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Confidentiality and a therapist's role in custody litigation

The intersection of therapy and litigation is a regular occurrence in the modern divorce. Individuals in treatment, or with children in treatment, go through divorces. Parents seek therapy to help children deal with the ramifications of a divorce. Invariably, families in particularly acrimonious divorces find themselves in court-ordered therapy.

But when parties to a contested custody case draw their therapist into the litigation, a litany of problems quickly materialize for all involved.

At the outset, all therapy is confidential pursuant to the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1, et seq. That confidentiality can be waived only by the express written consent of the party in treatment, or if that party puts his or her own mental health at issue in the litigation. In the case of a child under 12, confidentiality can be waived only by the written consent of both of the minor's parents.

For therapy emanating specifically from divorce litigation, Section 608 of the Illinois Marriage and Dissolution of Marriage Act provides that a court may order individual counseling for a child or family counseling for one or more of the parties and child. Pursuant to Subsection (f), all counseling sessions are to remain confidential, and the communications in counseling shall not be used in any manner in litigation nor relied upon by any expert appointed by the court or retained by any party.

These confidentiality parameters are established to protect the efficacy of therapy. What sensible person would genuinely open up in treatment if he or she knew everything said could get back to the spouse, parents or judge assessing the merits of the custody claims? Therapy only works when it is confidential.

Unfortunately, the divorce litigation process often compromises this confidentiality. When a divorce becomes a contested custody matter, a series of protocols

is put into effect.

A guardian ad litem (or child's representative) is appointed by the court to investigate the circumstances surrounding the family and recommend resolution in the best interests of the child. Absent resolution, a custody evaluator is appointed pursuant to Sections 604(b) or 604.5 to conduct an evaluation into the child's best interests, considering a variety of statutory factors including the mental health of the parties involved.

When the parties or children in such a case are in treatment, the investigator or evaluator will consistently seek confidentiality waivers from the parties. They seek access to the individual therapists, family counselors and child therapists working with the participants whether by prior relationship or divorce court order.

This is a particularly acute request when the mental health of one or all of the participants is at issue in the custody case. The conventional wisdom is that it would be extremely helpful for the investigator or evaluator to talk to the therapist treating the alleged mental health issues.

This is where due process may



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The therapist cannot be deposed or called to testify as a witness in the custody trial. As such, the litigant is denied the ability to confront a witness, and the investigator or evaluator is granted exclusive access to a mental health professional to conduct an interview that cannot be verified, questioned, recreated or impeached by counsel.

There is no ability for the court to independently verify the content of those interviews or to

The child therapist cannot be subpoenaed or otherwise questioned about it. Any therapy notes disclosed to a parent pursuant to Section 5 of the Mental Health and Developmental Disabilities Confidentiality Act are inadmissible at trial. The damning statement is now a matter of record that cannot be directly impeached or otherwise mitigated.

In addition, the veracity of the therapist's assessment of the family dynamic is more questionable than it might first appear. Therapists are not objective evaluators of families or custody situations. They are advocates for their patients who work through the issues the patients present.

Therapists do not evaluate parents or the spouse whom they are not treating.

Their work with an individual is contextual only as it relates to that individual, not the custody dynamic as a whole.

The child therapist in our example may have only met the father in passing and have no substantive information about the family dynamic outside her one-on-one therapy sessions with the child. It is not the therapist's job to clinically assess the parents, and the therapist's observations should not be taken as such.

So what is an attorney to do? In short, make certain confidentiality is an all-or-nothing proposition. Either maintain therapy's confidentiality entirely as a safe haven from litigation or waive that confidentiality entirely.

The worst decision an attorney can make is to allow a guardian ad litem or custody evaluator to speak with a therapist without deconstructing the remainder of the confidentiality to allow the attorney's subpoena power over the therapist for deposition and trial.

Of course choosing that course of action creates a good chance of irreparably destroying the therapeutic relationship to the detriment of the participants. So the best answer to the question, What is therapy's role in custody litigation? Ideally, no role whatsoever.

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break down to the detriment of the therapist, patient and attorney. Allowing an investigator or evaluator to speak with a therapist does not, in and of itself, destroy confidentiality. The waivers presented for execution in these scenarios are limited to the individual granted access (i.e. the guardian ad litem or custody evaluator).

Signing such a waiver does not allow a parties' attorney to subpoena or question the therapists.

question the underlying veracity of the information obtained.

Take, for example, a child therapist working with a 9-year-old whose parents are contesting her custody. If a limited waiver is signed and the child therapist informs the guardian ad litem that the child is uncomfortable with the father and prefers not to spend time with him alone, then what is the father's attorney to do when confronted with that information?