

# Admissibility of Mental Health Care Records in Custody/Placement Disputes

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The question of the admissibility of mental health records in custody disputes is one that provokes spirited legal and psychological debate. While all 50 states have adopted some form of legislation governing psychologist-patient privilege, interpreting and applying these laws on a national basis remains virtually impossible. The tension between preserving a patient's confidentiality and admitting critical discovery is strikingly evident in the context of custody disputes, where often preserving a child's best interests depends upon the court's ability to gauge the mental health of a parent. No clear national standard has emerged from the multiplicities of state legislation and case law; however, in examining the history of law in this area, we can begin to map out some ways of allowing courts both to preserve confidentiality and to admit relevant records without violating this important evidentiary privilege.

## PSYCHOLOGIST-PATIENT PRIVILEGE UNDER PROPOSED RULE 504 (REJECTED 1972)

The psychologist-patient privilege, unlike the attorney-client privilege, did not exist in common law. Because there is no clear history to direct states in developing law around this issue, the confidentiality of information divulged during therapy is protected by statutes that vary considerably from state to state. In pursuit of a national standard, the U.S. Supreme Court tried to establish a

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federal psychologist-patient privilege in 1972. However, Congress rejected proposed Rule of Evidence 504 and, lacking national direction, most states maintained their previous laws.

Rule 504 provides a blueprint for psychologist-patient privilege standards in the evidentiary codes of Florida, Hawaii, Idaho, Louisiana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oregon, Texas, and Wisconsin.<sup>1</sup> Other states have adopted modified versions of Uniform Rule of Evidence 2d 503, Congress's second attempt at establishing a national standard. Rule 503 defined psychological/psychiatric privilege as a subset of a broader physician-patient privilege.<sup>2</sup> Still other states have refused to adopt any form of Rule 504, choosing instead to retain their original statutes on psychological/psychiatric privilege.<sup>3</sup> However, as the most commonly used framework

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for developing individual state legislation, Rule 504 and its derivatives provide a useful starting point for discussing the admissibility of mental health records nationwide.

### **Rule 504 (Rejected 1972) Recognition of Right to Psychological Confidentiality**

Rule 504(b) reads in relevant part:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for purposes of diagnosis or treatment of his mental, or emotional condition, among himself, his psychologist, or persons who are participating in the diagnosis or treatment . . . including members of the patient's family.

In states with similar provisions, a litigant claiming psychological/psychiatric privilege must show that he or she was a "patient" of the mental health care provider and that the communications made to the provider were "confidential."<sup>4</sup> An analysis of psychological privilege depends upon the definition of these terms.

### **Definition of Psychotherapist**

Rule 504(a)(2) defines a "psychotherapist" as

(A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction; or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

Many states have modified Rule 504 by expanding this limited definition to declare psychiatrists, psychologists, therapists, social workers, and other mental health professionals privileged under this law.<sup>5</sup>

### **Definition of Patient**

Rule 504(a)(1) defines a "patient" as any "person who consults or is examined or interviewed by a psychotherapist." Some states have understood this definition selectively, applying privilege only to patients of licensed psychologists or psychiatrists.<sup>6</sup> Others have extended the privilege to patients of other mental health care professionals, including marriage counselors, rape counselors, and social workers.<sup>7</sup>

### **The Meaning of Confidential**

Rule 504(a)(3) says in relevant part:

A communication or information is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination or interview, or persons reasonably necessary for the transmission of the communication or information, or persons who are participating in the diagnosis or treatment.

The U.S. Supreme Court recognized a federal psychologist-patient privilege in *Jaffee v. Redmond*, its recent decision that protection of confidential communications between a psychotherapist and a patient was an interest sufficiently important to outweigh a need for probative evidence.<sup>8</sup> The Court found that effective psychotherapy occurs only when a patient is able to feel confidence and trust in his or her therapist. Disclosure of confidential therapeutic materials jeopardizes that trust, which in turn dilutes the quality of psychotherapy.<sup>9</sup> Because the mental health of the nation's citizens is a "public good of transcendent importance," a privilege protecting mental health care is justified.<sup>10</sup>

