IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CAMILLA B. ZARZAUR,

Petitioner,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D16-3454

JOSEPH A. ZARZAUR, JR.,

Respondent.

_____/

Opinion filed March 27, 2017.

Petition for Writ of Certiorari – Original Jurisdiction.
Linda L. Nobles, Circuit Court for Escambia County, Judge.

James L. Chase and Hunter R. Higdon of James L. Chase & Associates, PLC, Pensacola, for Petitioner.

Robert R. Kimmel, Pensacola, for Respondent.

PER CURIAM.

Petitioner, Wife, seeks certiorari review of the trial court's discovery order requiring her to disclose "all her records regarding treatment, diagnosis, care and medications from all her psychologists, psychiatrists, counselors, and medical doctors who have treated her for any mental health issues or prescribed pain medication or any mental health medications to her in the last seven (7) years."

The order also requires Wife to submit to deposition questioning and answer interrogatories with the same scope. We grant Wife's Petition in part.

Certiorari Jurisdiction.

We have certiorari jurisdiction to review orders granting discovery that create a material injury not remediable on appeal and constitute a departure from the essential requirements of law. *State, Dep't of Children & Families v. B.D.*, 102 So. 3d 707, 708 (Fla. 1st DCA 2012); *Mullins v. Tompkins*, 15 So. 3d 798, 800 (Fla. 1st DCA 2009). Erroneous disclosure of medical records qualifies as irremediable harm. *Scully v. Shands Teaching Hosp. & Clinics, Inc.*, 128 So. 3d 986, 988 (Fla. 1st DCA 2014) (citing *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995); *James v. Veneziano*, 98 So. 3d 697, 698 (Fla. 4th DCA 2012)).

Facts and Procedural History.

Upon filing for dissolution in 2012, the parties agreed to 50/50 timesharing of their minor child, born in 2008. The parties maintained 50/50 timesharing until February of 2015, when Husband initiated involuntary commitment proceedings against Wife under the Marchman Act,[1] alleging Wife abused prescription drugs, had been under the influence of drugs or medications while driving their child, and had exhibited suicidal tendencies and episodes of violence. He simultaneously

[1] The Marchman Act permits involuntary commitment and assessment for substance abuse issues. *See generally* §§ 397.301, .601, .675, Fla. Stat. (2016).

moved to suspend 50/50 timesharing, based on the Marchman Act proceeding and his allegations supporting it. The court gave him total parental responsibility, suspending Wife's parenting time. After one day of Marchman Act evaluation, the examining physician's report concluded there was "no documented abuse."

Wife then moved to reinstate 50/50 timesharing, which Husband opposed. Both parties consented to independent psychological evaluations pursuant to section 61.20 of the Florida Statutes.[2] The trial court appointed an independent psychologist, who obtained medical/psychological and counseling records, interviewed Wife and Husband separately, administered written tests, conducted home visits, and interviewed the head of the child's school. He completed a written evaluation addressing the statutory factors of the child's best interests. § 61.13(3), Fla. Stat. He recommended that the child continue to live with Husband until the end of the 2016 school year pending an updated evaluation, but that Wife should be given more time with the child during that time.

After an evidentiary hearing, the trial court gave Wife some supervised timesharing with the child, but the parties continue to dispute the proper

[2] Section 61.20 authorizes the court to order a "social investigation and study" in actions where the parents cannot agree on a parenting plan, to gather relevant facts and make recommendations to the court. The court may consider the report and recommendations and may order additional study if the court determines that the investigation and study are insufficient. § 61.20(1), Fla. Stat.

timesharing. In connection with the continued dispute, Husband sought disclosure of Wife's mental health records, asserting that Wife had placed her mental health at issue. Wife's counsel argued that Wife had not placed her mental health at issue in a claim or defense, and that the requested discovery was overbroad and improper. Further, Wife's counsel argued that any issues had already been addressed by the independent psychological exam to which both parties had agreed, eliminating any basis for the broad discovery Husband requested. Wife's counsel requested an evidentiary hearing and in-camera review of any other mental health documents to determine whether they should be produced.

The Order Under Review.

In the order under review, the trial court granted Husband access to Wife's mental health records for the past seven years, not limited to those provided to the independent psychologist, and without requiring in-camera review. We quash this order in part.[3]

(1) The Psychotherapist-Patient Privilege.

