Custody and Admissibility of Mental Health Records:
Data Trumps Rhetoric

by Leigh D. Hagan, Scott D. Landry, and T. Michael Blanks

This statute protects parents' mental health records and information as confidential and permits parents to bar their mental health professionals from testifying.

In what area of law may litigants put their mental states at issue and, at the same time, claim a privilege? The strategy of having it both ways is not permissible when pleading a claim of psychological damages, workers' compensation, disability, competence, insanity, or sentencing. Only when the best interest of a child is before the court may litigants claim a superior mental health posture on the one hand and unilaterally block all discovery of their counseling records and bar any testimony from mental-health professionals relating to that claim.

In what area of law must litigants secure advanced written permission of the opposing party in order to have a mental health expert testify? Is there any area of law which creates a privilege for a nonparty? Is there any legal issue in which mental-health professionals are statutorily barred from testifying because they hold licenses, yet unlicensed professionals are permitted to testify? Yes — when the interest of a child hangs in the balance.

Does any area of law permit litigants to testify about what a therapist said in the presence of the other litigant, yet bars professionals from testifying about what they actually said and meant? Again, the answer lies in Virginia Code § 20-124.3:1, only when the interest of a child is at stake.

Is there any statutory scheme that grants greater protection to the able adults while potentially compromising the interests of those who cannot speak for themselves? Yes — again, § 20-124.3:1.

§ 20-124.3:1 and Mental Health Records in Custody Cases

This statute protects parents' mental health records and information as confidential and permits parents to bar their mental health professionals from testifying. The parents also have the power to thwart discovery, even if therapists are not called to the stand. This power is not limited to barring the bad news. The statute also invests the power in one parent to bar the positive and constructive mental health testimony offered about the other parent.

The prohibition is not limited to opinions. It is not an effort to reign in advocacy testimony in scientific clothing nor is it intended to limit junk science or raise the standard for scientific testimony. The prohibition extends to any and all "records concerning a parent, kept by any licensed mental health care provider."[1] This blanket protection is not limited to what a litigant might have said or done in the presence of the mental health professional. It renders confidential any information obtained during or from therapy. It protects custody litigants from anything they told counselors about anything and anyone at any time. The therapist cannot disclose records or testify about a litigant's behavior, demeanor, attire, or statements. This privilege extends to nonparties, including any of the parents' adult relatives.

Two exceptions apply: First, the mandated reporter may notify the Department of Social Services of suspicion of an abused or neglected child. Second, it states, "this section shall not apply to mental health care providers who have conducted or are conducting an independent mental health evaluation pursuant to a court order."

Rationale for the Privilege and Prohibitions

The Virginia Academy of Clinical Psychologists (VACP) promoted the bill that passed in 2002. The proponents wanted to see families get the treatment they need to remain intact. In theory, when patients realize their records can be subpoenaed, they stop treatment and lose an opportunity to help their families in crises when they need access to care. Upon hearing the testimony of family law practitioners and others, the Virginia General Assembly delayed the effective date until 2003. Failed efforts at compromise led to enactment of the current statute.

In 2006, VACP conceded that there was no research to support its position that families will not get the help they need if records can be discovered. In 2007, a bill to repeal this statute failed in a tie vote in the Senate Courts Committee.

Appellate Review and Unanticipated Consequences

The cases reported since enactment of § 20-124.3:1 exemplify how this statute has been used to thwart the presentation of necessary and relevant information in child custody proceedings. The Virginia Court of Appeals rendered its first decision interpreting and applying the privilege in the case of *Schwartz v. Schwartz*, in which the court ruled that a coparenting therapist's testimony was inadmissible under § 20-124.3:1 because, although the therapist was not the treating therapist of either parent, he was the treating therapist of the child, and there was no requirement that the parent be the patient. *Schwartz v. Schwartz*, 46 Va. App. 145 (2005).

By giving such an expansive reading to the privilege set out in § 20-124.3:1, the *Schwartz* court minimized the court's paramount concern in child custody proceedings, which is the "best interests of the child" standard. Further, when the mental health of a parent is a relevant or even critical issue in child-custody proceedings, the application of § 20-124.3:1 by the *Schwartz* court forces future litigants to go to extreme measures and additional expense just to introduce mental health evidence.