In general, therapy patients intend that their communications with their mental health care providers remain confidential so that they can be treated effectively. The Wisconsin Court of Appeals explains why this intent is objectively reasonable in its analysis of the rationale underlying the psychologist-patient privilege:

A patient must have complete confidence in a psychotherapist to ensure effective therapy. The psychotherapist-patient relationship has been compared to that of the lawyer-client or the priest-penitent. Because a threat to secrecy would block successful treatment, the need for such a privilege is evident.<sup>11</sup>

Since the therapeutic relationship stems from "a high degree of candor," some courts have held that the patient would suffer severe injury if the privilege were unduly violated.<sup>12</sup>

However, a patient may waive the privilege if the privileged communication occurred in the presence of a third party. For instance, in divorce litigation, one party may wish to introduce confidential materials previously disclosed in the couple's therapy. While courts in Indiana have admitted such evidence,<sup>13</sup> other state legislatures have created a statutory exception for any case in

which a third party is "participating in the diagnosis or treatment under the direction of the psychotherapist."<sup>14</sup> Still other states, such as Wisconsin, maintain that third-party disclosures are probably *not* "confidential," since whether a communication is "intended to be disclosed to third persons" turns on the "objectively reasonable" belief of the patient.<sup>15</sup>

### STATUTORY EXCEPTIONS TO PRIVILEGE THAT MAY APPLY IN CUSTODY ACTIONS

Although the psychologist-patient privilege as defined by Rule 504 is fairly comprehensive, it is not absolute. Many states have included specific exceptions to the privilege in their evidentiary codes. Most states designate at least three cases in which the privilege is automatically waived: commitment for mental illness proceedings, court-ordered examinations, and when the patient relies on a mental or emotional condition as an element of his or her claim or defense.<sup>16</sup> A few states also make an exception whenever a patient's mental health is clearly relevant to a child custody dispute.<sup>17</sup> However, perhaps the most significant exception in a custody matter concerns the revocation of psychological privilege when a party has deliberately put his or her mental condition at issue.<sup>18</sup> Since mental health evaluations of a parent are often critical in making custody decisions, legal discussion has centered around this exception.

#### When a Party Puts His or Her Mental State at Issue

Rule 504(d)(3) reads in relevant part, "There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of a patient in any proceedings in which he relies upon the condition as an element of the patient's claim or defense." Clearly, a party whose defense cites psychological privilege while simultaneously claiming confidentiality of mental health records has forfeited the right to confidentiality. But the practical applications of this thesis when considered in the context of divorce litigation are unclear. If a parent's mental health is of paramount concern in determining a child's physical placement, then that parent's psychological history should certainly be made available to the court. It seems that a parent's claim to confidentiality, denying the court access to psychological records,

is in direct conflict with preserving the best interests of the child. This logic leaves the courts with a difficult question: Does it then follow that simply by virtue of seeking custody, a parent automatically waives the right to confidentiality of mental health records?<sup>19</sup>

#### Relevance of a Parent's Mental Health Does Not by Itself Abrogate the Psychologist-Patient Privilege

If mental health records in a custody dispute are by definition admissible under this exception, any divorcing parent may be required to justify his or her entire psychological history to the court. This interpretation of the privilege, however, is bad policy and violates privacy rights. Disclosure of a person's mental health records is time consuming, and, when unrelated to a placement determination, an inappropriate use of the court's time. It is also personally harmful to the patient, whose confidential records are being made public. Some states have dealt with this potential abuse of the exception by enacting law stating that the relevance of a parent's mental health status does not negate privilege in a custody matter. For example, in *Navarre v. Navarre*,<sup>20</sup> the Michigan Court of Appeals found that provisions of the Michigan Child Custody Act requiring consideration of the mental and physical health of the parties did not take precedence over the general privilege statute. The court noted:

All privileges exist at the expense of suppressing valuable evidence. Indeed, were this not the case, there would be no need for privileges at all. In this context, potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting physician-patient relationships. Moreover, the court in this case was able, with the plaintiff's participation, to gather information with regard to her mental condition.<sup>21</sup>

