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Minor Secrets, Major Headaches: Psychotherapeutic Confidentiality After Berg

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The New Hampshire Supreme Court's July 13, 2005, decision entitled *In The Matter of Kathleen Quigley Berg and Eugene E. Berg*[1] has profound implications for anyone dealing with issues related to the confidentiality of psychotherapy records of minors. This review of *Berg* focuses on the decision's impact on two groups with strong, and sometimes competing, interests in these issues: domestic relations attorneys and psychotherapists.

In its remarkable ruling, the New Hampshire Supreme Court made two head-turning findings:

- parents do **not** have the exclusive right to assert or waive the therapist-client privilege on their child's behalf, and,
- the assertion or waiver of this privilege by a minor of "sufficient maturity" may be given "substantial weight" by the trial court, even if that is contrary to their parents' wishes. Further, others, including the guardian ad litem and the child's therapist, may assert the privilege. The decision has far reaching implications for anyone dealing with children who are in psychotherapy.

THE DECISION

The facts of this case are common enough. When Eugene Berg and Kathleen Quigley Berg divorced, Kathleen was awarded primary physical custody of their four children. The parents shared joint legal custody, and Eugene had specific periods of visitation.[2]

Eugene initiated post-divorce litigation, asking the trial court to find Kathleen in contempt. The children were not visiting him as scheduled, and he alleged that Kathleen had alienated the children from him. Eugene requested records and notes from the children's therapists to determine whether they contained evidence of Kathleen's alleged interference with his relationship with the children. The therapists refused to produce the records on the grounds that disclosure would not serve the children's best interests.

The guardian *ad litem* (GAL) who had been appointed by the trial court to represent the children's interests asked the court to seal the children's records. Kathleen assented. Eugene objected. The marital master denied the request to seal, stating that the legal right of a custodial parent to access his children's medical records overrides the children's privacy rights.

In an interlocutory appeal, the Supreme Court was asked to address three questions:

1. Do children have a right to privacy for their medical records and communications?
2. Does the court have the authority to seal the therapy records of the parties' minor children when one parent demands access to the records for purposes of litigation?
3. Should the court have the authority to seal the therapy records of minor children when the parents are in conflict about the release and access to such records?

The Court answered all three questions in the affirmative.

In analyzing the questions presented, the Supreme Court considered and rejected Eugene's argument that a parent's right to raise his or her children is superior to the children's privacy interests. It held that while parents do have a constitutional right to raise and care for their children, that right is not absolute. The state, as *parens patriae*, may intervene if a child's welfare is at stake. "Thus, the superior court has the authority to determine whether it is in the best interests of a child involved in a custody dispute to have confidential and privileged therapy records revealed to his or her parents." 152 N.H. at 661.

The Court noted that children are "clients" protected by the therapist-client privilege codified in RSA 330-A:32. The statute does not specify who may claim the privilege on behalf of the child. In rejecting Eugene's argument that only a parent may do so, the Court noted that Eugene's argument "assumed that a parent will act solely with the children's best interests in mind. Unfortunately, this assumption may not always be warranted in the context of divorce and custody proceedings". Id. at 662. In fact, in a custody dispute, the interests of the parents may be adverse to the child's interest.

The Court held that as "clients" under RSA 330-A:32, minors may "claim" the privilege. Parents, as legal guardians may do so as well, but their right is not exclusive. Indeed, the Court extended the right to "claim" the privilege to the client's therapist, without explanation, but apparently by analogy to role of the attorney in an attorney-client relationship covered by the attorney-client privilege which is referenced in RSA 330-A:32.

In an age when it often seems that the exceptions to confidentiality swallow the rule, the Court analyzed and reaffirmed the public policy underlying the therapist-client privilege. Citing *Jaffee v. Redmond,* 518 U.S.1, 116 S. Ct. 1923 (1996), the landmark decision of the United States Supreme Court recognizing a psychotherapeutic privilege, the Court stated that "the public policy behind the therapist-client privilege may be even more compelling than that behind the usual physician-patient privilege." *Berg*, 152 N.H. at 664. The Court recognized the "serious risk that permitting parents unconditional access to the therapy records of their children would have a chilling effect on the therapist-client relationship, thus denying the children access to productive and effective therapeutic treatment." *Id*. at 665.