The parties agree that Wife has a psychotherapist-patient privilege under section 90.503(2) of the Florida Statutes as to confidential communications and records of mental health treatment or diagnosis. The issue is whether, and to what

[3] The trial court also entered a protective order, prohibiting dissemination or publication of any records produced, which we approve.

extent, it applies here. A court cannot set aside the privilege on the basis of "mere allegations of mental or emotional instability." *Oswald v. Diamond*, 576 So. 2d 909, 910 (Fla. 1st DCA 1991). Any invasion of the privilege must be limited to what is demonstrably necessary on the facts of each case. Further, where parenting is at issue, "[w]hat is relevant to the trial court's determination regarding child custody is the parties' *present* ability and condition." *Schouw v. Schouw*, 593 So. 2d 1200, 1201 (Fla. 2d DCA 1992) (emphasis added); *see also Scully*, 128 So. 3d at 988-89 (requiring that discovery be limited to what is relevant and temporally related); *O'Neill v. O'Neill*, 823 So. 2d 837, 840 (Fla. 5th DCA 2002) (holding waiver of privilege is evaluated based on what occurs "during a pending custody dispute"). Previous substance abuse problems and treatment, without more, are insufficient to invade the privilege. *Koch v. Koch*, 961 So. 2d 1134, 1135 (Fla. 4th DCA 2007).

Here, the trial court did not appropriately limit the temporal reach of its order, even assuming the facts otherwise justified overcoming the privilege. Husband's most recent motion requested only three years' worth of discovery, but the court granted access to seven years' worth of records, without explaining why. In further proceedings, the parties and the trial court must focus on Wife's *present* parenting ability and fitness. If older records are pertinent to present ability, the trial court may order disclosure upon proper findings; but there must be some basis for doing so.

(2) Waiver.

Next, we consider whether Wife waived her psychotherapist-patient privilege. A court may deem the privilege involuntarily waived under extreme circumstances. In *O'Neill*, for instance, an involuntary waiver occurred when the court found the existence of a "calamitous event" after a mother threatened to kill herself and her children and then voluntarily committed herself to a psychiatric ward. 823 So. 2d at 840. *See also Miraglia v. Miraglia*, 462 So. 2d 507, 507-08 (Fla. 4th DCA 1984) (allowing testimony of former wife's psychiatrist following wife's suicide attempt undertaken while final judgment of dissolution was pending on rehearing); *Critchlow v. Critchlow*, 347 So. 2d 453, 455 (Fla. 3d DCA 1977) (finding wife's voluntary commitment for mental health treatment during custody dispute constituted waiver).

It appears the trial court either deemed the Marchman Act proceeding itself a "calamitous event," or relied on Wife's behavior before the Marchman Act proceeding as constituting the "event." At this juncture we need not determine whether a course of past conduct can constitute a "calamitous event." If and only if Husband adduces appropriately recent competent evidence of a genuine "calamitous event" could the trial court properly evaluate the existence of such an

event as a potential involuntary waiver of Wife's privilege, and then only after an evidentiary hearing.[4]

(3) Effect of Independent Evaluation.

A separate issue is whether and to what extent Wife voluntarily waived her privilege by participating in the independent psychological evaluation contemplated in section 61.20 of the Florida Statutes. The independent evaluation process is intended to avoid the privilege-invasion that would result from disclosing past records. *Leonard v. Leonard*, 673 So. 2d 97, 99 (Fla. 1st DCA 1996) ("[W]e reject the husband's meritless assertion that both he and the independent examiner are entitled to take depositions and examine the records of mental health professionals who treated the wife and her son."). *See also Flood v. Stumm*, 989 So. 2d 1240, 1242 & n.1 (Fla. 4th DCA 2008) (noting that independent evaluation assists the trial court without invading psychotherapist-patient privilege) (citing *Schouw*, 593 So. 2d at 1201). Although the independent valuation process is intended to avoid disclosure of past records, records that the parties voluntarily give the independent evaluator lose their privileged status. *See McIntyre v. McIntyre*, 404 So. 2d 208, 209 (Fla. 2d

[4] Husband also asserted that Wife waived her privilege by attempting to set aside the parties' settlement agreement for incapacity from an adverse reaction to Lunesta, which she had been prescribed and had taken before signing the agreement. Wife sought only to set aside the financial terms of that settlement, not putting her reaction to Lunesta at issue in relation to timesharing.

DCA 1981). Likewise, the parties' communications to the evaluator are not privileged. § 90.503(4)(b), Fla. Stat.

Consistent with these principles, the parties agreed that both of them could discover records furnished to the independent psychologist, subject to protective order against outside disclosure or dissemination. They also agreed they would have the right to depose the independent psychologist, which the law allows. *Kern v. Kern*, 333 So. 2d 17, 20 (Fla. 1976); *see also Hill v. Hill*, 371 So. 2d 573, 575 (Fla. 1st DCA 1979) (applying *Kern* to child custody evaluation prepared by authorized state agency). Because of the parties' agreement to provide records to the independent psychologist, and their failure to object to the scope of the order giving the psychologist access to records, we deny Wife's petition insofar as the trial court's order granted Husband access to records actually provided to the independent psychologist.