In another troubling decision made pursuant to § 20-124.3:1, the *Shoemaker* court in *Shoemaker v. Shoemaker* allowed a mother to simultaneously admit her own therapist's testimony and prohibit therapist testimony proffered by the father. *Shoemaker v. Shoemaker*, 2007 Va. App. LEXIS 126 (2007). The court ruled that the testimony offered by the father was inadmissible because the father was an adverse party attempting to admit therapist testimony in a custody proceeding, which the court ruled was necessarily being offered against the mother. As such, the therapist would necessarily testify as to impressions made by the child and statements that could have been made by the mother.

The father argued that the mother should not be able to use § 20-124.3:1 as both a sword and a shield, and that the court's admission of the mother's testimony was error. The court struck down the father's argument, holding that the introduction of the mother's evidence was harmless error.

The *Rice* court took the privilege under § 20-124.3:1 one step further by excluding testimony that would have been adverse to a mother's position in a grandparent's visitation case. The court held a therapist's testimony about the grandparents was inadmissible because it was on behalf of or against one or both of the parents. *Rice v. Rice*, 49 Va. App. 192 (2006).

Unanticipated consequences of § 20-124.3:1 have significantly complicated the preparation and presentation of essential best-interest considerations with regard to not only mental health concerns relative to potential custodians but also for the court to understand the child's needs. The tragedy of *Rice* is the preclusion of testimony by a child's therapist premised on the notion that merely being called as a witness by one party "is necessarily testifying on behalf of or against one or both of the parents" — even if the anticipated testimony seeks to advise the court of the mental health needs of the child. Barring sufficient financial resources, time, and a child of sufficient age to fully engage a psychologist in both spoken and written word for an independent assessment, the odds of being able to present evidence of a child's mental health status or progression in any talk or play therapy and identify detrimental conduct causing trauma is akin to doing so by Ouija board. It's likely that most parents in custody actions cannot afford an independent assessment, do not desire to wait for the period of time it takes, and cannot identify such severe circumstances anticipated by the neglect-or-abuse exception to the privilege.

Often the court's receipt of helpful information related to a child's mental health is dependent on the parents' consent. But culprits do not cooperate. So, the child who cuts her arms and legs and relates to her therapist that it is due to her father's constant yelling and cruel behavior has little hope. The father did not cut his daughter's arms and legs. His tirades and demeaning behavior were observed only by younger siblings. A child's disclosure to his therapist about how it makes him feel to watch his parents fight, to be called names, to be subjected to additional cruel actions, or to witness a parent's break with reality offers little relief when it essentially remains a secret shielded from the court. Not only does § 20-124.3:1(B) preclude such on a parent's nod, but as explained in *Rice*, the mental health provider may not advise the court of the problem, progress in treatment, or cooperation of the parents. Secrets are easy to keep, especially when they involve a young child who may only be adequately assessed utilizing play therapy and for whom an independent assessment is of limited value as noted in the dissent to the majority in *Rice*. The child's therapist is muted by privilege, and the young child by intimidation.

Often the only way for a child to share with the court her fear, anxiety, or anger and the perceived causes is to testify. Even an in camera interview, if granted, gambles that a child will respond to the court's inquiry. Somehow the court, in this first encounter, must gain the child's trust and then encourage responses to open-ended questions probing the most traumatic events of the last year or two — typically all within a fifteen-minute interview. This single encounter with the court hardly compares to a therapeutic relationship formed over several months.

Statewide Survey of GALs

Rather than resting on a priori assumptions, authors Leigh D. Hagan and Scott D. Landry undertook a statewide survey of guardians ad litem (GALs) qualified for the representation of children pursuant to § 16.1-266. We chose GALs to avoid the argument that the debate about this law is a conflict between aggressive lawyers and members of the helping professions, as some have mischaracterized the debate. GALs represent the interest of the children and do not represent parties in the litigation. Their standards foster vigorous, effective, and competent representation of children's interests and welfare.[2]

The Sample

We sent surveys to a sample of certified GALs in each of Virginia's thirty-one judicial districts. Respondents replied anonymously. The analysis derives from the eighty-eight valid responses from qualified and experienced guardians on behalf of children. The majority of respondants practiced as GALs for more than five years. On average, the respondents devote 26 percent of their law practice to GAL appointments. To assure that survey data were based on well-informed respondents, those who indicated that they were not at all familiar with § 20-24.3:1 were permitted to omit the remainder of the survey and return it to us. Of the valid responses, at least 91 percent were at least slightly familiar with the statute and the *Schwartz* and *Rice* appellate decisions.