Having concluded that a parent does not have the exclusive right to assert or waive the privilege, the Court stated that it is up to the trial court to determine whether an assertion or waiver of the privilege is in the child's best interests. While the Court refrained from establishing a "detailed procedure" for asserting or waiving the privilege, it did provide some specific guidance for the trial court and the participants. When a privilege issue arises, the trial court must determine whether waiver or assertion of the privilege is in the child's "best interests". In making such a determination, the trial court should place particular emphasis on "preservation of the child's ability to engage in open and productive therapeutic treatment." *Id*. at 666.

While the assertion or waiver of the privilege by anyone is not determinative, the trial court may give "substantial weight" to the preference of a "mature minor". In determining whether the minor is of "sufficient maturity" to make a sound judgment as to the privilege, the trial court must consider three factors: the child's age, intelligence and maturity; the intensity of the child's preference; and whether the preference is based on improper influences.

The trial court may exercise its discretion to appoint an independent GAL to address this issue. It may also grant the GAL the right to inspect the treatment records, or it may conduct an in-camera review of the records.

The Supreme Court declined to rule on Eugene's argument that his constitutional right to confront adverse witnesses would be violated if his request for the records was denied, as not ripe for review. However, the decision appeared to suggest that if someone with access to child's records, such as the child's therapist, were to testify, then constitutional protections would operate to permit a parent in Eugene's situation access to the records.

The Court also reviewed the applicable HIPAA regulation, 45 C.F.R. 164.502 (g)(3)(ii)(B), which states that a healthcare provider may not provide access to protected information about a minor to a parent if doing so is "prohibited by an applicable provision of state or other law, including applicable case law." The Supreme Court specifically defined its own decision in *Berg* as "applicable case law" within the meaning of that regulation. "In the context of this case, the therapist-client statute prohibits the father from obtaining access to his children's therapy records absent a court order." 152 N.H. at 668-669.

THE IMPACT ON PSYCHOTHERAPISTS

New Hampshire psychotherapists are certain to enthusiastically approve of the Supreme Court's strong language in *Berg* affirming the public policy underlying New Hampshire's therapist-client privilege. However, the Court's decision also places significant additional burdens, presumably unintended, on New Hampshire's licensed psychotherapists.

Prior to *Berg,* psychotherapists were trained that parents held the exclusive right to assert or waive the psychotherapeutic privilege for their minor children. Child therapists routinely encouraged parents not to assert their right to access their child's records, but rather to respect their child's privacy so that therapy would not be compromised. Realizing that not all parents would comply, child therapists also advised mature minors that their parents, if they insisted, could access their treatment records even if discouraged by the therapist. While child therapists may not have been pleased with the parental right of absolute access, at least it was clear and easy to explain. After *Berg*, explanations about the limits of confidentiality of minors' therapy records are no longer as clear. The *Berg* decision creates significant issues for therapists with regard to informed consent for treatment to parents and their children.

Under RSA 330-A, New Hampshire psychotherapists, with limited exceptions, are required to be licensed. Licensed psychotherapists are covered by RSA 330-A:32, which creates the statutory privilege for confidential communications between a licensed practitioner and a client. Licensees are also covered by the regulations issued by the New Hampshire Board of Mental Health Practice. Pursuant to those regulations, licensees are obligated by Mhp 502.02, the "Mental Health Bill Of Rights", to engage in "documented informed consent" with their clients. Mhp 502.02(a)(7).

