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Judge backs doctor in bid to keep mental records private

By: Peter Vieth November 11, 2019

A Fairfax County judge has sided with a clinical psychologist who declined to turn over a teen's mental health records in response to a subpoena in the parents' divorce case. The psychologist said disclosure before a custody hearing could cause harm to the young patient or his sisters.

The psychologist hired a lawyer and asked the judge to quash the subpoena after the father, who sought the records, declined to cooperate with procedures for an independent review to determine if the records should be released.

Circuit Judge Richard E. Gardiner penned a 10-page opinion granting the motion to quash and interpreting the governing law for medical professionals who think their records should stay private.

The case is *Sherfey v. Cushing* (VLW 019-8-092).

Extensive treatment

The parents' divorce case produced what the judge termed "significant litigation" over eight years. A three-day hearing was set in which each parent would seek sole legal and physical custody of their 14-year-old child.

The father, a physician, contended the child's mental health concerns were a significant element of the case, and the parties deposed psychologist Jeffrey A. Schulman in July.

Schulman had been treating the child since 2015, and had cooperated in the divorce proceedings. He released his entire file without objection at a 2017 custody proceeding and testified at length about his work with the child. Since then, however, the child had extensive mental health problems, including an attempted suicide.

Two weeks after the 2019 deposition, the father served Schulman with another subpoena duces tecum for copies of his file. Schulman consulted with another doctor and then wrote in his notes:

"In the exercise of my professional judgment the furnishing of or revealing of this record to the requesting parent could or would be reasonable likely to cause substantial harm to the minor child or his biological sisters."

The language tracks that of Va. Code § 124.6(B) regulating denial of access of health records.

Schulman – represented by lawyers from Smolen Plevy in Vienna – then filed the motion to quash the subpoena.

No independent review

Schulman said release of the records might destroy "any feeling of privacy and safety that enables the minor child to freely seek counseling and therapy." Moreover, he said the father resisted the procedure called for under Virginia law – selecting a comparable professional to review the records and make the call.

The father argued Schulman, through voluntary involvement with the litigation over the years, had waived his right to make a blanket objection to production of his file. He said Schulman refused to provide more specifics about the potential for harm and refused to redact problematic portions of the records.

The child's serious mental health issues meant the possibility of embarrassment, injury or invasion of privacy was "far outweighed" by the importance of the evidence, the father said.

The mother contended that, since Schulman covered the subject at his deposition, the medical records would be "redundant, cumulative and unnecessary," according to the judge's summary. She said the motion to quash should be granted.

Second opinion allowed

Gardiner said three statutes must be read in concert to interpret Virginia law on parents' access to their children's medical records: Code § 32.1-127.1:03, § 20-124.6 and § 8.01-413.

American jurisprudence generally holds that "parents are ultimately and predominately responsible for the safeguarding, development and education of their children," Gardiner said. But he said even the seminal cases recognized the need for some state intervention.

In 2005, the Virginia General Assembly added two paragraphs to § 20-124.6 which "significantly limited a parent's rights to mental health records of minors where their provider believes disclosure of such records would 'cause substantial harm to the minor or another person,'" Gardiner said.

Gardiner harmonized the statutes to confirm that parents have a procedural option if a provider seeks to withhold a child's records. "A law that prevented parental access to medical records would hamper the parents' informed decision making and would be 'repugnant to American tradition,'" the judge wrote.

Subsection F of § 32.1-127.1:03 allows for an independent review of the disputed medical records by a comparable physician or clinical psychologist. If that independent reviewer decides the records should be made available, the provider in question must make the disclosure, Gardiner said.

The rule applies even when a parent serves a subpoena duces tecum, the judge said. Waiver does not apply given the bar to disclosure of § 20-124.6, Gardiner continued. And the provider has no burden to prove requisite harm to the minor, he said.

"The only requirement is for the provider, in this case Dr. Schulman, to allow a second physician or clinical psychologist of equivalent credentials to review the files to give a second opinion. Dr. Schulman did exactly what § 32.1-127.1:03 (F) required of him," Gardiner said.

Joshua Isaacs of Vienna, who argued on behalf of Schulman, said other providers have invoked the statutes to resist records disclosure, but no other cases have produced court opinions. Normally, if an independent review takes place, there's nothing for a judge to decide.

"It wouldn't reach a court," Isaacs said.

Providers who make use of the statutes should be aware that they may have to foot the bill for a second opinion if it comes to that. The person requesting an independent review does so at their own expense, Isaacs said.

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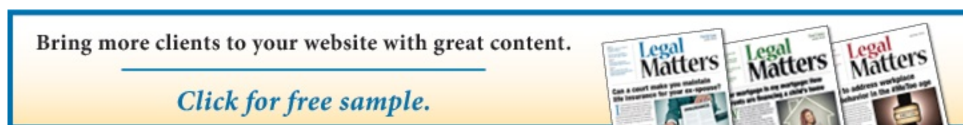

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