

IS THE PRIVACY OF THERAPY A SECRET TO FOSTER CHILDREN?

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Abstract

This article examines the standard of care owed to foster children as to the privacy of their therapy. In many U.S. jurisdictions, the presumption is that such therapy information is not private. This article explores countervailing privacy arguments and asserts that it is the legal duty of the child's counsel not just to avoid unnecessary disclosure of a child's confidential communications to her therapist, as some have suggested, but also to vigorously protect the privacy of those conversations. In many states, statutes and long standing practices do not afford foster children the privacy they need and deserve so that therapy can be effective, and protection is overdue. Suggestions for changes to statutes and practices conclude the discussion.

I. Introduction

This article will examine the standard of care owed to foster children as to the privacy of their therapy. In many U.S. jurisdictions, the presumption is that such therapy information is not private. Of the reasons offered for this presumption, paramount is that the mission of dependency courts is to serve the best interests of the child. In order to determine that interest, the court and social workers need as much information as possible about a child's emotional state - especially how the child perceives past, present and potential caregivers. According to this argument, what services abused and neglected children need and with whom they should live are of such fundamental importance that there should be no barriers to obtaining information that would assist those trying to help these children.

This article explores countervailing privacy arguments and asserts that it is the legal duty of the child's counsel not just to avoid unnecessary disclosure of a child's confidential communications to her therapist, as some have suggested,¹ but also to vigorously protect the privacy of those conversations. In a few states, statutes and case law align to support privacy. In other states, statutes and long standing practices do not afford foster children the privacy they need and deserve, and protection is overdue. California law and practices will serve as a basis for this discussion. Statutes more than a decade old require vigorous protection of such privacy, but case law has helped maintain some of the old practices.

For readers less familiar with legal process in the foster care system, here is a short primer. Children in the system are known by different names in different states: juvenile dependents, CHINS (children in need of services), CHIPS (children in need of protection), among others. Courts having jurisdiction over these children may be called juvenile dependency courts, child protection courts, family courts, etc. The legal structure of the modern foster care evolved in part from the federal Adoption Assistance and Child Protection Act of 1980,² and the Adoption and Safe Family Act of 1997.³ Many states have an integrated agency that administers the system for the entire state. In the remainder, including California, each county has its own agency operating under state laws and regulations, but subject to local policies.

In most states' systems, the Child Welfare Agency, the Department of Children and Family Services, or some other agency charged with this function (hereinafter "the Agency") evaluates the circumstances of children whose abuse or neglect comes to its attention. In a small percentage of these cases, the Agency files a court petition seeking court jurisdiction over the child. In most of those cases, the children are removed from the home. At the first hearing, the dependency court appoints counsel for the children and for each of the parents. After two or more hearings, the court usually takes jurisdiction over the case and approves case plans for the Agency and family to follow. These case plans may include family and

individual mental health therapy. Subsequent review hearings track the progress of the Agency and the family. Sometime later, the court terminates jurisdiction, either because the children have been returned to their parents and are safe, have been adopted or placed in a guardianship, or have aged out of the system. All states are supposed to follow federal and state laws requiring that various steps in the process occur within particular timeframes, both to protect due process rights and to ensure that children will be in permanent homes in due course.

At all of the various points in the process, in order to guide actions or make recommendations to the court, the child welfare worker may seek mental health information about the child that is subject to some degree of confidentiality. The extent of this confidentiality and the protections that it should be afforded are key subjects of this article. Also, at various hearings along the way, the Agency or another party may attempt to introduce evidence containing confidential mental health information that could be protected by evidentiary privilege.

The first discussion in this article is a general review of what level of care society owes foster children. Any compromises concerning that care should be informed by commonly agreed upon standards. Otherwise, application of the laws governing these children will be neither consistent nor fair. Flowing from these principles, what is the purpose of therapy? Specifically, how much does information gathering intrude on the process, and do the benefits of that intrusion outweigh any harm it causes? Second is a discussion of the law in California concerning out of court disclosures of therapy information to persons such as social workers, parents and caregivers. Third is a review of the history of the exclusion of confidential psychotherapist-patient communications as evidence in court. This includes an informal survey of some states' protection of the privacy of the mental health information of foster children. Then there is a detailed examination of what the law in California says about the presentation of such mental health information to the court, and thus to other parties in the case. While California and some other states have adequate or nearly adequate statutory protection of the privacy of foster children's therapy, the key to actual protection is the willingness of minor's counsel to assert statutory authority and the court's commitment to support this effort. But convenience is a form of inertia and old habits die hard.

Fourth is a set of recommendations. Minor's counsel should actively protect their clients' stated desire for privacy, and explain children's privacy rights to them in an age appropriate manner. Using the protocol provided may help those possessing confidential mental health information about foster children better protect privacy. Those states without protections against disclosure of confidential mental health information at least as strong as those in California should strengthen their laws. States with exceptions for psychotherapist-patient privilege in dependency cases should eliminate this lapse in protection. Foster children should not give up their fundamental privacy rights by virtue of their parents' misdeeds.

In California, some legislative clean-up would go further to protect the privacy of foster children's therapy. Case law has misinterpreted the intentions of the Legislature, and legislative clarification is long overdue. There are also some minor fixes that would eliminate what appear to be unintentional conflicts in the law. A substantial suggested change would deny parents access to the confidential mental health information of their children that have been removed from their physical custody.

Like many states, unfortunately, California has a confusing dual role for dependency counsel. Well established case law instructs all lawyers to maintain an absolute duty of loyalty to the client.⁴ Section 317(e) of the California Welfare and Institutions Code obligates the child's counsel to tell the court the child's stated interests, but at the same time requires counsel to advocate for the client's "interests" and not to advocate for return at the risk of safety.⁵ A recent Court of Appeal opinion holds that minor's counsel has a "paramount duty to serve the minor's best interests" in lieu of stated interests.⁶ Although it does not appear that many minors' counsel are so limiting their advocacy for their older clients, confusion regarding the role of counsel continues to plague many client relationships. Another significant

recommended change would set twelve or over as the presumptive age at which counsel should represent a dependent minor's stated interests, rather than being under an obligation to advocate for what in counsel's opinion was best interests even if contrary to the client's wishes. As described below, this change would end the conflict caused by these dual mandates, as well as the fear some foster youth have that in revealing confidences to their therapists their own counsel could discover those confidences and use them to advocate against the youth's stated desires.⁷

So as to set proper expectations for the reader, this article does not explore whether court ordered psychological evaluations should be confidential. Across all U.S. jurisdictions, such evaluations are rarely excluded on the basis of evidentiary privilege.⁸ In large part, this is because it is assumed that the person being evaluated is not receiving treatment and has no expectation that his communications with the evaluator will be confidential. Also, this article does not address the privacy rights of minors that have been conserved - that is placed in locked psychiatric facilities by order of the court because they are a danger to themselves or others.

