

Therapy Notes Related to Murders



Murders of four family members involve issues of counselor/client privilege.

Counselors and social workers — beware. The law of confidentiality that protects communication with your client, just got more complex with this recent Supreme Court opinion.

According to the Court, therapy notes about a teen and members of his family he is accused of killing — the murders were on April 29, 1989 — are not protected by Indiana’s statutorily created counselor/client privilege.

“[T]he privilege does not extend to communication taking place before the statute was enacted,” it held.

Sessions Took Place before Murders

While preparing for trial, the prosecutors found that the Defendant, charged with slaying his father, step-mother and two stepsisters, had been in therapy days before the killings.

Along with his father and his step-mother, he had received group and individual counseling at least a dozen times, and records from these sessions

had been compiled.

At the trial court, one of the key issues was whether these records were privileged under Indiana law — or did they fall within an exception to the confidentiality statute?

Judge Found Privilege Existed

The judge reviewed the documents privately and determined that they were protected by the confidentiality privilege.

The Court of Appeals affirmed the lower court’s decision. (See the Summer 2004 issue of **FAMILY LAW FOCUS**.) But the Indiana Supreme Court vacated this holding and agreed to consider the case.

The Court focused on I.C. §25-23.6-6-1, a statute effective July 1, 1990. This law states, in part:

Client Matters Are Privileged

“Matters (told) to a counselor in the counselor’s official capacity by a client are privileged . . . and may not be disclosed . . . , except:

(1) In a criminal proceeding involving a homicide if the disclosure relates directly to the fact or immediate circumstances of the homicide.”

The Center where the Defendant received therapy argued “the critical time for determining the applicability of the statute is when

the communications are sought to be disclosed, not when the communications are originally made.”

Supreme Court Disagrees

The Supreme Court disagreed.

“The intent and dominant purpose of the statute is to grant a privilege to protect confidential communication between a counselor and the counselor’s client,” it noted.

“[B]ecause the focus of the statute is on the underlying communications and not, as the Center contends, on the ultimate disclosure of the communications, the statute only protects communications made after the effective date.”

On this issue, the Court reversed and remanded the case to the trial court for further action.

See *State v. Pelley*, 828 N.E.2d 915 (Ind. 2005).♦

SPOTLIGHT ON:

- **Privilege Is Tied to Information about Four Murders in Family...1**
- **“Parenting Time” Is Trickier.....2**
- **Teen Wants No Tie with Dad.....3**
- **Can Agreement Be Modified?...3**
- **Reality Checks: Cohabitation.....3**
- **Parents Can Teach Paganism...4**

“Parenting Time” Is Now Trickier

With apologies to the singing group Sister Sledge and its pop anthem *We Are Family*, our Court of Appeals recently crafted its own definition of family — within the context of parenting time.

In the case at hand, Mother and Father obtained a divorce when their daughter was less than four years old.

They shared joint legal custody, and the Mother was designated as the primary physical custodian of the girl.

Other Parent Should Be Offered

According to their custody order, “[w]hen it (became) necessary that the child be cared for by someone other than a parent or family member, the parent needing the child care shall first offer the (other) parent the opportunity for additional parenting time.”

[The trial court was defining family “to include step-parents and grandparents (not step-grandparents), and the parties may leave the child with these individuals without giving the other parent the right of first refusal.”]

Grandmother Cared for Girl

For a while, the Father picked up his daughter from child care at Grandmother’s house. But when the woman related that she was “concerned” about the arrangement, he filed to modify custody.

The trial court denied his peti-



Spending time with his daughter was high priority for Dad.

tion and explained the definition of “family” included step-parents and grandparents.

These individuals may keep the child before the other parent is to be offered additional parenting time, it noted.

Father Came in Third

The Father appealed, contending that the lower court’s definition of family “improperly placed him in a tertiary position to gain additional parenting time when Mother was unavailable.”

He further suggested that “limiting the definition of ‘family’ to household members would better comport with the intent of the Indiana Parenting Time Guidelines, allowing him the right of first refusal before Grandmother and (the child’s) stepfather if he is not part of Mother’s household.”

Preference Exists for Parents

On appeal, the Court agreed and pointed to “a preference for parental childcare” in the Parent-

ing Time Guidelines.

“It is usually in a child’s best interest to have frequent, meaningful and continuing contact with each parent,” it observed.

Best Interests of the Child

“The practical outgrowth of this,” the Court said, “is that the best interests of the child are also served by extending the parental childcare preference to responsible family members within the custodial parent’s household, also the child’s household.

“As a result, the definition most appropriate . . . is that ‘family member’ must be limited to a person within the same household as the parent with physical custody.”

Child Benefits from Parent

Reversing the trial court, the Court concluded that the Guidelines “clearly rest upon the concept that children benefit most from spending time with a parent.

“To that end, when the parent with physical custody *or a responsible member of that parent’s household* cannot care for the child,” (emphasis added) it held, “the noncustodial parent is to be offered the right of first refusal regardless of whether a non-household family member can care for the child.”

See *Shelton v. Shelton*, 835 N.E.2d 513 (Ind.App. 2005).♦

Obligation to Pay Costs Ends with Teen's Denial of Father

Some parents may be on the receiving end of a teenager's "I hate you," but few end up in court over the issue.

Here, though, when one such youngster repeatedly repudiated her relationship with Dad, a court relieved him of his obligation to contribute to her college expenses.

On appeal, Mom contended that the evidence did not support this finding of the trial court.