Before *Berg*, psychotherapists were advised that minors could not sign contracts and that informed consent documents should be reviewed and signed only by their parents. After *Berg*, therapists would be well advised to change that practice. The Court specifically ruled that under RSA 330-A, children are "clients". The Mental Health Bill Of Rights specifically applies to anyone who is "a client of a New Hampshire Mental Health Practitioner". Mhp 502.02(a). Obviously, many children are too young to participate in the informed consent process. Nonetheless, psychotherapists should have "mature minors", in addition to their parents, engage in the informed consent process.

Informed consent includes, among other things, informing clients of "the risks and benefits of the proposed treatment". Mhp 502.02(a)(7). In all situations involving minors, a parent may seek access to the child's therapy records. Many children, particularly adolescents, would object to parents accessing their therapy records under any circumstances. Such children would likely perceive parental access as a "risk" of treatment. When there is strife between the parents, as the Court points out in *Berg,* the personal interests of a parent may become adverse to the child's interests. This certainly would present a "risk" to the child's interests.

The Mental Health Bill Of Rights also states that as part of the documented informed consent "clients have the right to be informed of their rights and responsibilities, and of the mental health provider's practice policies regarding confidentiality . . ." Pursuant to the *Berg* decision, mature

minors now have the right to assert their therapist-client privilege, even against their parents. Following the assertion of that right, a court will decide whether the child is "sufficiently mature" to assert the privilege and whether the assertion is in the child's best interests following the guidelines set out in *Berg.*

Explaining these "risks" and "rights" under *Berg* will present quite a challenge to therapists who treat mature minors. These rights are complex and not easily explained even to adults, much less to minors. One of the threshold decisions a therapist will have to make is whether and when a minor client is "sufficiently mature" to comprehend these rights. After making that determination, the therapist then faces the additional challenge of how to explain these rights in a manner that is meaningful and neutral.

The very act of educating mature minors about the risks of disclosure and their right to possibly withhold their treatment records from their parents may drive a wedge between children and parents. The Court intended its decision in *Berg* to protect the therapeutic relationship. But the informed consent process may cause some parents to become angry with the therapist and terminate the therapy. Thus, the very harm the Court was trying to avoid may result from educating children about the risks of disclosure and their rights.

Regardless of the extent to which a therapist explained informed consent about *Berg* rights early in the treatment of a mature minor, a therapist will be confronted with the need for an even more detailed explanation upon receiving a request from a third party for the minor client's treatment records. Records cannot be released without the informed consent of the client. Prior to *Berg*, it was assumed that such consent was only required by a minor's parent. But as minors in treatment are now considered "clients," therapists of "mature minors" will need to determine whether the minor objects to the release of their records. This will necessarily involve a review of the records with the minor client and explaining to the client the potential risks associated with releasing the records.

Following the *Berg* decision, therapists who treat children will invariably be confronted with situations in which either a minor objects to the release of treatment records or the therapist independently determines that release is not in the minor's best interest. In either event, the therapist will then have to make a determination how to proceed. The Mental Health Bill Of Rights states that a "client" has the right "to have the information you disclose to your mental health provider kept confidential within the limits of State and Federal Law." This appears to be a regulatory mandate that mental health professionals affirmatively take appropriate steps to protect confidential information. In the *Berg* decision, the Court extended the group that may assert the privilege on behalf of the client to include the client's therapist. Given the apparent mandate under the Board of Mental Health Practice regulations to keep client information confidential within the limits of the law, it would appear that a therapist must, at the very least, assert the privilege in the context of a divorce or custody proceeding when the minor client directs the therapist to do so or when, in the therapist's opinion, disclosure would not be in the child's best interest.

The dilemmas facing child therapists in the wake of *Berg* are likely to extend beyond litigated child custody disputes. Although the *Berg* decision relates to a litigated custody dispute, its specific findings express much broader fundamental principles.[3] For example, therapists face the dilemma of what to do when no litigation is pending and they believe disclosure of a minor's therapy records of a minor client is not in the child's best interests. In *Berg*, the Court ruled: "In the context of this case, the therapist-client privilege statute prohibits the father from obtaining access to his children's therapy records." 152 N.H. at 668. The Court does not state whether "the context of the case" is limited to domestic relations litigation or extends to any situation in which release of a minor client's psychotherapy records is not in the best interests of the child. The emphasis placed by the Court on the importance of maintaining confidentiality to preserve and encourage "open and productive therapeutic treatment" would suggest the latter.

