The Right of a Minor to Confidentiality: An Aftermath of Bartley v. Kremens

MARTIN WEINAPPLE, MD and
IRWIN N. PERR, MD, JD*

Until recently, the right to hospitalize a minor child psychiatrically resided totally within parental prerogatives. The Bartley v. Kremens case resulted in a drastic change of law in those jurisdictions which judicially or legislatively have followed its principles — namely, that minors 14 or above have an independent right to assent or not assent to voluntary hospitalization and that minors under 14 must have a judicial review of the need for hospitalization. The right of either parent to act unilaterally therefore no longer exists where the Bartley principle applies. The issues and procedures involved in such hospitalizations have been described in *Psychiatric and Legal Issues in the Hospitalization of Children.*[1]

A new issue deriving from these changes is the right of confidentiality and the application of privilege to children whose psychiatric history may be relevant to divorce and custody proceedings. This article discusses an unreported New Jersey case involving a custody dispute. Each parent requested release of information concerning the child's hospitalization at an intensive treatment psychiatric institution; each felt that the psychiatric information would be helpful in obtaining custody. The child had been hospitalized briefly and had signed out voluntarily, there being no grounds for involuntary hospitalization. The right of hospitalized patients to confidentiality is clear cut in New Jersey (and is supported by the New Jersey privilege and hospitalization statutes). The right to authorize hospitalization includes the collateral right to authorize release of information. The minor, who was 14 years of age at the time of the court hearing, had not authorized release of information. The position taken by the psychiatrist was not to respond to the parents' wish to introduce records regarding the minor's hospitalization, considering this to be a violation of the minor's right to confidentiality. A subpoena was served on the psychiatrist, necessitating a court appearance with representation by the State Attorney General's office. Despite the professed wish of the mother and the stance of the father (who had custody but who offered at trial no opinion as to release of information), the court upheld the right of the minor to exercise the right of privilege. The extension of such authority to the protected minor and its antecedents in law are presented in this article.

*Dr. Weinapple is Clinical Director of Adolescent Services, Carrier Foundation, Belle Mead, NJ 08502. Dr. Perr is Professor of Psychiatry, College of Medicine and Dentistry of New Jersey, Rutgers Medical School, Piscataway, NJ 08854.

Under the New Jersey physician-patient privilege,[2] a person, whether or not a party to a suit, has a privilege in a civil action to refuse to disclose and to prevent a witness from disclosing a medical communication. The person has to claim the privilege (which can be claimed for him by the physician), and the judge must find that the communication conformed with the rules for confidential communications.

There are several exceptions to the physician-patient privilege within the statute — for example, in a wills case or if the condition of the patient is an element in the claim or defense of the patient or any party claiming through the patient. For example, a person dies in an automobile crash and the question arises whether the cause of death was the accident or a concurrent coronary occlusion. The importance of such a clarification is that double indemnity may apply if the death was due to the accident. If a claim is made for double indemnity, the nearest-of-kin beneficiary who is claiming death due to accident cannot suppress the medical records as privileged. Thus, while the law protects the right of a patient to confidentiality under certain prescribed circumstances, there is some ambiguity requiring interpretation. More specifically, the law makes no reference to the right of a parent or guardian to waive privilege for a minor child. Inasmuch as the new rule for hospitalization no longer authorizes a parent or guardian to act on behalf of the minor child for admission purposes beyond seven days, then it would seem logical that the same authority given to the child would extend to release of information.

The New Jersey statutes governing hospitalization[3] dictate that all certificates, records and requests made pursuant to the hospitalization laws shall be kept confidential. Under the existing law, the information could be authorized for disclosure by the individual or his legal guardian, or if he is a minor by a parent or a legal guardian.

A court may also direct disclosure if it is necessary for the conduct of proceedings before it, and failure to make such disclosure would be contrary to the public interest, thus raising another possible ambiguity. The hospitalization law, however, specifically allows information to be given to a patient's attorney if the information is to be used directly or indirectly for the benefit of the patient.

Hospital Consent Forms

The Rutgers Community Mental Health Center has a specific consent form allowing diagnostic and treatment procedures. This form, entitled *Consent to Receive Hospital Services*, has a clause which states:

> "The confidentiality of the patient's medical record is required by law. The medical record will not be released without first receiving my written permission."

Subsequent to court-ordered changes regarding admission of minors, the Center has had the policy of requiring the signature of the minor and the counter-signature of one or both of the parents.

The Center follows the same procedure with children under 14 as it does with minors 14 through 17; however, generally those hospitalized beyond a brief period will under current rules be formally committed. Therefore, the exact status of the right to confidentiality by a minor under 14 is unclear. It is assumed until further decision clarifies the issue that the right of release of information for minors under 14 will remain with the parents. On the other hand, the interesting point is raised concerning the release of information by a minor who is hospitalized under the age of 14, but who, at the time of request for release, is over 14 (whether or not the child is still in the hospital).

At this point, even the admission status of a 13-year-old who becomes 14 while in the institution is unclear; however, inasmuch as this is a short-term institution and the vast majority of patients are over 14, this has not become an issue at the Rutgers Mental Health Center.