Similarly, in *Griggs v. Griggs*,<sup>22</sup> although the Missouri Court of Appeals interpreted statutory provisions as directing the court to consider the mental health of the parties in making a custody decision, it also held that this provision was insufficient to waive psychological privilege under the state's general privilege statute. The Court of Appeals did, however, note that psychological evidence could be admitted when provided by a court-appointed independent medical examiner.<sup>23</sup>

### Psychological Communications and Records Provided by an Independent Medical Examiner

Appointing its own independent medical examiner allows a court to acknowledge the relevance of mental health information while preserving the psychological/psychiatric privilege. In states that require psychological confidentiality and psychological discovery, an independent medical examiner can fulfill both those requirements by providing mental health data without violating a party's privilege.<sup>24</sup> Florida, for instance, requires that the mental health of the parties be considered in custody determinations under the "best interest of the child" standard. In *Roper v. Roper*, the Florida District Court of Appeal held that the appropriate method of determining a party's mental health was not a waiver of the privilege, but rather a court-ordered examination.<sup>25</sup> In Wisconsin, the option of an independent medical examination is preserved under Wis. Stat. § 804.10. Using this statute, the court may admit information regarding a party's mental health as required under Wis. Stat. § 767.24 while simultaneously upholding the privilege of Wis. Stat. § 905.04(2).

### SEEKING CUSTODY SHOULD NOT NEGATE RIGHTS PROTECTED BY PSYCHOLOGICAL/PSYCHIATRIC PRIVILEGE

This article contends that a parent does not put his or her mental condition at issue simply by seeking custody or physical placement of a child.<sup>26</sup> Rather, it is the opposing party who brings a parent's psychological history into dispute by asserting that the parent is psychologically unable to parent appropriately. But neither seeking custody nor claiming psychological confidentiality indicates a relevant mental health issue in and of itself; rather, these claims are a demand for the opposing party to justify waiver of the privilege. Contesting a custody action should not automatically invalidate the psychologist-patient privilege.

#### Varying Rules

Some states have adopted the position articulated here; others have not.

#### *Privilege Supersedes Discovery*

Some states have determined that privilege is not negated merely because a parent contests custody. For example, in *Schouw v. Schouw*,<sup>27</sup> the

Florida District Court of Appeal held that although the mental health of parents is relevant in a child custody case, one parent's claim that the other is mentally unstable fails to meet the standard for waiving privilege.<sup>28</sup> The Connecticut Appellate Court found in *Cabrera v. Cabrera*<sup>29</sup> that, even if seeking custody raised the issue of a parent's mental health, that fact alone would not render otherwise privileged testimony admissible. Some states have found that, while a parent's mental health is relevant to a custody determination, mere allegations of mental or emotional instability are insufficient to put a parent's mental health at issue.<sup>30</sup>

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#### *Privilege Is Waived in a Custody Dispute*

On the other hand, some states have assumed a radically different legal stance. For example, Texas has enacted a statutory exception to psychologist-patient privilege in custody matters.<sup>31</sup> In a few states, it is considered a given that a party waives the privilege by actively contesting custody.<sup>32</sup> Those jurisdictions, for the most part, have either enacted specific statutory exceptions for such cases or expressed a preference for the judge to first examine the evidence for relevancy through an *in camera* inspection.<sup>33</sup> However, in these states the opposing party still must demonstrate "beyond mere conclusory statements" that determining custody requires a breach of confidentiality.<sup>34</sup> Similarly, Alabama holds that although the privilege may be waived in custody disputes, the trial court must be careful to consider whether the waiver is the only method of resolving an issue.<sup>35</sup>

A handful of states hold that the policy interest in determining children's best interests outweighs the benefit of preserving psychiatric confidentiality.<sup>36</sup> These states argue that a child's well-being is more compelling than a parent's right to psychological privilege. A New York court determined that "the disclosure of privileged and confidential mental health records may be permitted in child custody upon a nonconclusory evidentiary showing of relevancy and need."<sup>37</sup> In Alabama, a court explained that "where the issue of the mental state of a party to a custody suit is clearly in controversy,

and a proper resolution of the custody issue requires disclosure of privileged medical records, the psychologist-patient privilege must yield."<sup>38</sup>