Without further guidance from the Court, therapists appear to be left in the unenviable position of having a legal duty to prevent the release of records to protect the best interests of a minor client when no one else does so. This requires therapists to determine whether confidential information should be protected from disclosure and if so, to take steps to protect it, presumably by refusing to disclose it, regardless of whether litigation is pending.

The Court's decision in *Berg* is intended to shield children from parents who put their personal interests ahead of the child's. This is certainly an admirable goal. Unfortunately for child therapists, an unintended consequence will likely be that for many of the above-stated reasons, therapists will become the target of hostile parents and their counsel. Already, domestic-relations-related complaints comprise the majority of complaints to the New Hampshire Board of Mental Health Practice.

To add injury to insult, whenever anyone objects to disclosure of minor's treatment records based on the standards articulated in *Berg*, it is likely that the child's therapist will be subpoenaed to a *Berg* hearing by one party or the other. Child therapists can expect to lose much time away from their practice with no compensation other than statutory subpoena fees and mileage. Trial courts should mitigate the adverse financial consequences to child therapists by ordering reimbursement of lost fees. This would be consistent with the spirit and intent of *Berg* as failure to do will discourage qualified therapists from taking on these cases where their services are so important for the children involved.

THE IMPACT ON DOMESTIC RELATIONS ATTORNEYS

Most domestic relations lawyers would agree with the *Berg* Court's stated intent to "preserv[e] the child's ability to engage in an open and productive therapeutic treatment." 152 N.H. at 166. However, the lawyer who represents a parent is obligated to advocate for that parent's interests. The *Berg* decision imposes a potential obstacle: the child's therapist may possess relevant evidence, for which there is no alternative source. Yet in the event of a dispute about waiver of the child's privilege, the court may require the parent's rights to yield to the child's privacy interests, thereby effectively placing the therapist off- limits as a witness.

When parents cannot agree whether the balance of competing interests weighs in favor of disclosure of the child's therapy records, the court must decide whether the privilege shall be waived. There is no clearly defined procedure for bringing such an issue to the attention of the court, and the Supreme Court declined to establish one in the *Berg* opinion. *Berg* arose in the context of post-divorce custody litigation, and many *Berg* disputes likely will be brought to the attention of the New Hampshire family or superior courts in domestic relations cases. However, the *Berg* opinion does not limit its analysis to conflicts about parental rights and responsibilities. If relief is not available in the context of a divorce or post-divorce action, counsel may need to initiate a declaratory judgment action seeking a *Berg* determination.

Either parent or the guardian *ad litem* may file a motion. In *Berg*, the GAL filed a motion to seal the children's therapy records after learning of the therapists' concerns. As suggested above, situations may arise where a therapist's professional obligations require him or her to raise the issue on behalf of a minor client. As a practical matter, a parent who disagrees with the therapist is likely to file a motion or subpoena the therapist, thereby bringing the issue to the court's attention. However, if neither parent does so, and a GAL has not been appointed,[4] the therapist may ask to intervene in the case for the purpose of bringing the issue to the court's attention.

The Supreme Court's decision does not address what may happen if a minor and the GAL appointed to represent the minor's interests disagree about parental access to therapy records. Although the Court states that a mature minor's assertion of the privilege may be given substantial weight, no process is described whereby the minor may address the court to "assert

the privilege personally." *Id*. at 666. It is highly unusual in New Hampshire practice for a minor to address the court directly.