II. What Standard Of Care Do We Owe Foster Children - Where Is The Balancing Point?

An appropriate starting point in any analysis that compares competing interests is to examine the ethical values that underpin the placement of the balancing point between them. Many legal writers visualize balancing tests as weights on the scales of justice. But a more realistic analysis recognizes that the outcome of balancing tests sometimes is determined before relative weights are assigned to the two interests, because the arms of the scale may not be of equal length. By looking at the pivot point on the scale, this alternative approach gives new meaning to the expression "the long arm of the law." If two interests are of equal weight, the interest at the end of the long arm likely will tip the scale. An important factor that often lengthens an arm is cost. If an interest costs less, it may be placed at a greater distance from the pivot point despite its being less fair, efficacious or just.

Determining how much care we owe foster children is not an academic question. In fact, courts and social workers make thousands of such choices in individual children's cases every day, influenced by the recommendations of various professionals using their own scales-some with unequal arms that only reflect present and not future societal costs. A key question is the extent to which the lengths of the arms of the balancing scale should reflect long term social values and the costs of realizing the goal that foster children become fully functional and responsible adults.

The foundation of one model of care is rooted in Section 364(c) of the California Welfare and Institutions Code, which says that the standard for dismissal of the foster care case of a child living at home is met when the circumstances of that child would not justify court supervision if jurisdiction were ended.⁹ Essentially, this means that if there is no current risk of physical or emotional harm to the child caused by the custodial parent or legal guardian,¹⁰ the court must dismiss the case. By this threshold, the standard of care owed to foster children is only what is needed to keep a child's well-being above the level that mandates removal. Stated another way, although the circumstances of many children are less than ideal, it is not the government's job to be the perfect parent.¹¹ The foster care system is only intended to address parent's failures, and to solve children's mental health problems only to the extent to which parents are unable or unwilling. Public resources are limited, and any particular proposed use must be balanced against other competing social needs and in consideration of ebbs and flows in state revenues.

An alternative model assumes a greater social responsibility toward child victims of abuse or neglect, providing them whatever services are needed to mitigate the harm suffered. The first basis for this responsibility is pragmatic. For example, the national push to extend foster care to age twenty-one reflects the recognition that providing more resources to foster youth reduces the likelihood of their incurring

societal costs as adults, such as from welfare, incarceration, or rehabilitation, and also improves their lives as adults and their contributions to society as taxpayers.¹² Estimates of the return on this societal investment on each dollar invested in foster youth range from \$1.35 in direct savings to government, to as high as \$5.16 in overall benefit to society based partly on the higher lifetime earnings of youth receiving extended foster care.¹³

This alternative model also relies on the notion of special duty - that in many cases the state may have a heightened responsibility to a child because its previous actions or inactions increased the harm suffered by that abused or neglected child. The vast majority of foster care cases involve families that have come to the attention of the Agency more than once before the events that caused the court to take jurisdiction. Missed warning signs could have prevented injury to the child and remedial actions based on those signs might have precluded the need for removal. Courts recognize a special duty to protect children that have been removed from the home,¹⁴ sometimes even when the child is returned to or placed with a parent¹⁵ - despite the limitations on damage suits against state actors created by the U.S. Supreme Court in *DeShaney v. Winnebago County Department of Social Services*.¹⁶

Using a scale informed by one of these models improves the chances that in weighing risks to the therapy patient, the balance that is reached reflects the society's values. Two areas of privacy concerns illustrate relevant competing interests: effective treatment versus disclosure that could be helpful in case management decisions, and sharing information between individual and conjoint therapy.

A. Therapy In Foster Care: Treatment Versus Disclosure

Extending the care versus cost analysis, what should be the balance between privacy and informational access to a child's therapy? The access side of the scale includes the fact that the resources of foster care are limited. For example, one way of preserving the privacy of therapy is to gather information about a child's emotional well-being using an evaluator independent of the child's therapist.¹⁷ As discussed below, there are therapeutic advantages to such an approach that flow from respecting privacy, but an independent evaluation adds to short term costs. Also, from a therapeutic standpoint, subjecting abused children to questioning by too many professionals could increase their trauma. This suggests limiting the number of different mental health professionals evaluating foster youth. Finally, allowing the therapist to freely communicate with social workers, foster parents, teachers and the courts could lead to better decision making about issues such as placement and visitation.¹⁸ For high needs children, more communication could facilitate anticipating mental health crises.

The privacy side of the scale asserts that each child deserves the best treatment. A system that sends children the message that their healing does not come first may reinforce feelings set by their abusive or neglectful parents that these kids' well being is not valued. They may see therapy less as a friendly place for healing and more as a place for spying on their personal thoughts and emotions. There are extra costs incurred if the therapeutic relationship is destroyed by a breach of trust and therapy must be restarted with another therapist, as discussed below. Worse still, if the child refuses further therapy, downstream societal costs from a failed launch into adulthood can run to seven figures.

In many states, including California, parents whose children have been removed can still access their children's mental health information,¹⁹ subject to some discretion by the therapist.²⁰ Such parents may not act in their children's best interests regarding use of mental health treatment,²¹ and may use confidential information from that treatment to frame a litigation strategy hostile to their children's stated wishes or best interests - even if that information may not be directly admissible in court.

B. What Are The Risks Of Disclosure?

A 2009 article by Law Professor Deborah Paruch reviewed a number of published studies that examined whether lack of confidentiality in psychotherapist-patient communications inhibited the process and reduced patients' forthrightness and disclosure of symptoms. She concluded that there was ample evidence of a detrimental effect.²² The American Psychological Association (APA) asserts that confidentiality is meaningful to the patient only if it can be guaranteed against intrusion by persons or institutions outside the sessions. According to the APA, psychotherapist-patient privilege has "little value if it could be abrogated whenever information from therapy sessions might have a significant impact on the outcome of the case."²³

Law Professor David Katner's 2004 article, *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, asserts that children who experience disclosure of their confidences may be unwilling to trust future therapists, social workers or counsel.²⁴ This is because treatment of a child who has been abused often requires helping the child create a sense of trust, autonomy and personal boundaries. Where trust of adults is absent it has to be created and nurtured, thus enabling the child to reveal past events and present emotions to a "safe" adult without fearing adverse consequences. Treatment may not be effective where trust is violated, and the child is unable to experience autonomy and feel in control of personal boundaries. Writing about the therapy confidentiality of a foster child, the California Court of Appeal in *In re Kristine W.* observed that Kristine probably felt "betrayed and powerless, and it would be regrettable if the entities trying to help her were inadvertently to reinforce those feelings by allowing her innermost thoughts to be disclosed by and to those she distrusts."²⁵ It may be impossible to even start a therapeutic conversation with an older victim unless confidentiality is assured.

