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Family Law: Don't subpoena mental health records

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The mental health of a party is often at issue when litigating custody or parenting time issues and medical records pertaining to a parent's mental health can be important evidence. A recent decision from the Court of Appeals calls into question how to go about obtaining a party's mental health records. *Huber v. Vohnoutka*, No. A14-1403, (Minn. Ct. App. Apr. 6, 2015).

The dispute in *Huber* arose after an attorney representing a mother in a custody proceeding obtained the father's mental health records by serving a subpoena duces tecum on the father's therapist. The father brought various claims against his therapist and the mother's attorney. The issue on appeal was whether the district court had properly granted the attorney's motion for summary judgment on the father's claim that the attorney had violated the Minnesota Health Records Act. The Court of Appeals ultimately reversed the grant of summary judgment because it concluded that there was sufficient evidence in the record to allow a finding of fact that the attorney had used false pretenses. However, in a lengthy footnote, the Court of Appeals suggested that perhaps a subpoena should never be used to obtain health records.

Under the Minnesota Health Records Act, a medical provider may release health records only in certain circumstances, one of which is when there is "specific authorization in law." Minn. Stat. § 144.293, subd. 2(2). The Court of Appeals did not need to decide whether a subpoena constituted such an authorization because it held that the subpoena was invalid and unenforceable since it was improperly served by mail upon the therapist. In dicta, the Court of Appeals reasoned that attempting to obtain health records by serving a subpoena duces tecum is impermissible because Minn. R. Civ. P. 35.04 is the exclusive means for obtaining such records where a party's medical privilege has been waived.

In support of this proposition, the Court of Appeals cited *Wenninger v. Muesing*, 240 N.W.2d 333 (Minn. 1976), *superseded by statute on other grounds*, Minn. Stat. § 595.02, subd. 5. *Wenninger* involved a medical malpractice lawsuit in which defense counsel obtained an order permitting them to informally interview the plaintiff's treating physicians outside the presence of plaintiff's attorneys. Plaintiff's attorneys sought a writ of prohibition, which was granted by the Supreme Court because Rule 35.04 is "the exclusive means" for obtaining discovery of a patient's health condition to which the privilege has been waived and does not allow private interviews. *Id*. at 410. The procedure under that rule allows relevant information to be obtained while protecting the patient's right to privacy. *Id*. at 410-12.

The Court of Appeals in *Huber* went on to point out that Rule 35 has been applied in custody litigation, citing *Morey v. Peppin*, 353 N.W.2d 179 (Minn. Ct. App. 1984*), rev'd on other grounds*, 375 N.W.2d 19 (Minn.

1985). In *Morey*, a mother initiated custody litigation and the father sought an order requiring mother's counselor to produce records of sessions involving the mother, the child, and the mother's daughter from another relationship. *Id*. at 181. The mother opposed this request and the district court stated that it would review the documents in camera and evaluate their relevance. The district court never received the counseling records as anticipated. The father's attorney subpoenaed the records but the counselor did not provide them because he did not have the mother's permission to release them. *Id*. The district court granted the mother sole custody and father appealed, challenging the district court's failure to require production of mother's counseling records. The father argued that he was entitled to the records because mother waived her medical privilege by placing her health in controversy. *Id*. at 183. Citing Minn. Stat. § 518.17, the Court of Appeals agreed that the mental health of a parent "is at issue" in custody litigation, but called for caution in terms of handling the disclosure of the records:

While Rule 35 provides an orderly handling of disclosure of records on personal injuries, its meaning and purpose are strained when a parent is required to permit an unlimited search of records related to past mental health therapy.

Upon remand the trial court should examine records demanded according to the rule and use its protective authority to prevent disclosures that are irrelevant to the custody question or otherwise annoying, embarrassing, oppressive, or unduly burdensome.

***Id*. at 183.**

The Court of Appeals in *Huber* concluded that if Rule 35.03 applies, then an attorney should seek the records under Rule 35.04 and should not attempt to obtain them by serving a subpoena under Rule 45.

Under this analysis, the key question is when does Rule 35.03 apply? Does a party waive medical privilege and trigger the application of Rule 35.04 simply by seeking custody? What if the party is only defending against allegations of poor mental health? What if the party is not disputing custody but simply wants parenting time? "The purpose of the psychologist-patient privilege is to increase the effectiveness of treatment by creating 'an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.'" *Expose v. Thad Wilderson & Associates, P.A.*, ___ N.W.2d ___, No. A14-0413, (Minn. Ct. App. 2015) (*quoting Jaffee v. Redmond*, 518 U.S. 1, 10 (U.S. 1996)). How should courts balance protecting this privilege so as to encourage a parent's mental health treatment while also receiving mental health evidence bearing upon the best interests of children?

Morey seems to say that the privilege is waived and Rule 35.04 is triggered automatically simply by becoming a party to a case in which custody or parenting time is at issue because Minn. Stat. § 518.17 makes mental health a relevant factor in assessing a child's best interests. But *Morey* does not provide a very thorough analysis of the topic. The myriad of nuances surrounding this issue have been addressed far more comprehensively in other jurisdictions. *See., e.g., Culbertson v. Culbertson*, 455 S.W.3d. 107 (Tenn. Ct. App. 2014) (detailing approaches taken by various states and applying approach more protective of the privilege, which requires examination of whether party has acted to waive the privilege). Until our appellate courts revisit this issue, the best practice is to follow the guidance offered in *Huber* and seek records under Rule 35.04 and avoid Rule 45.

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