The lawyer who brings a *Berg* issue to the court's attention should be prepared to propose a method for the court to determine whether the privilege must be waived. Options include a review of the therapy records *in camera* by the judge or marital master; review of the records by the GAL; or appointment of a special GAL, solely for the purpose of making recommendations on this issue. Counsel should consider that it may be helpful for the special GAL to have mental health training. The *Berg* Court suggests that the appointment of a special GAL may avoid controversy at trial about whether the GAL "relied" on the therapy records in making recommendations about parenting rights and responsibilities. If the GAL did rely on the records, a parent may invoke his or her constitutionally protected right to confront and cross-examine adverse witnesses to argue for access to those records. As mentioned above, Eugene Berg raised this argument, and the Supreme Court determined that it was not ripe for review. Counsel should consider carefully whether appointment of a special GAL will avoid this potential problem, as a parent may subpoena the special GAL and invoke the same argument of "reliance."

If the determination is made that the privilege should not be waived, then counsel representing a parent in a contested parenting rights and responsibilities case must seek alternative sources of evidence on parenting issues. Post *Berg*, New Hampshire courts may see an increase in the number of custody evaluations performed either by neutral professionals hired jointly by the parties, or competing professional evaluators hired by each parent to support their opposing views of what is in the best interests of the children.

Some practitioners have suggested submitting the child to a psychological evaluation, with the report to be submitted to the court; others reject this idea as too intrusive, subjecting the child to unnecessary hardship. Families who cannot afford to hire custody evaluators may invoke current court rules permitting the appointment of parenting coordinators and/or marital mediators to assist in resolving parent disputes, including disputes about access to children's medical information.

Often, divorcing parents decide to obtain therapy for their child to help the child process the breakup of the parents' marriage. If both parents are allowed to participate in selecting the child's therapist, they may be less inclined to suspect therapist bias in favor of the other parent, thereby reducing the risk of later conflicts about access to the therapist's records. Of course, such agreement may not be possible given discord between the parents, and counsel may not be involved at the stage when the child's therapist is selected to encourage consultation with the other parent.

The *Berg* decision forces domestic relations lawyers to change their approach to cases involving parenting disputes. No longer can counsel assume the availability of discovery from a child's mental health counselor. Ideally, parents should agree that neither parent will seek to call the child's therapist as a witness, or introduce the therapist's records in court. Such an agreement preserves the child's relationship with the therapist as a "safe place" where the child can discuss his or her feelings without concern that those discussions will be reported to the parents. However, such an agreement may not be possible for any number of reasons. A child's diagnosis, or lack thereof, may be the subject of a dispute for the court to decide. A child with Asperger's syndrome, bipolar illness or any number of other issues may have special needs, a full understanding of which is necessary for the court to make a determination about parenting rights and responsibilities. Accordingly, if the parents cannot or will not agree that the therapy records are to be kept out of the courtroom, then they should work with counsel to develop ground rules, defining who will have access to what information. These ground rules can be codified in an agreement for a protective order.

Divorce attorneys are well advised to try to anticipate and address disputes about access to a child's therapy records before a problem arises requiring court intervention. Court intervention, of course, is expensive, offers no guarantee of a satisfactory outcome, and presents the potential for

damage to relationships – not only the relationship between the child and his or her therapist, but also the relationship between the parent who seeks access and the child who is the subject of the dispute.

Endnotes

1. 152 N.H. 658, 886 A.2d 980.

2. The divorce preceded the legislative changes which eliminated the terms “custody” and “visitation” effective October 1, 2005. RSA 461-A.

3. The New Hampshire Board of Mental Health Practice appears to recognize the broad applicability of the Berg decision in an undated “Board Notice” to licensees posted on its website stating, in part: “Although these questions were raised in a case where parents (sic) legal custodial rights were at issue, the Board urges all mental health licensees to familiarize themselves with this opinion, particularly those who provide services to children and families. Questions regarding the application and interpretation of the Court’s opinion should be directed to an attorney.”

4. RSA 461-A:16(I) permits, but does not require, appointment of a Guardian ad Litem to represent the interests of children of the parties in proceedings for divorce, separation, annulment, paternity, or determination of parental rights and responsibilities.