As Professor Katner points out, there is also a considerable stigma surrounding mental health treatment, which is increased with disclosure of the details of the symptoms, diagnosis and nature of treatment. Willingness to engage in treatment often is reduced if there is an expectation or fear of such disclosure.²⁶

The consequences of lack of privacy in therapy are analogous to the old adage about the work ethic in the old Soviet Union. "We pretend to work, and they pretend to pay us." In other words, without candor the patient pretends to engage in therapy and the therapist pretends to be engaged in healing, but both know they are engaged in a form of charade.

Expressed another way, lack of confidentiality creates what can be described as *the quantum physics observer effect*, whereby the act of measuring a phenomenon changes it. Children who know their thoughts ultimately may be revealed to their parents may tell their therapists what they think their parent(s) want them to say - either out of fear or loyalty - thus profoundly changing the therapists' conclusions. Alternatively, children may decide to say nothing at all about what is at issue in the dependency case. These patients get no help, and the social workers and the court get no information in a sort of pact of *mutual assured destruction* - this kind of scorched earth standoff was known by the acronym *MAD* in the nuclear standoff between the superpowers during the Cold War.²⁷

These risks are even greater for sexual abuse victims. In a common pattern, a child abuser, who is a parent or relative, intimidates the victim into keeping the abuse secret. When the child eventually reveals the secret, it results in the child's removal from the home. Because the child is punished twice - first for keeping a secret and then for revealing it - secrets become very stressful for that child. The created secret maintains the abuse, but disclosure of the secret destroys the family. As abuse expert Tilman Furniss has described it, child sexual abuse is a "syndrome of secrecy for the child."²⁸

Therefore, sexual abuse presents enormous challenges for the therapist. As a patient, the victim often is reluctant to reveal private information, fearful of the consequences in doing so. This creates a classic

chicken and egg situation. A sexual abuse victim may never develop a healthy ability to trust adults without therapy, yet cannot meaningfully engage in therapy because of an inability to develop the trust needed to reveal private information. If those interactions appear to the child to be exploitive, have a hidden agenda or be subject to disclosure, a therapeutic level of trust may never be achieved. As Furniss observed, whether sexually abused children “are motivated to trust is the result not of an internal state but of an interactional process between professionals and the child.”²⁹

As will be discussed in Part V.B., there are some ways to mitigate the potential damage from disclosure, the foremost being discussing the need for disclosure with the patient so that the patient - with the advice of counsel - may have the option to permit the disclosure. This is the reverse of the adage sometimes followed in business and law: it is better to beg for forgiveness than to ask for permission. In building and preserving trust, an ounce of permission is better than a pound of apology.

C. Balancing Privacy In Conjoint Therapy

Although conjoint therapy is a subject that would merit comprehensive discussion in a separate article, it deserves at least a brief mention as a privacy issue here. One of the most challenging privacy issues occurs in conjoint therapy where the same therapist does individual therapy for a client, and then family therapy between that client and other family members. When the reason for treatment is limited to the clients’ difficulty in understanding and communicating with each other, this arrangement may allow the therapist to more efficiently get to the root of the problem and guide its resolution. Some clients prefer to deal with only one therapist instead of having one for individual therapy and another for family therapy.

Alternatively, having a separate therapist for individual therapy and another for conjoint sessions can improve the therapeutic benefits by greatly reducing the risk of an inadvertent damaging disclosure,³⁰ thus increasing the client’s trust in the therapist and privacy of their communications in individual sessions. The importance of privacy generally is greater in situations where there is a high degree of conflict within the family.

The therapeutic dangers of using the same therapist for both individual and family therapy have been well known for decades. From a highly respected clinical text:

Colleagues and patients alike have inquired about the advisability of the individual therapist’s working with both one individual in the family and the family as a whole in ongoing treatment. It has been our experience that this does not work out well. Being the therapist to the whole family interferes greatly with the work of individual therapy. Issues of confidentiality, the specialness of the support and rapport between the therapist and patient, and the unique “acceptance” of the patient’s perspective would all be significantly compromised by an extended combination of individual and family therapy with the same therapist.

Similarly, family therapy will be untenable if one family member has a ““special” relationship with the therapist. Not only may the others feel there is bias in the therapist’s judgments, but one individual’s talking to the therapist between family sessions may undermine the powerful pressures to change the family system that family therapy attempts to generate. For these reasons, we advise even those individual therapists who are comfortable with and experienced in family therapy to refer the family to a colleague if ongoing family work seems an appropriate treatment modality.³¹

Other highly respected texts criticize using the same therapist for both individual and family therapy, saying that in such a situation, “The patient in individual therapy feels that what he or she reveals in the

one-to-one situation may in some way (either overtly or covertly) be communicated to the family by the therapist.”³² While certainly a foster youth who has legal control over the disclosure of his confidential psychotherapist-patient communications should have the right to decide whether to share the same therapist in individual and conjoint therapy, any patient in individual therapy in this situation also should be afforded this decisional autonomy in order to ensure the best outcome. Special care should be taken regarding conjoint therapy when a child is near the age of having legal control over disclosure - discussed in the next Part. If that child subsequently objects to disclosure it might then be necessary to bring in a new therapist, thus delaying treatment.

In weighing the proper balance between effective treatment and the competing interests aided by disclosure, the harmful effects of disclosure on the treatment should affect the scale so that disclosure is reduced.

III. Out Of Court Disclosures Of Confidential Psychotherapist-Patient Communications And Therapy Records

The laws regarding disclosure of therapy records and confidential psychotherapist-patient communications are divided into two areas: confidentiality and privilege. It is important to distinguish between the two.³³ Confidentiality laws govern the conduct of healthcare providers and restrict the circumstances in which a provider may disclose mental health information about a patient to a third party, including the Child Welfare Agency. Privilege laws, discussed at length in the next Part, govern the submission of mental health information to the court and parties in the case.