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### Other Options

An alternative means of informing the trial court of a parent's mental condition is an order for an independent medical examination.<sup>39</sup> The trial court retains discretionary power to order a mental examination of any party to a dispute.<sup>40</sup> Other states have introduced court-ordered exams as the best way to "balance competing interests" in custody disputes by providing the necessary information without unfairly undermining the psychologist/psychiatrist-patient privilege.<sup>41</sup> Those opposed to this solution argue that the testimony of a patient's own psychologist would have more evidentiary value than any information obtained by a court-appointed psychologist.<sup>42</sup> However, this argument fails to take into account the fact that courts have "long relied upon the testimony of psychiatrists to determine a person's mental condition" in a variety of civil and criminal proceedings.<sup>43</sup> Courts also routinely appoint experts in other fields; there is no reason mental health should be considered uniquely.

### Future Legislation

Policy considerations dictate that, in the absence of a national standard, states should develop law enabling parents to seek custody without waiving psychological confidentiality. Such laws would preserve psychological/psychiatric privilege while allowing parents in need of mental health treatment to seek therapy without fear of disclosure. The U.S. Supreme Court's recent endorsement of psychological privilege in its *Jaffee v. Redmond* decision offers a national precedent for state legislatures to emulate. In *Jaffee*, the Court found that preserving psychotherapist-patient privilege took precedence over satisfying evidentiary requirements. Arbitrarily waiving psychological privilege in all custody disputes is bad law; courts would benefit from statutory guidelines indicating which right prevails under what circumstances.

## PSYCHOLOGIST-PATIENT PRIVILEGE SHOULD BE UPHELD IN CUSTODY CONTEXT

Protecting children caught in a custody dispute is unequivocally an important public policy goal. However, in the absence of a statutory provision or clear case law, courts seem caught between preserving confidentiality and upholding the best-interests-of-the-child standard. These two seemingly irreconcilable needs, however, do not necessarily conflict. By admitting mental health evidence through the use of an independent medical examiner, parents' psychological confidentiality rights are preserved, and children's rights are protected as well.

### Psychologist-Patient Privilege and the Due Process Rights of Children

In *Kinsella v. Kinsella*,<sup>44</sup> a New Jersey court noted that litigants who are not children are also "persons" within the 14th Amendment and that

[a]ll persons have the right not to be deprived of life, liberty and property without due process of law. The purpose of offering relevant evidence in court is to affect life, liberty or property, and the function of a privilege is to exclude relevant evidence. The argument propounded in *M. v. K.*<sup>45</sup> therefore leads to the conclusion that every successful assertion of a privilege violates a litigant's right to due process. But evidentiary privileges have been too firmly embedded in our statutes and common law for too long for them now to be so freely overridden on constitutional grounds.<sup>46</sup>

Criminal defendants, whose liberty is at stake and whose due process rights have been the subject of innumerable appellate opinions, do not have the unfettered right to put all available evidence before the fact finder. In *Montana v. Egelhoff*,<sup>47</sup> the U.S. Supreme Court characterized as "indefensible" the due process clause's guarantee of the right to introduce all relevant evidence.<sup>48</sup> The Court held that, while the due process clause places limits on restrictions of the right to introduce evidence, it does so only where the restriction "offends some principle of justice so rooted in the traditions and conscience of our people so as to be ranked as fundamental."<sup>49</sup>

In *Jaffee v. Redmond*,<sup>50</sup> the Supreme Court held that because all 50 state legislatures had judged psychological privilege a significant policy issue, protecting confidential communications was a sufficiently important interest to outweigh the need

for probative evidence.<sup>51</sup> Given the unanimous nationwide legislation on this issue, psychological privilege clearly does not "offend some principle of justice so rooted in the traditions and conscience of our people so as to be ranked as fundamental," and hence meets the due process criteria.

### Psychologist-Patient Privilege and the Best Interests of Children

Protecting the confidentiality of mental health records actually serves the best interests of children. The courts may obtain information about a parent's mental health by appointing an independent medical examiner. The evidence obtained through an independent examination allows a court to evaluate a parent's abilities accurately and make a placement determination accordingly, protecting the child's best interests. Independent examinations also preserve the parent's psychological privilege. If the privilege is eroded, parents who require psychological treatment may be reluctant to seek it, fearing that any information divulged in therapy may lead to disastrous legal consequences. It is in a child's best interest to have a psychologically healthy parent; without the protection of confidentiality, the law would endanger that interest.<sup>52</sup> The U.S. Supreme Court has identified the mental health of our citizenry as a public good "of transcendent importance."<sup>53</sup> The mental health of citizens is even more important when those citizens are parents, whose psychological soundness has a compelling effect on both parent and child.