None of the respondents believed that the statute benefits children primarily.

GALs' Views of § 20-24.3:1: The Data

Almost half of the respondents reported that this statute caused a moderate to significant impact on their practice as GALs (e.g., obtaining therapy records, calling therapists as witnesses, providing the court with relevant therapy information, having children testify or serve as informants because of a lack of access/present therapy information, etc.)

Almost 69 percent said that the law caused moderate to significant negative consequences for children. None reported a significantly positive consequence. A large majority of GALs reported that they are now more often faced with the choice of having the children testify or giving a statement in some fashion than they would have prior to this statute.

None of the respondents believed that the statute benefits children primarily. The majority concluded that this protection benefits the adults more than the children. A substantial minority advised that this statute actually undermines the GAL's efforts on behalf of children.

One of the proponents of the statute suggested that we previously published an article teaching lawyers how to circumvent the law.[3] Of concern to this statute's advocates were strategies that might help with discovery of records otherwise protected by § 20-124.3:1. At a continuing legal education program, a panel discussion took up the following question: is it appropriate to request or subpoena a party's therapy records for case development purposes even if the statute bars the admissibility of those records?[4] The conference concluded with a consensus that the pursuit of the records is appropriate because the attorney has a duty to act with reasonable diligence taking whatever lawful and ethical measures are required to vindicate a client's cause. Although the records themselves might not be admitted into evidence, the information might assist the attorney in developing other permissible avenues to present critical information to the court.

We posed the question to the GALs. Eighty percent said that it is appropriate to request or subpoena a party's therapy records for case development purposes even if the statute bars the admissibility of those records. These data correspond to the consensus developed at the CLE on this specific issue.

Saving Families in Crisis: Reality or Rhetoric?

VACP's primary theory for promoting the original bill in 2002 and rebutting efforts for its repeal in 2007 was that when there is no confidentiality, parents will no longer seek professional help with their marriage. We asked GALs if they found support for this rationale over the last four years that the statute has been in force. Eighty-two percent found little or no support for this theory. None found significant support.

Recently, E. Archer and A. Stolberg surveyed the peer-reviewed scientific literature and refuted the assumptions that discoverability of treatment records impedes people from using therapy.[5] These researchers' findings, the GAL survey, and the concession from the statute's supporters converge on one conclusion: there is no empirical evidence to support the claim that this privacy shield for parents and their adult relatives in any way preserves families. Of greatest concern is the finding that this statute shields parents and other adults from the natural consequences of their own conduct while undermining children's interests.

Ultimate Issue: Preserve or Repeal § 20-124.3:1?

The majority of GALs participating in this survey believe that children's interests would be better served by repealing the statute entirely. Only a small minority of certified GALs would like to see this statute preserved.

The original rhetoric that gave rise to this statute collapses in the face of data about the unintended consequences. The unintended tragic consequences and appellate opinions severely aggravate the efforts of GALs on behalf of the children whose interest should be paramount. ⚖

Endnotes:

1 § 20-124.3:1

2 Standards to Govern the Appointment of Guardians Ad Litem Pursuant to § 16.1-266, Code of Virginia

3 Hagan, L. & Blanks, T.M. (Oct. 2004). Hiding the ball or necessary protection: § 20-124.3:1 Custody and admissibility of mental health records. *Virginia Lawyer*. 53 (3) 52-55

4 § 20-124.3:1: Making the best of an unfortunate statute. Mental Health Issues in Family Law Cases: Implications of Virginia Code Section 20-124.3:1. Virginia Continuing Legal Education. Fairfax, Va. (August 15, 2007).

5 Archer, E. & Stolberg, A. (Nov. 21, 2007). Draft Report on Empirical Investigations of the Impact of Therapist Testimony on Client Disclosure and Participation in Psychotherapy.

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