A social worker,³⁴ relative caregiver (if granted the authority by the court³⁵), or parent (if his authority has not been removed by the court³⁶), can sign an authorization for a California foster child to receive mental health treatment. However, that person’s ability to authorize mental health treatment does not by itself confer a right to access or control access to information about that treatment. One key concept is that if a minor in the foster care system legally can consent to treatment in therapy, that minor controls access to her confidential therapy records and communications, except in exigent circumstances³⁷ or pursuant to a court order or subpoena.³⁸ If the minor is not lawfully able to consent to treatment, the court may limit the parents’ authority regarding the child’s mental health information,³⁹ and the therapist also may limit their access based on detriment to the child.⁴⁰ A recently enacted statute addressed the ability of social workers to access the therapy records and confidential communications of minors not lawfully able to consent to treatment.⁴¹

Thus, consent to treatment is key to understanding the statutory framework in California. Section 6924(b) of the California Family Code specifies that a minor twelve years of age or older may consent to therapy if the minor “is mature enough to participate intelligently,” and is either in “danger of serious physical or mental harm to self or to others” without therapy, or “is the alleged victim of incest or child abuse.”⁴² For patients receiving care via private insurance, the dangerousness and abuse victim requirements were dropped in 2011.⁴³ (The Legislature feared empowering poor children to seek counseling would add additional costs to Medi-Cal, the state’s public insurance program.⁴⁴) There is nothing in the legislative history of Section 6924 of the Family Code to suggest that the legislature intended to treat child victims of abuse and neglect differently regarding consent, so for this purpose it is reasonable to assume that all children in foster care are victims of child abuse.⁴⁵ Here the analysis diverges slightly as to access versus the ability to authorize the therapist to disclose confidential information to others.

A. Access

Minors have a right to confidentiality in their therapy. Licensed therapists, psychologists and their

supervisees are prohibited from disclosing “any individually identifiable information” without a court order or authorization, except to, among others, “the patient or the patient’s representative.”⁴⁶ A patient’s representative is a “parent or guardian of a minor who is a patient.”⁴⁷ These statutes do not grant social workers a right to this confidential information. There is no legal authority under which a social worker is a “guardian” in this context, or any other context in health care or juvenile law.⁴⁸

The right of the parent or guardian to access minors’ therapy records and confidential psychotherapist-patient communications is limited by Section 123115 of the California Health and Safety Code, which reads:

- (a) The representative of a minor shall not be entitled to inspect or obtain copies of the minor’s patient records in either of the following circumstances:
 - (1) With respect to which the minor has a right of inspection under Section 123110.
 - (2) Where the health care provider determines that access to the patient records requested by the representative would have a detrimental effect on the provider’s professional relationship with the minor patient or the minor’s physical safety or psychological well-being.⁴⁹

Under Section 123110(a) of the Health and Safety Code, minors have the right of inspection to records concerning any treatment for which they are ““authorized by law to consent.”⁵⁰ Thus, Section 123115 means that a parent cannot access a minor’s therapy records or confidential psychotherapist-patient communications if the minor is age twelve or over, of sufficient maturity and a victim of child abuse.⁵¹ There is no distinction in these statutes between what dependency law considers an offending parent and a nonoffending parent.⁵²

The only exception that explicitly addresses social worker access is Section 56.103(e)(1) of the California Civil Code, effective in 2008. The statute also applies to caretakers and custodial parents. This exception for limited disclosure was negotiated with interested stakeholders and passed both chambers of the Legislature by nearly unanimous votes.⁵³ This statute states that:

if a provider of health care determines that the disclosure of medical information concerning the diagnosis and treatment of a mental health condition of a minor is reasonably necessary for the purpose of assisting in coordinating the treatment and care of the minor, that information may be disclosed to a county social worker, probation officer, or any other person who is legally authorized to have custody or care of the minor.⁵⁴

Under this change in the law, the decision to exercise the exception is squarely in the hands of the mental health provider, not the social worker. However, the statute states that it does not abrogate other privacy protections.⁵⁵ Thus, disclosure of mental health information about foster children age twelve or over still requires the patient’s release.⁵⁶ In addition, disclosure of “psychotherapy notes” is barred by Section 56.103(e)(2) of the Civil Code.⁵⁷

Section 56.103(e)(1) of the Civil Code goes on to put a duty of confidentiality on the social worker or caretaker who receives the information the therapist chooses to disclose: “The information shall not be further disclosed by the recipient unless the disclosure is for the purpose of coordinating mental health services and treatment of the minor and the disclosure is authorized by law.”⁵⁸ This means that the information disclosed under Section 56.103(e)(1) cannot only be passed on by the recipient for any other purpose other than for coordinating treatment and mental health services - a narrower definition than the one that initially enabled the disclosure, “coordinating treatment and care” - and then only if there is also some other legal basis to do so. Also, in creating this new law, the Legislature did not modify the law concerning psychotherapist-patient evidentiary privilege. Thus, information obtained via Section 56.103(e)(1) cannot be used as evidence, such as in court reports or testimony, unless there is some

independent basis for its admission. This issue is discussed in more detail in Part IV.B.4.

Section 56.103 of the Civil Code does not affect the obligation of therapists as mandated child abuse reporters to report newly discovered instances of child abuse.⁵⁹ Nor does it mitigate the ability to warn persons at risk of serious harm by the patient, or to warn authorities who could prevent the patient from harming herself if at such risk.⁶⁰ Outside of these situations and in the absence of a valid release or court order, it is absolutely clear in the legislative history of the enabling legislation for Section 56.103 of the Civil Code, AB 1687, that this new law is the only state statutory non-exigent basis for therapists to provide confidential mental health information about foster children under the age of twelve to social workers or foster parents. The author of the bill stated that because of misunderstandings about Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulations, “Social workers for the Department of Children and Family Services, probation officers and other custodial caregivers are being denied critical medical and psychological information absolutely necessary to the safety and well-being of their charges.”⁶¹ If social workers or foster parents could simply sign a valid waiver, there would have been no need for the legislation.

Minor’s counsel has the right to inspect the records of any licensed medical or mental health provider that has treated the child.⁶² Most interpret this right to include obligating such providers to speak to the child’s counsel.