### CONCLUSION

While no national standard has been established regarding the admissibility of mental health records in custody disputes, both state legislation and national case law delineate appropriate public policy. A litigant's psychological and/or psychiatric records should remain inadmissible in divorce, custody, and placement proceedings. In the absence of an applicable state statutory exception, these records fall squarely within the psychologist-patient privilege. Courts may admit psychological discovery without compromising confidentiality by appointing an independent medical examiner, protecting both the best interests of the child and the parents' rights to confidentiality. Parents should not be forced to sacrifice their psychological/psychiatric privileges in attempting to

preserve their right to parent their children, nor should children be made to suffer the consequences of their parents failing to receive adequate medical care. Recent federal case law supports this understanding of psychological privilege, suggesting a direction for future state legislation.

### ENDNOTES

<sup>1</sup>See Fla. Evid. Code § 90.503; Haw. R. Evid. 504.1; Idaho R. Evid. 517; La. Evid. Code art. 510; Nev. Rev. Stat. § 49.215; N.H. Rev. Stat. Ann. § 329:26; Or. R. Evid. 504; Tex. R. Evid. 509; Wis. Stat. Ann. § 905.04.

<sup>2</sup>See Alaska R. Evid. 504; Ala. R. Evid. 503; Ark. R. Evid. 503; Del. R. Evid. 503; Ky. R. Evid. 506; Maine R. Evid. 503; Mass. Ann. Laws § 233:20B; Miss. R. Evid. 503; N.D. R. Evid. 503; Okla. Stat. Ann. tit. 12, § 2503; S.D. R. Evid. 503; Vt. R. Evid. 503.

<sup>3</sup>See, e.g., Mich. Comp. Laws Ann. § 330.1750; Minn. Stat. Ann. § 595.02(4); N.C. Gen. Stat. § 8-53.

<sup>4</sup>See, e.g., Fla. Evid. Code § 90.503; Haw. R. Evid. 504.1; Neb. R. Evid. 504; Wis. Stat. § 905.04.1 For an example of an evidentiary code that protects the confidentiality of communications but not records, see Md. Ann. Code § 9-109.

<sup>5</sup>See, e.g., Fla. Evid. Code § 90.503(1)(a)(1); Ky. R. Evid. 506(a)(1); Wis. Stat. § 905.04(1)(c).

<sup>6</sup>See, e.g., Conn. Gen. Stat. §§ 52-146(c), 52-146(d); Haw. Rev. Stat. § 626-1, R. Evid. 504.1; Mich. Comp. Laws § 330.1750.

<sup>7</sup>See, e.g., Ky. R. Evid. 507; La. Rev. Stat. Ann. § 3734; Me. Rev. Stat. Ann. tit. 32, § 1362; Vt. R. Evid. 503.

<sup>8</sup>116 S. Ct. 1923, 1928 (1996).

<sup>9</sup>*Id.* at 1928.

<sup>10</sup>*Id.*

<sup>11</sup>*State v. Locke*, 177 Wis. 2d 590, 602-603, quoting *Cunningham v. Southlake Medical Center for Mental Health*, 125 F.R.D. 474, 477 (N.D. Ind. 1989).

<sup>12</sup>See, e.g., *Roper v. Roper*, 336 So. 2d 654, 656 (Fla. Dist. Ct. App. 1976); *State ex rel. Husgen v. State*, 617 S.W.2d 414, 417 (Mo. Ct. App. 1981).

<sup>13</sup>*Bishop v. Goins*, 586 N.E.2d 905, 907 (Ind. Ct. App. 1992).

<sup>14</sup>See Fla. Evid. Code § 90.503. See, e.g., Neb. R. Evid. 504; Ore. R. Evid. 504; Tex. R. Evid. 409.

<sup>15</sup>*State v. Locke*, 177 Wis. 2d 590, 605, 502 N.W.2d 891 (Ct. App. 1993).