Discussion of Case

A.B. was 14 years old when he was admitted to the Rutgers Community Mental Health Center (or the Center) in Spring, 1978. The patient was hospitalized at the Center for four days and then signed himself out. He had been brought to the Center by the mother because of his acting-out behavior at home and in school. The parents at the time were divorced.

The workup was limited as he had been admitted on a Friday and left on a Monday. The impression at that time was that he was not psychotic or mentally retarded and that he had a behavior disorder of limited dimension. There was no further contact until the time of the hearing. Subsequent to discharge the father obtained custody of the boy. A continuing custody dispute culminated in court procedures, which took place in Fall, 1978.

The mother wished to have the facts surrounding his hospitalization brought to the attention of the court. The father did not object to the release of information, apparently feeling that full disclosure would be non-prejudicial to his claim for custody.

When the psychiatrist and the Center were subpoenaed to provide records and testimony, they took the stance that the right to release of information remained with the minor child, in accordance with the new rules governing hospitalization.

The child was consulted by the father's attorney as to his wishes in this matter. A.B. chose not to authorize release, his reasons for which were never made clear. Therefore, the court conducted a formal hearing on the issue of the right to confidentiality of a minor child over the age of 14.

Attorney's Brief on Behalf of the Center

Robert A. Fagella, Deputy Attorney General assigned to represent the

Center, noted in his brief supporting the claim of confidentiality that New Jersey had recognized a common-law privilege of confidentiality for doctor-patient communications even before the passage of the first formal doctor-patient statute in 1968.[4]

Subsequently, one decision clearly stated that confidentiality should be breached only if the communication fell within the specific and narrowly defined exceptions allowed.[5] The attorney noted that Rutgers Community Mental Health Center and its employees were under a duty to assert the privilege of non-disclosure. The brief on behalf of the Center included the following:

"*NJSA 2A:84A-22.2* provides:

> 'Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action . . . to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefore and (c) the witness (i) is the holder of the privilege, or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted, or (iii) is any person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant, and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.' "

NJSA 2A:84A-22.1 (d) defines a "confidential communication":

> "(d) . . . such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted."

In Unick v. Kessler Memorial Hospital [107 NJ Super. 121 (Law 1969)], it was stated:

> "The broad sweep of the statutory language clearly indicates

that the Legislature was aware of the need to encompass in the physician-patient privilege not only communications between the doctor and patient, but also communications to others who are, in the words of the statute, 'reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.' "

In addition to the physician-patient privilege discussed above, there is another statute which reinforces the contention that the legislature clearly intended that information such as the actual medical records of defendant sought in the instant case should not be required to be disclosed. NJSA 30:4-24.3 provides a pertinent part:

"All certificates, applications, records, and reports . . . directly or indirectly identifying any individual presently or formerly receiving services in a noncorrectional institution . . . shall be kept confidential and shall not be disclosed by any person . . ."

The first exception [30:4-24.3 (1)] indicates that information can be released with the consent of the individual identified or his legal guardian, if any, or, if he is a minor, his parent or legal guardian. This rule allowing for release by a parent was an inherent part of the statute at a time when the parent was authorized to admit a minor child. That authority no longer resides within the parent, and therefore it would be only logical to assume that inasmuch as a parent can no longer hospitalize a child neither can he or she authorize release of information dealing with that hospitalization.

New Jersey court rules specifically permitted A.B. as a minor to check himself in or out of the Rutgers Mental Health Center without the consent of his parent or guardian. R.4:74-7 (j) provides as follows:

"(1) . . . any minor 14 years of age or over may request his admission to an institution for psychiatric treatment . . . [and] may discharge himself from the institution in the same manner as an adult . . . (2) This rule shall not be construed to require any court procedure or approval for the admission of a minor by his parent, parents, or other person in loco parentis to any institution for the evaluation or diagnosis of a mental condition provided the admission does not exceed seven days."

This rule specifically permitted A.B. to enter the Center *without* his parents' consent, and since his mother was specifically informed at the time of his admission that A.B.'s medical records would only be released upon his written consent, no one else can consent to release of the records. One source of confusion is NJSA 30:4-24.3(2) which allows disclosure to carry out the provisions of the act, namely for release of information so that hospitalization could be accomplished.

Another possibly pertinent exception to the statute is NJSA 30:4-24.3(3). It provides that a court may order disclosure of such records if it believes it " . . . Is necessary for the proceedings before it and that failure to make such disclosure would be contrary to the public interest."

The attorney also argued that patients legitimately fear that the disclosure that they have undergone treatment for mental disorders may seriously stigmatize them in their future endeavors.

It is true that the nondisclosure of medical communications and records *may* limit the availability of relevant evidence at trial. Nonetheless, the legislature chose to adopt this policy because of its determination that the policy of confidentiality outweighed the benefits of disclosure.[6] Accordingly, courts have strictly adhered to this policy of nondisclosure charted by the Legislature.