Courts of Appeals Disagreed

The Court of Appeals dis-

agreed. It found, in fact, that the girl's repudiation did serve to eliminate Dad's obligation in this regard.

According to the Court, the law recognizes "a child's repudiation of a parent . . . will obviate a parent's obligation to pay certain expenses, including college expenses."

Girl Continued with Repudiation

Although the girl's repudiation of her relationship with Dad started when she was a minor, it continued uninterrupted after she had come of age legally.

Even with court-ordered counseling — aimed at achieving a reconciliation between them — the girl remained defiantly uncooperative.

The record showed that Dad "has stood with open arms attempting to reestablish a father-daughter relationship with (his daughter.)"

Father's Invitations Are Rejected

And she "has rejected all of Father's invitations but now insists that we require Father to stand with outstretched open wallet."

That the Court refused to do.

"[W]e will not provide [a child who has repudiated his/her parent] with the means of inflicting yet another blow to a parent who has already suffered the deeply painful rejection of his or her child," it said.

See *Norris v. Pethe*, 833 N.E.2d 1024 (Ind.App. 2005). ♦



Couple began squabbling anew after modification of maintenance.

Can Marital Deal Ever Be Altered?

How can a trial court modify an agreement that it cannot order?

In short, it can't — reports this Court of Appeal decision.

On appeal, Wife argued the maintenance agreement she negotiated with her Ex was not based on statute — and the court had erred when it modified their agreement.

Wife Gets Appellate Agreement

The Court of Appeals agreed.

By statute, a court may grant maintenance only after a finding of incapacity, a need for care-giver maintenance or the necessity of rehabilitative maintenance.

But the parties to a divorce are not so limited, and they are free to make any "continuing financial arrangements as . . . they wish."

Such an agreement may not be modified, though, without their mutual assent — and, here, the trial court lacked this authority.

See *Cox v. Cox*, 833 N.E.2d 1077 (Ind.App. 2005). ♦

REALITY CHECKS:

- ✓ If you are living with a heterosexual or same-sex partner, each should be legally protected.
- ✓ Keep separate bank accounts.
- ✓ If you have property, such as homes and cars, be sure they are titled in separate names.
- ✓ Draft a contract specifying how any joint property will be divided if your relationship ends.
- ✓ If you're renting space, decide beforehand such issues as who gets the place, who keeps the deposit and who pays the fee if a lease needs to be broken.
- ✓ If any children are involved, make a will to set forth custody designations if one parent dies.

SOURCE: *The Indianapolis Star*, 1/27/03.

“Pagan” Parents Allowed to Teach

Despite filing for a divorce — and having the petition granted some nine months later — the Father was joined by his ex-Wife in appealing a section of their divorce decree.

And the issue that united these newly single folks? Religion.

Both Upset about Ban on Wicca

Both were upset by the court’s handling of their shared “practice (of) Wicca, a form of paganism.”

At one point in the divorce process, each had been interviewed by a social worker with the Domestic Relations Counseling Bureau.

From this professional had come “a report advising the trial court on appropriate custody and parenting time arrangements.”

Father Named Custodial Parent

The resulting Decree of Dissolution ordered joint legal custody but made the Father the child’s custodial parent. It also impliedly included a comment about Wicca.



Parents chose practices of Wicca instead of mainstream religion.

On its own, the Court observed “[t]hat the parents are directed to take such steps as are needed to shelter [the child] from involvement and observation of these non-mainstream religious beliefs and rituals.”

At this point, the Court of Appeals drew a line, holding that the trial court had abused its discretion in so ordering the parents.

Custodian Can Determine Religion

I.C. §31-17-2-17 provides that, except as otherwise agreed by the parties in writing at the time of the custody order, “the custodian may

determine the child’s upbringing, including the child’s education, health care, and religious training.”

The custodial parent’s authority can also be limited if there is a finding by the court that the child’s physical health would be endangered or his/her emotional health would be significantly impaired.

Neither Scenario Took Place

According to the record, neither scenario took place.

Given the Father’s statutory authority and the lack of any limitation thereof, the Court concluded that “the trial court lacked the authority to specifically limit the parents’ ability to direct their child’s religious training.”

Accordingly, it ordered the offending subparagraph stricken from the Decree but affirmed the Decree in all other respects.

See *Jones v. Jones*, 832 N.E.2d 1057 (Ind.App. 2005).♦

NEWTON BECKER BOUWKAMP

317 • 598 • 4529

ATTORNEYS AT LAW
<http://www.nbblaw.com>

317 • 598 • 4530 (fax)

M. Kent Newton
Carl J. Becker
Alan A. Bouwkamp
Judith Vale Newton
Lana Lennington Pendoroski
Leah Brownfield, Paralegal
Courtney Haines, Paralegal
LaDonna Lam, Paralegal
Jane Callahan, Administrator
Mary Myers, Administrative Assistant

knewton@nbblaw.com
cbecker@nbblaw.com
abouwkamp@nbblaw.com
jnewton@nbblaw.com
lpendoroski@nbblaw.com
lbrownfield@nbblaw.com
chaines@nbblaw.com
llam@nbblaw.com
jcallahan@nbblaw.com
mmyers@nbblaw.com

FAMILY LAW FOCUS is intended to provide updates on matters of family law. Information contained herein does not constitute legal advice, nor is this publication intended to identify all developments in family law that may affect the reader’s case. Readers should not act or refrain from acting on the basis of this material without consulting an attorney. Transmission or receipt of this information does not create an attorney-client relationship. Copyright © 2006. NEWTON BECKER BOUWKAMP. All rights reserved.