

Confidentiality and Disclosure of the Forensic Examination

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A Court-Ordered Forensic Examination in a Child Custody Proceeding Is Not Privileged Mental Health Information and Is Discoverable in Subsequent Custody Proceedings

In *Johnston v. Weil*, 946 N.E.2d 329 (Ill. 2011), the Supreme Court of Illinois held that evaluations, communications, reports, and information obtained for an independent evaluation to determine custody are not confidential, even when the professional advising the court is a psychiatrist. The court's reasoning gave substantial consideration to the distinction between a treating psychiatrist and a forensic psychiatrist, as well as the limits to confidentiality for the forensic examination and report.

Facts of the Case

Heather Johnston married Sean McCann, and they had a son in 1998, then divorced. Shortly afterward, Ms. Johnston married Andrew Weil and they had a daughter in 2002, before divorcing in 2005. Mr. McCann then filed a petition to modify the joint parenting agreement with Ms. Johnston. In 2006, pursuant to § 604(b) of the Illinois Marriage and Dissolution of Marriage act (Marriage Act), the court ordered psychiatrist Dr. Phyllis Amabile to conduct an independent evaluation to assist the court in determining custody of the McCann son. Dr. Amabile evaluated Ms. Johnston, her parents, Mr. McCann, and Mr. Weil and notified each individual that information obtained from her evaluation would be disclosed in her report to the court and to all parties involved in the custody case regarding the McCann son. Dr. Amabile completed her evaluation and submitted a report to the circuit court. At the same time, Mr. Weil filed a motion seeking custody of the Weil daughter and subpoenaed Dr. Amabile's report. Ms. Johnston countered that Dr. Amabile's report was

privileged under the Mental Health and Developmental Disabilities Confidentiality Act (Confidentiality Act) and was not discoverable in the Weil daughter custody proceedings; in 2006 the circuit court ruled in her favor.

In 2007 Ms. Johnston and her parents sued Mr. McCann, his attorneys, the McCann son's representative, Mr. Weil, his attorneys, and the Weil daughter's representative for damages for disclosing confidential information. Dr. Amabile was not named as a defendant. The defendants filed motions for dismissal of the complaint as a matter of law. They argued that the contents of Dr. Amabile's report were not privileged under the Confidentiality Act. The circuit court denied their motion to dismiss and the defendants appealed. The appellate court allowed the appeal and agreed that the information obtained by Dr. Amabile for the § 604(b) report was not confidential and privileged under the Confidentiality Act. The plaintiffs then appealed this decision to the Illinois Supreme Court.

Ruling and Reasoning

In reaching its decision the court weighed the competing interests of disclosure called for in the Marriage Act against privilege set forth in the Confidentiality Act. The court relied heavily on a core principle of the Marriage Act pertaining to child custody proceedings, namely that the court should use all relevant factors to determine custody according to the best interest of the child. The court found that the Marriage Act makes no distinction when one of the relevant factors is mental health information and thus agreed with the defendants in this case that disclosure was permitted. The court agreed with the plaintiff that § 604(b) itself limits the findings of a mental health evaluation to the original proceeding, but also noted that the following § 605 outlines the acceptable conditions for discovery of a § 604(b) report in subsequent proceedings. The court reasoned that the disclosure required by the Marriage Act in regard to custody is mandatory, whereas the Confidentiality Act governs discretionary privilege. Thus, the court concluded that a forensic psychiatric evaluation and report would be discoverable in a child custody proceeding beyond the original one.

The court affirmed that the purpose of the Confidentiality Act is to preserve the confidentiality of

mental health services to encourage individuals to seek necessary mental health treatment. The court found that the therapist-patient privilege is grounded in the therapeutic relationship, but that this privilege did not extend to mental health evaluations outside the treatment context. Dr. Amabile was not treating the plaintiffs, but rather she was acting as an independent evaluator for the circuit court. Therefore, because Dr. Amabile and the plaintiffs were not engaged in a therapeutic relationship, the court reasoned that the Confidentiality Act does not apply. Furthermore, it was undisputed that Dr. Amabile informed the plaintiffs that their communications with her were not confidential and that her report would be presented to the circuit court. Because of this notification, the court reasoned that the evaluation and report were not confidential. Thus, the court found that under § 10(a)(4) of the Confidentiality Act, which governs exceptions to privilege, the plaintiffs could have no expectation of privilege for the custody evaluation.

Dissent

In his dissent, Chief Justice Kilbride departed from the majority primarily in his reasoning that all mental health information *per se* is protected by the Confidentiality Act, irrespective of whether the context is treatment. Therefore, mental health information contained in a § 604(b) report would be protected by the Confidentiality Act, and § 10(a)(4) identifies the circumstances under which mental health information obtained in a court-ordered examination may be admissible in another civil, criminal, or administrative proceeding: the information is relevant to the new proceeding, and the examinee in the evaluation must be adequately informed as to the limits of confidentiality before proceeding. Although in agreement with the majority that the Marriage Act promotes thorough consideration of all information available for determining the best interest of the child, Chief Justice Kilbride argued that this interest must be balanced against the interests of confidentiality of mental health information. To balance these interests he would apply the test of § 10(a)(4) requiring both relevance and prior disclosure of the limits to confidentiality of the forensic evaluation.

Chief Justice Kilbride disagreed with the majority's reasoning, but, in our opinion, his argument does not seem to be at odds with the result in this

case. The relevance of the information in this case and Dr. Amabile's clear notification to Ms. Johnston and her parents regarding the limits of confidentiality would satisfy the concerns raised in the dissent regarding the § 10(a)(4) exceptions to the Confidentiality Act.

Discussion

Although the psychiatrist involved in the court-ordered forensic evaluation was not named in the lawsuit for damages, the issues regarding confidentiality and disclosure are of great relevance to the forensic psychiatrist. As the forensic report applied to custody proceedings, the court reasoned that the best interests of the child stood above matters of confidentiality. Nonetheless, the court's reasoning, as well as that of the dissenting chief justice, are applicable broadly to the practicing forensic psychiatrist's conduct of an evaluation and preparation of a report.

In particular, the court's reasoning highlights a clear distinction between the two roles that a psychiatrist may serve, namely that of a treating provider or a forensic examiner. The court in this case reasoned that because the forensic evaluation was not for therapeutic or treatment purposes, it was exempted from the usual privilege of confidentiality for mental health information. This distinction is in accord with our subspecialty's understanding of these distinct roles, but may not be understood by the layperson, who may be more familiar with the psychiatrist in the therapeutic role. Therefore, psychiatrists operating in the role of forensic examiner must also take care to inform the examinee of the limits of confidentiality and make clear that the psychiatrist is functioning in the role of a forensic examiner and not a treating provider. This notification is essential to good practice and to satisfying the legitimate concerns raised in the dissenting opinion.

Current best practices in forensic psychiatry would satisfy the legal concerns expressed in both the majority ruling and dissent in this case. The forensic psychiatrist must also meet the ethics-based obligation to minimize harm to the examinee by maintaining confidentiality to the extent possible in the legal context and informing the examinee as to the limits of confidentiality and purpose of the evaluation.