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The Thorny Issue of Privilege and Waiver Regarding a Child's Mental Health Records in Custody Proceedings

In many custody proceedings, the children at issue have seen a mental health professional to deal with the trauma of a divorce, to improve a bad relationship with a parent, to address allegations of abuse, or for many other reasons related to or unrelated to his parents' divorce. These records are frequently relevant, and sometimes integral, to a custody determination that is in the child's best interests. Under other circumstances, few would disagree that discussions between a child and his therapist should remain confidential in order that the child could place his full trust in that practitioner and thus fully disclose and address the child's needs. What is the best process then to protect the child when his mental health records have been requested in a child custody proceeding?

By virtue of Kentucky Rules of Evidence 506 and 507, Kentucky litigants are blessed with the ability to assert or waive a confidentiality privilege to their mental health records in litigation. KRE 506 protects communications to therapists and counselors, while KRE 507 protects communications to psychiatrists, psychologists, and social workers. The privilege of KRE 506 may be asserted or waived by the individual, his guardian or conservator, or the personal representative of a deceased client. The privilege of KRE 507 may be asserted or waived by the individual or his authorized representative.

Both rules provide that when an individual asserts his physical, mental, or emotional condition as an element of a claim or defense in litigation, then he automatically waives the privilege. In *Atwood v. Atwood*, the Kentucky Supreme Court ruled that, in seeking the custody of a child or children in pleadings, a party makes her mental condition an element to be considered by the court in awarding her custody.[1] Thus, in custody proceedings, the parties automatically waive the privileges of KRE 506 and 507 by asserting custody rights to the children.[2] This is axiomatic, as certainly the mental health or fitness of a parent is a significant consideration in determining the best interest of a child in his custodial placement. But what of the child's mental health or fitness with regard to how it has been affected by his parental relationships? This, too, would be significant to the court in determining the child's best interests. Implicit in the Kentucky Supreme Court's decision in *Bond* is the holding that KRE 507 applies to children as well as to adults. As KRE 506 and 507 are substantially identical in their protections, KRE 506 applies to children as well. However, a child is generally not a party to his parents' custody proceedings, thus the automatic waiver to the privileges of KRE 506 and 507 should not apply. The court nonetheless held in *Bond* that "the automatic waiver is just as applicable to [children] as it is to their parents."[3] The dissent in *Bond,* in accord with other jurisdictions, noted that because the child in that case was not a party to the action, he did not put his mental health at issue and thus did not automatically waive the privilege.[4] Reliance upon the automatic waiver is, consequently, not the best course of action.

There are exceptions to the availability of the privilege for both rules. KRE 506 (the counselor/therapist privilege) provides that the privilege will not apply

> [i]f the judge finds:
> (A) That the substance of the communication is relevant to an essential issue in the case;
> (B) That there are no available alternate means to obtain the substantial equivalent of the communication; and

(C) That the need for the information outweighs the interest protected by the privilege. The court may receive evidence in camera to make findings under this rule.

This exception would then allow the child's mental health records to be released on a case-by-case basis, and in child custody proceedings, instances are easily foreseen in which a judge might determine that the need for the information outweighs the child's interest in not having the records released, such as when there have been allegations of abuse that do not rise to the level of Dependency, Neglect and Abuse but which nonetheless would heavily impact a custody determination.

Contrarily, KRE 507 provides that the privilege will not apply
(1) In proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;
(2) If a judge finds that a patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of an examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental condition; or
(3) If the patient is asserting that patient's mental condition as an element of a claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.

KRE 507 (the psychologist/psychiatrist/social worker privilege) therefore makes no provision for the judge to balance the countervailing interests of the need for the information versus the child's interest in not having the records released. That leaves only one other avenue to escape the privilege: the child's waiver of the privilege.

KRE Rule 509 provides that a person may waive the privilege by voluntarily disclosing or consenting to disclose any significant part of the privileged matter. Children are procedurally incapable of asserting or waiving this privilege.[5] If children are incapable of asserting or waiving the privilege, who then is to do it? Neither parent can assert or waive the privilege on behalf of the child, for the parents' interests in custody disputes are "potentially, if not actually, adverse to the child's interests," and one parent may be significantly motivated to prevent full disclosure, despite the benefit to the child of the disclosure.[6]

The Court of Appeals in *Bond* held that "the judge may appoint a guardian ad litem pursuant to CR 17.03 for the sole purpose of determining the best interests of the child and for recommending whether, and to what extent, the privilege should be waived."[7] However, this does not rule out the possibility that the court could request an already appointed GAL to make a recommendation regarding waiver of the privilege. Because the guardian ad litem would then be exposed to records that he might not otherwise have seen, both his recommendation as to whether to waive the privilege, or, if he recommends not waiving the privilege, his ultimate recommendation to the court could be tainted. The safest course would be the appointment of a guardian ad litem, in addition to any already appointed guardian ad litem, for the sole purpose of making a recommendation to the court as to whether the privilege should be waived.

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[1] 550 S.W.2d 465, 467 (Ky. 1976).
[2] *Bond v. Bond*, 887 S.W.2d 558, 561 (Ky.App. 1994).

[3] *Id.* at 561.
[4] *Id.* at 562; *Berg v. Berg,* 886 A.2d 980 (N.H. 2005); *S.C. v. Guardian Ad Litem,* 845 So.2d 953 (Fl. App. 2003); *Attorney Ad Litem v. Parents of D.K.,* 780 So.2d 301 (Fl.App. 2001); *In re Daniel C.H.,* 220 Cal. App. 3d 814 (1990); *In re Adoption of Diane,* 508 N.E.2d 837 (Mass. 1987); *Nagle v. Hooks,* 460 A.2d 49 (Md.App. 1983); *In re M.P.S.,* 342 S.W.2d 277, 283 (Mo. App. 1961);
[5] *Bond,* 887 S.W.2d at 562.
[6] *Id.* at 560.
[7] *Id.* at 561.

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