The trial court erred, however, in failing to limit disclosure of the parties' records to those produced to the independent psychologist. This was a departure from the essential requirements of law because it improperly invaded Wife's privilege. In further proceedings, the trial court may not allow disclosure of Wife's privileged information without determining whether specific information is within the scope of the waiver resulting from Wife's agreement to disclose records to the independent psychologist. Any disclosures beyond what Wife agreed to provide

the independent psychologist may be ordered only upon a record of competent, appropriately relevant, and timely evidence showing an actual or involuntary waiver by the Wife within the meaning of the relevant authorities.

(4) In-Camera Review Required.

Florida courts consistently require in-camera review of medical records so the trial court can ensure that only relevant, timely documents are disclosed; and in this context, that only non-privileged documents or documents as to which the privilege has been waived are disclosed. Such an in-camera review is mandatory. *Scully*, 128 So. 3d at 989 (requiring in camera review); *James*, 98 So. 3d at 698 ("[W]hen a party challenges a discovery order concerning material to which the party asserts his or her constitutional right to privacy, the trial court *must* conduct an in camera examination to determine the relevance of the materials to the issues raised or implicated by the lawsuit.") (emphasis added) (citing *Bergmann v. Freda*, 829 So. 2d 966, 967 (Fla. 4th DCA 2002)); *Barker v. Barker*, 909 So. 2d 333, 338 (Fla. 2d DCA 2005) (finding departure from essential requirements of law by not holding in camera inspection of broad grant of medical records discovery). No documents may be disclosed to Husband or his counsel until after the trial court makes the required in-camera inspection to determine that every document disclosed is relevant, timely to the issue of Wife's then-present fitness as a parent, and either not privileged or within a valid waiver of Wife's privilege.

Order QUASHED.

WINSOR, J., CONCURS; KELSEY, J., CONCURS SPECIALLY WITH OPINION and MAKAR, J., CONCURS IN PART, DISSENTS IN PART WITH OPINION.

KELSEY, J., concurring specially with opinion.

I write separately to encourage the parties and the trial court to advance this case to disposition expeditiously and with due concern for the impact that continued litigation has on everyone involved, particularly the child. This case, like too many others involving similar issues, has languished far too long. The parties' minor child was three years old when the dissolution action was filed, and will turn nine shortly after the opinion is released. Yet the principal issues relating to the marriage, time-sharing, finances, and property distribution remain unresolved. The very pendency of litigation and accompanying discovery, hearings, and disputes, is good for no one (except potentially for generating attorney fees).

The best interests of the child are paramount. § 61.13(3), Fla. Stat. (2016) ("[T]he best interest of the child shall be the primary consideration."). It appears this child has never been aware of a time when her parents were not embroiled in this ongoing tug of war, and she cannot have any memory of a time when she had anything resembling a normal relationship with her mother—in spite of the fact that the independent psychologist rendered an official report over a year ago recommending that the maternal relationship be substantially expanded and strengthened. Two mental health care professionals who evaluated Wife noted that marital discord, the dissolution proceeding itself, and deprivation of timesharing with her child have contributed substantially to Wife's stress levels, which she described

as “unbelievably” stressful and “beyond words.” Especially in cases where there may be an imbalance of emotional strength as well as of finances, care should be taken to avoid prolonging disposition unnecessarily.

MAKAR, J., concurring in part, dissenting in part.

At issue is a discovery order requiring that Camilla B. Zarzaur disclose "all her records regarding treatment, diagnosis, care and medications from all her psychologists, psychiatrists, counselors, and medical doctors who have treated her for any mental health issues or prescribed pain medication or any mental health medications to her in the last seven (7) years." The order arises in this dissolution/time-sharing dispute due to the need to determine whether Ms. Zarzaur has the ability to resume greater visitation with her daughter or return to the custodial arrangement in place before court orders were entered curtailing her contact with her daughter based on judicial findings that she posed the potential for harm to herself and others arising from substance abuse and mental health issues. Ms. Zarzaur asks that we grant her petition and quash the trial court's order, which should be done in only one limited respect. Broward County v. G.B.V. Intern., Ltd., 787 So. 2d 838, 844 (Fla. 2001) (On certiorari review, our role is "to halt the miscarriage of justice, nothing more," leaving the parties to proceed thereafter as if "the order reviewed not been entered.") (citation omitted).

The trial court's order extends to seven years of records, but Mr. Zarzaur initially requested only three years and later made the duration unlimited. No basis in the record exists for a durational limit of seven years (which appears to coincide with the child's age) or beyond, though an adequate basis exists for the three-year

period initially sought, during which much occurred relative to the Ms. Zarzaur's fitness. For this reason, the order should be quashed to the extent that it requires disclosure of records that existed more than three years before the date of the order (excepting out those provided to the independent psychologist), leaving open whether a greater duration is justifiable upon an adequate showing of need.