<sup>16</sup>See, e.g., Fla. Evid. Code § 90.503(4); Haw. R. Evid. 504.1(d); Neb. R. Evid. 504(4); Or. R. Evid. 504(4); Tex. R. Evid. 509(d). Other states have established additional exceptions, including allegations of crime or fraud, Alaska R. Evid. 504(d)(2); proceedings against a psychologist, Haw. R. Evid. 504.1(d)(4); or a case of wrongful injury or death, La. Evid. Code art. 510(B)(2)(b). Wisconsin has an unusually large number of automatic waivers for (a) proceedings for hospitalization, guardianship, protective services, or protective placement; (b) court-ordered exams; (c) situations in which a party has put his or her condition at issue; (d) homicide trials; (e) examinations of abused or neglected children; (f) tests for intoxication; (g) paternity proceedings; (h) reporting wounds and burn injuries; and (i) information obtained by intake workers in juvenile matters. See Wis. Stat. § 905.04(4).

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<sup>17</sup>See, e.g., Ala. R. Evid. 503(d)(5); La. Evid. Code art. 510(B)(2)(d).

<sup>18</sup>See, e.g., Haw. R. Evid. 504(d)(3), Fla. Evid. Code § 90.503(4)(c), Wis. Stat. § 905.04(4)(c).

<sup>19</sup>See, e.g., Fla. Stat. Ann. § 63.13(3)(e); Minn. Stat. Ann. § 257.025(a)(8).

<sup>20</sup>191 Mich. App. 395, 479 N.W.2d 357 (Mich. Ct. App. 1991).

<sup>21</sup>191 Mich. App. at 399.

<sup>22</sup>707 S.W.2d 488 (Mo. Ct. App. 1986).

<sup>23</sup>*Id.* at 490-91.

<sup>24</sup>See, e.g., Conn. Gen. Stat. §§ 52-146(c)(1), 52-146(f)(4); Haw. Rev. Stat. § 626-1(d)(2), Haw. R. Evid. 504.1; Md. Code Ann., Cts. & Jud. Proc. § 9-109(d)(2); Wis. Stat. § 804.10.

<sup>25</sup>336 So. 2d 654, 657 (Fla. Dist. Ct. App. 1976).

<sup>26</sup>See, e.g., *State ex rel. Husgen v. Stussie*, 617 S.W.2d 414, 417 (Mo. Ct. App. 1981); *Leonard v. Leonard*, 673 So. 2d 97, 99 (Fla. Dist. Ct. App. 1996).

<sup>27</sup>593 So. 2d 1200 (Fla. Dist. Ct. App. 1992).

<sup>28</sup>*Id.* at 1201; see also *Roper v. Roper*, 336 So. 2d 654, 657 (Fla. Dist. Ct. App. 1976).

<sup>29</sup>580 A.2d 1227 (Conn. App. Ct. 1990).

<sup>30</sup>See, e.g., *Oswald v. Diamond*, 576 So. 2d 909, 910 (Fla. 1st Dist. Ct. App. 1991); *Griggs v. Griggs*, 707 S.W.2d 488, 490-91 (Mo. Ct. App. 1986).

<sup>31</sup>Texas R. Civ. Evid. § 510(d)(6); *Cheatham v. Rogers*, 824 S.W.2d 231, 234 (Tex. Ct. App. 1992).

<sup>32</sup>See, e.g., *Baecher v. Baecher*, 396 N.Y.S.2d 447, 448 (N.Y. App. Div. 1977); *Caston v. Centers for Psychotherapy, Inc.*, 619 So. 2d 1140, 1141 (La. Ct. App. 1993); *Owen v. Owen*, 563 N.E.2d 605, 608 (Ind. 1990); *Black v. Black*, 625 So. 2d 450, 452 (Ala. Civ. App. 1993).

<sup>33</sup>See, e.g., La. Evid. Code art. 510(B)(2)(d); Ala. R. Evid. 503(d)(5); *Cerre v. Cerre*, 687 So. 2d 601, 603 (La. Ct. App. 1997); *LeVien v. LaCorte*, 640 N.Y.S.2d 728, 733 (N.Y. Sup. Ct. 1996).

