at first might seem to be the obvious source of judicial authority to order an examination is Alabama Rule of Civil Procedure 35. However, if the examined party requests a copy of the report of the examining physician, subsection (b)(1) of that Rule entitles the party requesting the examination to receive from the examined party "a like report of any examination, *previously or thereafter made*, of the same condition. . . ." ALA. R. CIV. P. 35(b)(1) (emphasis added). That subsection would therefore place the examined party in the difficult position of either foregoing the opportunity to prepare a rebuttal to the examination report or making his privileged communications available to the opposing party. Further, subsection (b)(2) states unequivocally that the examined party "waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition" by obtaining a copy of the examination report or by deposing the examiner. ALA. R. CIV. P. 35(b)(2). Hence, Rule 35 does not present a viable alternative in a situation where one of the parties seeks to protect privileged communications.

or her findings to the court.¹²¹ After being presented with such an option, the parent must weigh the value of keeping his or her privileged communications confidential against the risks involved in undergoing the evaluation.

Before it orders a psychological examination, however, the court should establish that there is sufficient reason to believe that a problem exists and also should be certain that such a problem can be presented to the court only through psychological examination. That is to say, a court-ordered examination is in and of itself an extraordinary measure. In taking such a step the court ought to rely upon strong evidence (1) that the parent in question has severe psychological problems, (2) that these problems could be presented to the court only through a psychological examination, and (3) that these problems bear on the parent's fitness to be a proper custodian of the child. No psychiatric evaluation or further inquiry would be necessary if the court could determine, from the parent's behavior alone, that the parent had emotional or mental problems incompatible with retaining custody of a child; the evidence of concrete acts would suffice to show the parent's unfitness.

But even if there is a threshold showing of problems requiring psychological evaluation, the privileged communications ought not to be revealed. In that situation, the court should give the "suspect" parent a choice among several options: (1) submitting himself or herself to an independent psychological evaluation; (2) waiving the privilege so that prior psychological evaluations may be admitted; (3) or the court would have authority to say that in the absence of the evidence it could gain from either of the two preceding options, it is unable to determine the fitness of the parent in question and therefore it must not give the parent custody.

If an independent psychological evaluation is conducted, or if the parent in question waives the privilege as to prior psychological evaluations, the evidence so produced should first be viewed *in camera* by the judge to see whether it reveals any information relevant to the parent's fitness as the proper custodian of the child.

121. *E.g.*, *Critchlow v. Critchlow*, 347 So. 2d 453 (Fla. Dist. Ct. App. 1977); *In re A.J.S.*, 630 P.2d 217 (Mont. 1981); *D. v. D.*, 108 N.J. Super. 149, 260 A.2d 255 (1969); *Perry v. Fiumano*, 61 A.D.2d 512, 403 N.Y.S.2d 382 (App. Div. 1978); *People ex rel. Chitty v. Fitzgerald*, 40 Misc. 2d 966, 244 N.Y.S.2d 441 (Sup. Ct. 1963); *see Guernsey, supra* note 52; *R. SLOVENKO, supra* note 33, at 361, 371-72; *Weihofen, supra* note 50, at 77-78; *cf. Koump v. Smith*, 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969).

The parent's psychiatric history would be subject automatically to a protective order. Any information derived from the court-ordered psychological examination, or any material discovered as a result of the waiver of the privilege, would be sealed and could not be divulged by any party except in the court proceeding itself. If the parent consented to the court-ordered evaluation, any privileged communications with her private therapist would remain protected.

VII. Conclusion

How best to balance the parent's rights against the child's best interests presents an issue that is bound to come before Alabama courts again. Yet future courts need not sacrifice justice to one interest or the other. When the opportunity next arises, the courts of Alabama should accept the challenge of serving a child's best interest while preserving the parents' rights to the greatest extent possible. The alternatives proposed by this Article may, in some circumstances, require the courts to undertake additional steps in reaching custody determinations; indeed, the courts may find that proceedings involving privileged communications are time consuming and complicated. Yet the sacrifice of time and convenience is little price to pay if the result is a proper custody resolution without unnecessary violation of a parent's rights. In the event that the *Von Goyt* decision remains unmodified, parents who are in need of psychotherapy may choose to forego treatment for fear that their privileged communications will be revealed in a possible custody proceeding. The child, ironically, is often the victim in such a situation.

If future courts in Alabama unqualifiedly accept the position of the *Von Goyt* court, attorney-client relationships, as well as psychologist-patient relationships, may suffer serious, long-term chilling effects. The attorney-client relationship may come under reevaluation as a result of *Von Goyt*, because the statute establishing that privilege forms the basis of the psychologist-patient privilege. Other jurisdictions with psychologist-patient privileges that correspond to their attorney-client privileges¹²² have defined the bound-

122. DeKraai & Sales, *supra* note 103, at 374-75, 377.

aries of the former by referring to the law governing the latter.¹²³ Alabama courts may do the same, since the Alabama psychologist-patient privilege statute, by its terms, invites comparison with the attorney-client privilege.¹²⁴ When Alabama courts hand down decisions that erode the psychologist-patient privilege, litigators may not be far behind in urging a reversal of the comparison when—as advocates—such erosion would benefit their client's position. Alabama attorneys and those who use their services therefore have a vital interest in correcting the *Von Goyt* decision.

The Alabama appellate courts should reconsider *Von Goyt* so as to protect both confidential communications and the best interests of children.

123. See, e.g., *In re A.J.S.*, 630 P.2d 217 (Mont. 1981); *supra* notes 42-50 (discussing *A.J.S.*).

124. *Supra* note 102 and accompanying text.

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