B. Disclosure By Release

Section 56.11(c) of the California Civil Code states that an authorization for release of any medical information (which includes mental health information) is only valid if signed by the patient or patient’s “legal representative.”⁶³ Paralleling the scheme for access in sections of the California Health and Safety Code described above, Section 56.11(c)(2) states that the representative may not authorize disclosure of information concerning “services to which a minor patient could lawfully have consented.”⁶⁴ However, “legal representative” is not defined by statute or case law. The legislative history Section 56.103 of the Civil Code described above, and the passage of SB 2160 in 2000, described below in Part IV.B.2.b., make clear that social workers are not the legal representative of the child for this purpose.

Whether minor’s counsel should be the “legal representative” is an open question, with attorneys in some California counties taking on that responsibility, and in others refusing. The attorney performing the role of legal representative may increase the efficiency of information exchange decisions. But it also has the potential for conflicts caused by the attorney knowing confidential information that he may use in best interests advocacy against the wishes of the client, causing the client and the therapist to become reluctant to share information. These conflicts are explored more fully below in Part V.C.

IV. Psychotherapist-Patient Privilege

A. History

Professor Paruch’s article described in Part II traced how the concept of evidentiary privilege arose out of “the need to protect the privacy of certain relationships” in order to foster candid communications within them,⁶⁵ and became “an essential ingredient of a democratic society.”⁶⁶ It first arose for attorney-client and priest-penitent communications, and then was expanded to doctor-patient communications as a necessary extension of the Hippocratic Oath. The emergence of psychotherapy in the twentieth century led to expansion of the privilege to include it.⁶⁷

The first U.S. Court to recognize psychotherapist-patient privilege was probably in Cook County, Illinois in 1952.⁶⁸ Hospital authorities and the treating psychiatrist, subpoenaed to testify, refused, citing

privilege.⁶⁹ The court agreed with their assertion that the success and advancement of psychiatric treatment depends on greater protection of the confidentiality of psychiatrist-patient communications than of those between physician and patient in the treatment of physical ailments.⁷⁰ The court used a four part test for privilege found in John Henry Wigmore's seminal treatise on evidence:

1. The communications must originate in a confidence that they will not be disclosed;
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.⁷¹

The court was especially concerned that violation of psychotherapeutic confidences in one case would adversely affect the treatment of other patients by putting them in fear that their own confidences could be violated, and "thereby run the risk of such a disservice to society as may rob it of a healing process affecting thousands and perhaps millions of our inhabitants."⁷² Paruch and other commentators characterize this as a utilitarian approach, whereby an individual litigant's right to the truth is outweighed by a greater harm to society created by the particular truth finding process at issue.⁷³

After several states enacted psychotherapist-patient privilege statutes in the 1960's, the U.S. Supreme Court submitted a proposal to Congress for a federal privilege statute.⁷⁴ However, Congress enacted only a general statute referring to common law privilege.⁷⁵ The Court finally ruled on psychotherapist-patient privilege in *Jaffee v. Redmond*.⁷⁶

The Court found that successful psychotherapy requires "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."⁷⁷ Even the "mere possibility" of a breach of that confidentiality could preclude successful treatment.⁷⁸ The Court found that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."⁷⁹

Embracing the utilitarian approach attaching weight to public interests - or moving the balancing point on the scale - the Court held that, "The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."⁸⁰ Continuing its analysis, the Court weighed the public and private interests served by the privilege against the value of the evidence expected to be produced in the absence of a privilege.⁸¹

The Court suggested that little valuable evidence would be produced in the absence of a privilege because patients would be hesitant to disclose confidential information. Embracing a *mutual assured destruction* analysis, the Court observed that:

If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access - for example, admissions against interest by a party - is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.⁸²

No fan of new age sensibilities, Justice Scalia's dissent scoffed at the supposed value of psychotherapy:

When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, inter alios, parents, siblings, best friends, and bartenders - none of whom was awarded a privilege against testifying in court.⁸³

Paruch noted that, unlike bartenders, mental health professionals are bound by codes of ethics that impose a duty to maintain patients' confidential communications. "Sanctions for violation of these ethical duties include censure, expulsion from professional organizations, and the potential for suspension or loss of one's professional license. These ethical rules are enforced independently of the evidentiary rules of privilege and, in some ways, may provide more protection than legal privileges."⁸⁴ But, the statutory privilege is needed because nearly all ethical obligations to maintain confidentiality are abrogated by any action of law, such as a court order to submit a report or testify.⁸⁵

Although all fifty states guarantee psychotherapist-patient privilege in adult courts, Paruch asserts that the privilege "is routinely abrogated" in child protection hearings.⁸⁶ She described in detail several cases in her home state of Michigan where juvenile courts relied on therapists' testimony to rule against parents, even though the critical information was available from other sources.⁸⁷ She observed that the Ohio Supreme Court took a stand in favor of the privilege in child dependency cases in 2000, and seven months later the State Legislature created an exception in such cases.⁸⁸ New York does not recognize the privilege in dependency cases, while Missouri and Wisconsin do not recognize it in hearings to terminate parental rights.⁸⁹ An outlier, Florida does provide the privilege in dependency proceedings.⁹⁰

How low a priority such protection remains is partly illustrated by the fact that there does not appear to be any entity tracking the confidentiality of mental health information across the various states. The author was able to gather a small set of data from internet searches, academic journals, and an email survey. In the District of Columbia, Section 4-1321.05 of the D.C. Code provides that the judge in a dependency proceeding can deny psychotherapist-patient privilege "in the interest of justice."⁹¹ Case law has held that this court power even applies to professional evaluations conducted prior to court involvement.⁹² In Louisiana, under Article 663 D of the Children's Code, "Testimony or other evidence relevant to the abuse or neglect of a child or the cause of such condition may not be excluded on any ground of privilege"⁹³ None of the exceptions to this exclusion include psychotherapist-patient communications.⁹⁴

The law governing release of mental health records for minors in Pennsylvania has been meticulously documented by the Juvenile Law Center in Philadelphia.⁹⁵ A minor age fourteen or over in treatment generally controls access to his or her mental health information, except that parents can learn of diagnosis and treatment to be provided if they, rather than the minor, consented to the treatment.⁹⁶ In the case of a child under the age of fourteen, the parent controls access, but release is barred if it would be detrimental to treatment, would reveal the identity of a confidential reporter of child abuse, or is without the minor's consent if privileged; a court order overrides these protections.⁹⁷ Assertion of psychotherapist-patient privilege⁹⁸ bars even court intrusion into therapy, but that is only effective to stop a court order if asserted by the child or her counsel.⁹⁹ A large child advocacy office in Pittsburgh reported that minor's counsel there never attempt to block court access of clients' mental health information.¹⁰⁰

