

## All in the Family > column



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### Mental health information

In custody cases, the court often seeks the advice of professional personnel, commonly known as a 604(b) evaluator, to give the court advice about custody and visitation matters. By statute (750 ILCS 5/604(b)), the advice given shall be in writing and made available by the court to counsel. Counsel may examine the person the same as they would any other witness, even if the 604(b) evaluator is a psychologist or psychiatrist.

This raises the question of confidentiality and whether a 604(b) evaluation conducted by a mental health professional is privileged or confidential under the Mental Health and Developmental Disabilities Act (the "Mental Health Act") (740 ILCS 110/1 *et seq.*).

It is common in custody cases not only for a 604(b) evaluator to perform an evaluation or examination of the parties and child at issue, but to request a release of privileged mental health records from treating professionals. The purpose is to give the evaluator a complete history and overall picture of the family. Although parties can object and refuse to release their records, they usually go along with a release in order to avoid a negative inference that they are hiding something.

Without the records, the 604(b) evaluator may be criticized for relying solely on the parties' own biased account of their mental health history. This may prompt the evaluator to conduct his or her own psychological testing of the parties.

Ordinarily, test results, records and communications between a recipient of mental health services and a mental health professional or therapist are privileged; therefore, they cannot be disclosed without the recipient's consent in any civil or criminal proceeding. 740 ILCS 110/10. However, a court-ordered psychiatric examination or psychological evaluation is

generally not privileged and thus is not protected from discovery under the act even if performed by a psychologist or psychiatrist who fits the definition of "therapist" under the Mental Health Act. A number of courts in Illinois have held that where the court orders a party to be examined by a psychiatrist, psychologist or other child-custody evaluator, no physician-patient privilege exists. Nor is there a privilege if psychological testimony is necessary for the court to determine the best interest of the child; or, in criminal cases, the fitness or sanity of a defendant.

In *Johnston v. Weil*, No. 1-08-2861 (1st Dist. Dec. 2, 2009), the 1st District Appellate Court was faced with the question of whether a 604(b) custody evaluation performed in one case was discoverable in another custody case involving the same mother (Johnston). The court held that because the 604(b) evaluation in the first case was conducted for the purpose of making information available to assist the trial court in deciding custody, it was not privileged or confidential and, therefore, could be discoverable in the second case.

The court reasoned that 750 ILCS 5/604(b) expressly contemplates that the evaluation report and findings will be disclosed to the court and counsel, and that the evaluator may be called to testify as a witness. Further, before the evaluation, Johnston was told the evaluation was not confidential and that records and communications would be disclosed to the court and counsel. Thus, the communications were not confidential and did not give rise to a privilege against disclosure.

Moreover, there was no therapeutic relationship involved between the examiner and Johnston because she was being examined at the court's behest, not on her own volition for treatment purposes. Statements to a court-ap-

pointed evaluator in a non-therapeutic setting are not made in confidence and have no shield of the patient-therapist privilege. To hold differently would serve no purpose, as the purpose of the privilege is to motivate true recipients of mental health services to seek needed treatment and encourage complete candor between patients and therapists, which is essential to the treatment process.

In responding to the mother's concern that the report would be broadcast to the nation if the court held it was not privileged, the court observed that a protective order could remedy the fear of public dissemination.

At the time of appointment of a 604(b) evaluation, the court may issue a protective order prohibiting the parties and their attorneys from disseminating the contents of a 604(b) report for purposes other than the litigation or to the child or a non-party. In Cook County, the discretion of the court to enter a protective order is provided for by local court rule 13.4(a)(i)(h).

Attorneys should explain to their clients, before participating in a 604(b) evaluation, that the evaluation is neither confidential nor privileged and is discoverable for purposes other than the instant litigation absent a protective order.

They should also discuss the pros and cons of signing a release of prior mental health records, as well as the benefits of requesting a protective order so that the information is not disseminated to anyone outside the case. As the court noted in *Johnston*, a person who wrongfully disseminates such information, especially where a protective order is involved, may be subject to liability for invasion of privacy, defamation or negligent infliction of emotional distress. ■

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