Arguments at the Proceedings

The attorney for A.B.'s mother indicated that she wished to establish the fact that the child in question had emotional problems while disclaiming an interest in the actual communications. She stated that she wished to show how each parent had dealt with those problems so that the court could decide which parent could best deal with the child and his problems. For this purpose, she felt that knowing the diagnosis was necessary. She focused on the need for consideration of "the best interests of A.B." After a brief attack on privilege itself for keeping valuable testimony from the court, she also stated that, since A.B. was not currently under treatment, he could not be harmed in terms of interference of ongoing treatment. The attorney for the father indicated that he had no objection to the release of information from the record, and he, too, was concerned with the best interests of the child.

The Decision of the Court

After the argument and each side was heard, the Judge ordered a recess, asking the father's attorney to consult with the minor as to the minor's wishes concerning the release of information. The attorney reported that the child wished to uphold his right to nondisclosure. The court then ruled that the best interests of the youngster dictated that the supoena for the medical record should be quashed. Therefore, the court's decision upheld the right of a 14-year-old minor child to refuse to release information in a custody case where both parents did not wish to assert such nondisclosure.

New Illinois Statute Governing Privilege for Minors

There is apparently little precedent in statutory or case law dealing with minor authority under a doctor-patient or psychiatrist-patient privilege. The new Illinois statute dealing with hospitalization specifically covers the problem of a minor's consent.[7] Aside from specific exceptions provided by that act, records and communication may be disclosed only with the written

consent of the parent or guardian of a patient under 12 years of age. Similarly, consent is required of a patient 18 years or older, or of his guardian if he has been adjudicated incompetent. For the intermediate group, if a patient is at least 12, but under 18 years of age, consent can be given by both the parent or guardian and the patient. If only the patient refuses to consent despite the wishes of the guardian or parent, there shall be no disclosure unless the therapist finds that such disclosure is in the best interest of the patient. Thus, the statute is unique in allowing a therapist to determine the ultimate legal right for this narrow circumstance. If the parent or guardian refuses to consent, disclosure shall not be made. Thus, more weight or power is given to the parent or guardian.

Other interesting aspects of the Illinois law are these:

1. The law does not refer to patients, but instead refers to recipients of mental health or developmental disability services.
2. The "therapist" means a psychiatrist, physician, psychologist, social worker, or nurse providing such services as well as any other person believed by the patient to be a therapist. Authority is given to the therapist to keep personal notes immune to any kind of legal procedure whatsoever. This is unique in state law to our knowledge.

Proposed Model Laws

The model law prepared by the American Psychiatric Association Committee on Confidentiality and the Task Force on Confidentiality of Children's and Adolescent Clinical Records also deals with confidentiality of a minor's records.[8] It states that information dealing with the provision of service to a minor shall be kept confidential with some of the usual exceptions to confidentiality provided by law (within the facility, reportable conditions, billing, certain types of litigation, wills, malpractice, court-ordered). In this proposed bill, as in the Illinois statute, a minor 12 years of age or older must consent in writing for release of information. If a patient is under 12, disclosure may be granted by a patient's authorized representative (parent or other custodian or guardian). Section 4e (ii) specifically protects confidentiality in any action brought or defended under the divorce act.

The American Bar Association Commission on the Mentally Disabled, in its suggested statute on mental health treatment for minors,[9] would handle confidentiality in the following fashion. In the case of minors less than 14, the parent could release information after a mental Health Advocacy attorney or an attorney of the minor's selection has determined that there is no substantial risk that such parental access will be harmful to the minor's best interests. If the attorney felt that such a risk would be involved, he would petition the court for a final decision. Minors 14 and older could authorize a disclosure with a countersignature of one of the above attorneys. If the attorney felt that the minor had substantially impaired capacity to make a decision in his own best interests regarding disclosure, then the

attorney and the therapist could agree that no risk was involved (if the minor did not object). If either the attorney or the therapist believed that there was a risk to the minor's best interests, or if the minor did object, then the attorney would again have to petition the court for a final determination.

Conclusion

As a result of the Bartley-Kremens case, the status of minors in involuntary hospitalization procedures has been drastically altered. Depending on the age of the patient and the state of residence, children have been given the right to authorize voluntary hospitalization; usually this right has been given to children 14 through 17 years of age. Court reviews may be required for younger patients or for those older minors who refuse to volunteer. It logically follows that the right to admit oneself to a hospital would also include the right to confidentiality authorized in the specific state for patients, whether under mental health laws or privilege statutes. The status of information collected during the initial evaluation period is not clear. This paper has presented a case in New Jersey in which the court extended all privilege and confidentiality rights to a child of 14 in a custody case where both parents were willing, and in one case eager, to have full disclosure of information.

A change in law often has a ripple effect, and this is exemplified by this case and by the fact that at least one state, Illinois, has attempted to specifically clarify the procedure to handle the increasingly important problem of the right to confidentiality of minor children.

This paper has been directed to a narrow area of confidentiality where specific laws, state actions, and proposals dealing with the right of a minor to control release of information are presented. Whether or not minors should have such authority is a subject worthy of a greater scrutiny.

References

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