An email survey of children's law offices in nearly two dozen states produced complete responses from just three: Minnesota,¹⁰¹ Missouri¹⁰² and Illinois.¹⁰³ The results can be summarized by observing that there are some limitations on the child welfare agencies' access to dependent minors' confidential mental health information, but virtually none on the court's access to what it regards as relevant to the case at hand. Of course, whatever the court admits into evidence is seen by all parties, including the child's parents. It was clear in communications with attorneys in a few states that did not submit survey answers that they did not regard mental health privacy as being within the responsibility of minor's counsel. For example, a children's attorney in Indiana referred the author to the State child welfare agency for answers to questions

about privilege.¹⁰⁴

B. Application In Dependency Courts In California

In the time scale of dependency law, the privilege has long applied to the confidential communications between a dependent minor and her therapist.¹⁰⁵ Under Section 1012 of the California Evidence Code:

[C]onfidential communication between patient and psychotherapist” means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.¹⁰⁶

Information described by Section 1012 is privileged, and may not be admitted into evidence unless the privilege is waived by the holder of privilege or is subject to an exception. “[T]he purpose of the privilege is to protect the privacy of a patient’s confidential communications to his psychotherapist.”¹⁰⁷ It is noteworthy that the privilege standard for disclosure to persons other than the patient or “representative” is looser than that under HIPAA and California Law, which generally bar release of “any individually identifiable information,” absent a valid release or court order.¹⁰⁸

Court ordered psychological evaluations are exempt from privilege, but in dependency cases *In re Eduardo A.* makes it very clear that a referral to a mental health professional for therapy is not “the equivalent of a court-ordered examination of a patient by a psychotherapist within the meaning of Evidence Code Section 1017, subdivision (a),” and thus not subject to that exemption from psychotherapist-patient privilege.¹⁰⁹

Another exemption applies under Section 1024 of the Evidence Code, “if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.”¹¹⁰ This exception to psychotherapist-patient privilege “is narrow in the sense it only permits disclosure of those communications which triggered the psychotherapist’s conclusion that disclosure of a communication was needed to prevent harm.”¹¹¹ A patient’s privacy must still be preserved as far as confidential communications that do not trigger the warning.¹¹²

There are some mechanics of the privilege particular to dependency. If a minor is not mature enough to exercise the privilege, the attorney is the holder. If the child is found by the court to be mature enough, she may invoke the privilege, or she may allow her attorney to invoke it.¹¹³ Maturity “shall be presumed, subject to rebuttal by clear and convincing evidence, if the child is over 12 years of age”¹¹⁴ “If the child invokes the privilege, counsel may not waive it, but if counsel invokes the privilege, the child may waive it.”¹¹⁵ This means that when the child is twelve years of age or older, the child presumptively is the holder of the privilege and her attorney may invoke the privilege on her behalf with her consent. These provisions were enacted in 2000 as part of Senate Bill 2160, discussed below in Part IV.B.2.c.

I. Case Law Recognizes The Sanctity Of The Psychotherapist-Patient Privilege.

The court in *Eduardo A.* was adamant that the privilege is essential to the success of therapy:

Crucial to psychotherapeutic treatment is a patient’s readiness to reveal his thoughts, dreams,

fantasies, sins and shame. It would be unreasonable to expect a patient to freely participate in such treatment if he knew that what he said and what the therapist learned from what he said could all be revealed in court. A patient in therapy has and needs a justifiable expectation of confidentiality as to his psychotherapeutic treatment.¹¹⁶

The court pointed out that the key to providing information to the juvenile court for its use in making decisions about the child is good social work.¹¹⁷ If there is good social work, it should not be necessary to intrude into therapy. The court's response to the argument that the psychotherapist-patient privilege "would obstruct the court's ability to evaluate, at a dependency status review hearing, whether [to] return of a child to his or her parents" was that the social worker is supposed to make this report and recommendation.¹¹⁸

Implicit in these requirements for preparation and consideration of a "progress report" is the Legislature's recognition of a social worker's expertise in evaluating a parent's cooperation, development and growth as these matters relate to the parent's ability to provide a safe, well-supervised home for the child. Such information can be developed from a variety of sources including the social worker's personal observations as well as his or her interviews with the parent, neighbors, teachers, relatives, physicians, and even the children themselves; it need not depend on revelations by the treating psychotherapist.¹¹⁹

2. The Companion Cases: Privilege Goes Off the Rails.

*In re Mark L.*¹²⁰ and *In re Kristine W.*¹²¹ (hereinafter collectively "the companion cases"), two Fourth District Court of Appeal opinions issued within a day of each other by the same panel of three justices in Division One, and originating from the same juvenile court referee in San Diego County, are the only dependency cases ever to result in children being treated differently than adults with respect to psychotherapist-patient privilege. Neither case requested review by the California Supreme Court, so the high court has never had the opportunity to review the reasoning and holdings of these cases.¹²² Two later dependency cases, both from a single San Diego County judge and also reviewed by the same Fourth District Court of Appeal division, used some of the tortured analysis of the companion cases, but neither found reason to deny abused or neglected children the privacy protections enjoyed by their parents and the rest of society.¹²³

a. The Facts and Holdings

The companion cases stem from the same basic fact pattern: a referee ordered that minors visit their fathers with whom they wanted nothing to do, contingent upon input or approval from their therapists. Apparently, this referee was in the habit of delegating visitation decisions to minors' therapists. Both minors asserted privilege, presumably not wanting the fathers they disliked so intensely to know anything about what they were discussing with their therapists, and especially not anything they were discussing about their fathers. The minors undoubtedly realized that in either approving or disapproving visitation, and especially if asked to explain why, their therapists would reveal some details of what the minors had told them about their fathers. In one case, where the therapist refused to disclose information against the client's wishes, the referee's order said that was fine, and in another where the therapist did not refuse, the order declared that was okay, too. The Court of Appeal sought to harmonize these two orders.

i. Kristine W.¹²⁴

The case concerned prospective communications between the therapist and the social worker. It did not arise from a hearing where the admissibility of a document or witness testimony was at issue. But beyond that, it is challenging to discern from the opinion exactly what was in dispute. Someone, perhaps the referee, the trial or appellate attorneys, the law clerk at the Court of Appeal reviewing the transcripts, or all

of them, was confused about the issues presented by the case.