But that is the extent to which relief is justified because the record establishes that Ms. Zarzaur's self-destructive behavior has placed her mental health and substance abuse at issue in determining what degree of parental responsibility she is capable of achieving, thereby implicitly waiving her statutory privilege in the documents requested. O'Neill v. O'Neill, 823 So. 2d 837, 841 (Fla. 5th DCA 2002) (statements and behavior of parent can collectively "constitute a calamitous event and support an implicit waiver of the statutory privilege"); see also Critchlow v. Critchlow, 347 So. 2d 453, 455 (Fla. 3d DCA 1977) (holding waiver of patient-psychiatrist privilege where former wife was voluntarily committed for mental health treatment and mental health was vital to a proper determination of custody); see generally Bruce G. Borkosky & Mark S. Thomas, Florida's Psychotherapist-Patient Privilege in Family Court, Fla. B.J., May 2013, at 35, 36 (providing examples of waiver of privilege where spouse was "too emotionally distraught to enter into a settlement agreement," where "information sought relates directly to the well-being of the child or to the parent's ability to adequately care

for the child, and the child may be in danger," or where a "calamitous event has occurred, such as an attempted suicide").

The record reflects a prolonged series of troubling events such as a suicide threat, prescription drug abuse, full-time illegal marijuana use, endangering her child due to reckless and dangerous acts such as nodding off while driving on a bridge, neglecting her child's needs at school and allowing truancy, having a live-in boyfriend in violation of the parenting plan, alleging incapacity from use of Lunesta® in entering the settlement agreement, and so on. Her friends, the nanny, a boarder, and others unvaryingly testified that these types of major problems exist, which supported judicial intervention to protect her children and a waiver of her privilege in the requested mental health and medication records. That the Marchman Act proceeding, standing alone, didn't result in confirmed substance abuse doesn't negate the substantial evidence establishing mental health or substance abuse problems.

And Ms. Zarzaur's behavior is not just affecting her child with Mr. Zarzaur. In a parallel proceeding, before another circuit judge, the same story is playing out as to her older child from a previous marriage, who lives with her; the two proceedings are mirror images of one another. Based on Ms. Zarzaur's serious problems, the trial judge in that case has taken much the same steps as in this case to shield Ms. Zarzaur's children from her. The sad reality is that the oldest child

appears to be the "adult in the room," raising the mom and sheltering her from a further downward spiral. The trial judge in this case was very aware of the evidence and rulings in the parallel case, and was and continues to be in a superior position to determine the extent to which Ms. Zarzaur's ongoing behavior justifies release and review of records related to her mental health and substance abuse (subject to the protective order that was entered). On the current record, it is plain that the discovery sought is germane and potentially critical in determining the extent to which Ms. Zarzaur can undertake a greater role in her children's upbringing.

The trial court held an evidentiary hearing but didn't make an explicit finding that the series of disquieting events individually or collectively crossed the threshold and became "calamitous," thereby supporting a broad waiver and scope of discovery. In this regard, Ms. Zarzaur makes the point that appellate review is made difficult without explicit factual findings that a calamity exists, which is true. Perhaps judicial hesitancy exists to conclude that a "calamitous event" has occurred due to its stigma on the parent; but, the counterpoint is that the situation in this case is little different from that in O'Neill, which involved substance abuse, ideations of suicide, mental health problems, and related factors that compromised the children's safety and well-being and impliedly waived the parent's privilege in the records sought. 823 So. 2d at 839-41. In that case, the Fifth District concluded that the wife's "statements, when joined with appropriate supporting behavior, as here,

constitutes a calamitous event and support an implicit waiver of the statutory privilege. *A trial court is not required to wait until a calamitous event becomes a tragedy*." Id. (Emphasis added). As in this case, "there was additional testimony demonstrating that [the parent] was unable to function as a properly nurturing parent" and that "she had driven a motor vehicle when she was apparently intoxicated with one of her children as a passenger." Id. at 41. Though not identical, the two situations are nearly bookends, justifying the discovery order below.

Present fitness to parent is a function of the totality of all relevant information, including records of mental health and substance abuse from the recent past, provided a showing is made as to how they contribute to understanding present fitness. The Second District highlighted this point in Schouw v. Schouw, 593 So. 2d 1200, 1201 (Fla. 2d DCA 1992), saying that "[w]hat is relevant to the trial court's determination regarding child custody is the parties' present ability and condition," but saying in the next sentence that "[t]here was no showing by the wife that the husband's prior psychological records would contribute to such a determination." Id. In sharp contrast to Schouw, the three-year window of records and the testimonial evidence here show an interwoven pattern of distressing conduct that contributes to the determination of the "present ability and condition" to parent. The trial court is required to weigh all relevant evidence in making this

judgment, discounting what doesn't contribute to an accurate prognostication of current fitness; but it is not required to wear judicial blinders.