<sup>34</sup>*Perry v. Fiumano*, 403 N.Y.S.2d 382, 386-87 (N.Y. App. Div. 1978).

<sup>35</sup>*Harbin v. Harbin*, 495 So. 2d 72, 74 (Ala. Civ. App. 1986), quoting *Matter of Van Goyt*, 461 So. 2d 821 (Ala. Civ. App. 1984). See also *Slaton v. Slaton*, 1996 Ala. Civ. App. LEXIS 666 (Ala. Civ. App. 1996), and *Clark v. Clark*, 371 N.W.2d 749 (Neb. 1985), relying on the statutory law of Alabama and Nebraska, respectively. Other states holding that a parent waives the privilege by contesting custody include Indiana, Kentucky, and California.

<sup>36</sup>New Jersey appellate courts are in disagreement on this issue. See *Kinsella v. Kinsella*, 287 N.J. Super. at 305, 671 A.2d 130 (N.J. Sup. Ct. 1996); *M. v. K.*, 186 N.J. Super. 363, 452 A.2d 704 (N.J. Sup. Ct. 1982).

<sup>37</sup>In the *Matter of Brandon A.*, 630 N.Y.S.2d 850, 852 (N.Y. Sup. Ct. 1995).

<sup>38</sup>*Von Goyt v. State Dep't of Pensions & Sec.*, 461 So. 2d 821, 823 (Ala. Civ. App. 1984).

<sup>39</sup>See Conn. Gen. Stat. §§ 52-146(c)(1), 52-146(f)(4); Haw. Rev. Stat. § 626-1(d)(2), Haw. R. Evid. 504.1; Md. Code Ann., Cts. & Jud. Proc. § 9-109(d)(2); Wis. Stat. § 804.10.

<sup>40</sup>See *Coca-Cola Bottling Co. v. Negron Torres*, 255 F.2d 149, 153 (1st Cir. 1958).

<sup>41</sup>See, e.g., *Leonard v. Leonard*, 673 So. 2d 97, 98 (1996); *Cabrera v. Cabrera*, 580 A.2d 1227, 1233 (Conn. App. Ct. 1990); *Barker v. Barker*, 440 P.2d 137, 139 (Idaho 1968); *Griggs v. Griggs*, 707 S.W.2d 488, 490-91 (Mo. Ct. App. 1986); *Simek v. Superior Ct.*, 172 Cal. Rptr. 564 (Cal. Ct. App. 1981).

<sup>42</sup>See *Roper v. Roper*, 336 So. 2d 654, 656 (Fla. Dist. Ct. App. 1976).

<sup>43</sup>See *id.* at 655.

<sup>44</sup>287 N.J. Super. at 305, 671 A.2d 130 (N.J. Super. Ct. 1996).

<sup>45</sup>In *M. v. K.*, 186 N.J. Super. 363, 452 A.2d 704 (N.J. Super. Ct. 1982), a New Jersey court determined that a counselor-patient privilege was unconstitutional in the child custody context. N.J. Super. at 374. The court reasoned that a child is a "person" within the meaning of the 14th Amendment to the U.S. Constitution and that upholding the privilege would deny the child due process by excluding evidence relevant to a determination of her welfare. 186 N.J. Super. at 373-74. This approach has not been followed by any court outside of New Jersey, and as noted in the text, another New Jersey appellate court has rejected the reasoning of *M. v. K.*

<sup>46</sup>287 N.J. Super. at 312.

<sup>47</sup>116 S. Ct. 2013 (1996).

<sup>48</sup>*Id.* at 2013.

<sup>49</sup>*Id.*, citing *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

<sup>50</sup>116 S. Ct. 1923 (1996).

<sup>51</sup>*Id.* at 1929-30.

<sup>52</sup>See, e.g., *Steinberg v. Jensen*, 194 Wis. 2d 439, 459, 534 N.W.2d 361 (1995); *State ex rel. Husgen v. Stussie*, 617 S.W.2d 414, 417 (Mo. Ct. App. 1981); *Roper v. Roper*, 336 So. 2d 654, 657 (Fla. Dist. Ct. App. 1976).

<sup>53</sup>*Jaffee*, 116 S. Ct. at 1929.