Seventeen year old Kristine had been physically abused and sexually molested by her father.¹²⁵ Earlier in the case she had run away from her placement, skipped school and cut herself.¹²⁶ Later she settled in with her uncle, and there was no evidence that these behaviors were still a problem at the time of the hearings at issue.¹²⁷ The legal posture of the case is not clear from the opinion. The father could have been receiving reunification services, but there is no mention of any proposal to terminate his services, or whether he was receiving reasonable services. The Court of Appeal observed, “there is no practical possibility that she will be reunified with Father.”¹²⁸ “Kristine did not want contact with Father because she was angry, afraid and believed that he ‘will try to turn things around to say it is my fault.’ Indeed, Father claimed Kristine was sexually aggressive with him and blamed her for the molestation.”¹²⁹ Despite this, at some point during the early months of the case the referee ordered supervised visits with the father “with therapist[‘]s input and consideration of [Kristine]’s feelings.”¹³⁰

The referee had also ordered her to attend therapy. At first Kristine participated, but after being switched to a new therapist she soon refused to continue.¹³¹ “Kristine told the court that she ‘very much feels in need to talk to someone confidentially’ but did not want to go to therapy because she did not trust the therapist and believed ‘that confidences are being broken,’ explaining ‘[e]very time I tell my therapist something, it gets back to my dad.’”¹³² However, a month later Kristine resumed therapy.¹³³ At the agency’s request, the court ordered a psychological evaluation, which is exempt from the psychotherapist-patient privilege pursuant to Evidence Code Section 1017(a).¹³⁴ But it seems neither the referee nor Kristine’s counsel were sure of that, so in two hearings they argued about whether privilege applied to the evaluation. After the issue was resolved, and knowing that her communications with the evaluator would not be confidential, Kristine refused to go.¹³⁵ Kristine “‘made it clear to [the court] under no uncertain terms that she doesn’t want anybody to know what she’s talking to her therapist about, and did not trust the social worker.’”¹³⁶

A few months and two hearings later, Kristine again raised psychotherapist-patient privilege, this time asking that the court order her “‘therapist not speak to the social worker about the therapy,’” but the referee declined to order this.¹³⁷ One can infer from the request that neither Kristine nor her counsel had been successful in persuading the therapist to remain silent. Here, a footnote in the opinion says, “The court stated that its ruling might not be in the child’s best interests in every case.”¹³⁸ The admission by the referee that he might be serving the interests of someone or some entity other than Kristine could have ended that matter right there, because a ruling by a juvenile court that is not in the child’s best interests is clearly an abuse of discretion and cannot withstand appellate review.¹³⁹ But the Court of Appeal simply brushed the statement aside, implied the referee must have misspoken, and observed, “Of course, the juvenile court is required to focus on the child’s best interests.”¹⁴⁰ This begs the question: is justice served if a bench officer issues a ruling saying that he may not be following the law?¹⁴¹

The Court of Appeal and Kristine’s appellate counsel characterized the case as questioning whether “the juvenile court lacks the power to compel a dependent minor’s mental health therapist to disclose confidential communications between the minor and the therapist to the social worker over the objections of the minor and her counsel”¹⁴² But there is no support in the record as reported in the opinion, or in the opinion itself, that either court addressed this question.¹⁴³ Kristine’s therapist was already disclosing to the Agency, and there was no request by anyone to compel the therapist to disclose. So, the opinion offers no guidance as to whether the therapist could refuse to disclose to the Agency under either the privacy laws described above in Part III - in effect years before Kristine’s case,¹⁴⁴ yet not discussed at all in the opinion - or some other professional obligation to protect Kristine’s privacy.

Kristine asked the court to order her therapist not to speak the Agency and the court declined to do so.¹⁴⁵ Thus, one question this case actually presented was whether the court had the duty or the power to limit

what the therapist disclosed to the Agency. Neither the juvenile court nor the Court of Appeal responded to this question. The simple answer was probably no. There was no evidence in the record that the therapist was an agent of the Agency or had been joined as a party to the case pursuant to Section 362(a) of the California Welfare and Institutions Code.¹⁴⁶ There is no evidence that any party or the court had subpoenaed the therapist to testify.

Another puzzle in the opinion was the Court of Appeal's extrapolation of the juvenile court's orders and needs. The opinion states that the juvenile "court concluded that the Agency's need for information prevailed over Kristine's need for therapy to be privileged and confidential and the Agency was entitled under Evidence Code Section 1012 to receive information from the therapist related to the therapy."¹⁴⁷ Yet, there is nothing in the record as reported in the opinion suggesting that the juvenile court needed or wanted any information from the therapist. The referee was merely responding to the Agency's arguments about its need for such information, which consisted only of "one letter that gives a general idea of whether or not the client is making progress"¹⁴⁸ and not details of therapy.¹⁴⁸ One could speculate that at some future date the Agency might request a court order based on something it learned from the therapist, but neither such an order nor any request for confidential therapy information to support it was before either juvenile court or the Court of Appeal.

However, the Court of Appeal saw fit to expand the order "to the extent it permits disclosure by Kristine's therapist of matters that reasonably assist the court in evaluating whether further orders are necessary for Kristine's benefit and preserves the confidentiality of the details of her therapy."¹⁴⁹ But allowing disclosure to the court, and not just the Agency, also means disclosure to the parent, a party to the case, the very thing Kristine feared most.

A critical problem with the Court of Appeal's hollow order to preserve "the confidentiality of the details of her therapy" is that the court's notion of piercing privilege and yet protecting details of therapy originated with *In re Pedro M.*,¹⁵⁰ discussed in Part IV.B.2.c.ii. below. In that delinquency case, the Court of Appeal upheld piercing a minor's privilege in part because "the juvenile court carefully sought to circumscribe [the therapist]'s testimony 'so that the details of the therapeutic session [would] not [be] disclosed.'"¹⁵¹ Even though the therapist testified in considerable detail about Pedro based on his communications and actions in therapy, the *In re Pedro M.* court characterized her testimony as not violating psychotherapist-patient privilege.¹⁵² She said he had no "motivation to change," "little to no empathy or remorse," and that he was "passive-aggressive" and dishonest.¹⁵³ The *In re Kristine W.* court wholly adopted the standard created by *In re Pedro M.* That standard provides almost no privacy in therapy.

A final example of the case's disconnection from reality was the referee's request for "the social worker's assurance that she would respect Kristine."¹⁵⁴ It is hard to comprehend how the referee imagined that his ruling putting Kristine's needs below those of the Agency would have done anything other than make her feel disrespected by both the Agency and the court. Indeed, Kristine's counsel responded "that Kristine would not continue with therapy, and that this was 'an ... example of the chilling effect that that ruling would have on our clients.'"¹⁵⁵

ii. Mark L.¹⁵⁶

Mark L. was removed from his adoptive parents after his adoptive father Paul hit his older sister Tasha, then age twelve or thirteen, on the head with a pot and stabbed her in the hand with scissors during an altercation.¹⁵⁷ The criminal court placed the father on probation for five years and barred him from seeing the children "unless visitation was ordered by the family court."¹⁵⁸ The children eventually were returned to their adoptive mother, and the case was dismissed as to Mark.¹⁵⁹ They were removed again two years later because of the adoptive mother's drug use and domestic violence with her new boyfriend, and

because of her boyfriend's sexual abuse of Tasha.¹⁶⁰

At the contested six month hearing, Mark testified that he did not want to see Paul even in a therapeutic setting because he “was mean and beat him.”¹⁶¹ Mark had not seen Paul in three years.¹⁶² “In an earlier written submission, Mark stated he had ‘vivid memories’ of being physically abused by Paul and Paul once ‘pick[ed] him up and [threw] him across a room.’ Mark also stated he saw Paul abuse Tasha.”¹⁶³ After Mark asserted privilege, the referee excluded his therapist from testifying “and struck references in the Agency’s reports to information he provided the social worker.”¹⁶⁴ The referee ordered conjoint (family) therapy between Mark and each of his parents when approved by his therapist and his counsel.¹⁶⁵ “The court assumed Mark’s counsel would advise the Agency if [the therapist] determined conjoint therapy to be appropriate”¹⁶⁶

By the contested twelve month hearing, conjoint therapy had not occurred.¹⁶⁷ The social worker testified that Mark, age twelve, preferred to remain with his biological aunt and was “adamant that he does not want to return home.”¹⁶⁸ She also said her ability to make a recommendation about conjoint therapy was “impeded” by “her inability to communicate with [the therapist].”¹⁶⁹ Even though the father had complied with his case plan, the court terminated his reunification services, finding “detriment because Mark does not want to go home.”¹⁷⁰ There is no indication in the opinion that the criminal court bar to the father having contact with Mark beyond the scope of court ordered visitation was ever modified, so it is unclear whether the referee could have ordered return even if it had found it was in Mark’s best interests to do so.

Ruling on the father’s writ petition, the Court of Appeal held that he was denied reasonable services at the twelve-month hearing because the referee established conditions that precluded Paul’s contact with Mark.¹⁷¹ Given that the referee had ordered contact, he did not have enough information to determine if detriment to Mark precluded return, and Paul was thus entitled to another six months.¹⁷²

The Court of Appeal also found that the juvenile “court misinterpreted section 317, subdivision (f) to preclude [the therapist] from testifying or providing any information to the court or the Agency at the six-month hearing.”¹⁷³ But this statement is *dictum* because the Court of Appeal did not use this view to reach its holding on the issue before it from that hearing.¹⁷⁴ Given that visitation was the only issue, the Court of Appeal admitted that “Paul was not prejudiced by the error because the order denying visitation is otherwise supported by substantial evidence.”¹⁷⁵

The Court of Appeal concluded that privilege “does not preclude [the therapist] from giving circumscribed information ... whether any therapeutic progress between the six- and 12-month hearings warranted conjoint therapy or visitation between Mark and Paul.”¹⁷⁶ If the therapist were to simply provide an answer to this question to the social worker, this would seem to comply with the Court of Appeal’s intention. The Court of Appeal also suggested another means to solve the problem without piercing the privilege. “The court could have appointed another psychologist to examine and evaluate Mark, and under Evidence Code section 1017 there is no psychotherapist-patient privilege when the examination is by court order.”¹⁷⁷ Thus, the referee instead could have ordered such an evaluation on remand and not pierced Mark’s privilege. Unknown is what happened after the remand and whether Mark’s therapist revealed his confidences.

There are only three clear takeaways from the opinion. First, the ruling was not about Mark’s best interests; it was about satisfying the obligation for reasonable services to Paul. Second, under the facts and posture of the case and absent a change of circumstances, Paul’s services could not be terminated unless a therapist or other mental health evaluator communicated to the Agency and the court (possibly through the Agency) that visitation and conjoint therapy continued to be detrimental to the Mark. Finally, if the therapist were subpoenaed and ordered to testify regarding that limited question, such an action would be upheld by the Fourth District Court of Appeal. But, nothing in the opinion suggests that therapist could be

compelled to provide any information beyond answering that question.

The real problem with what the juvenile court referee did in the case was the contingent order at six months for conjoint therapy.¹⁷⁸ In addition to the problematic nature of such orders, there was no indication from any professional involved in the case that contact between Mark and his father was warranted. Based on the Court of Appeal's reasons for upholding the denial of visitation, nothing in the record suggests that the father would have been successful in appealing denial of a request for conjoint therapy if the referee had not ordered it. Conditioning the order on the therapist's approval, coming on the heels of Mark's assertion of privilege and the obvious impossibility of the therapist's providing such approval, set up the requirement for a service to be provided to the father that the Agency could not possibly fulfill, as the Court of Appeal noted. This was the father's only reasonable services argument.¹⁷⁹ If the referee had not made the order, the father would not have had a reasonable services issue on which to file a writ after the twelve month hearing.

More importantly, the Court of Appeal could simply have said that the referee's impossible order for conjoint therapy was not supported by the evidence, as it said regarding the father's request for visitation,¹⁸⁰ and resolved the writ without a remand.

In both of these cases, the Court of Appeal phrased its discussions, and especially its holdings, using the names of the respective youths. The court did not make sweeping pronouncements using nouns such as *minors* or *children* that could reasonably be extended to apply to other cases with different facts. Even the referee in *In re Kristine W.*, opining about how such conflicts should be handled in the future, stated, "that the need for therapy to be privileged and confidential would be balanced on a case-by-case basis"¹⁸¹ In the only two other dependency opinions on privilege to rely in part on these cases, this same Court of Appeal division upheld privilege for dependent minors.¹⁸²

b. The Companion Cases: Legislative Background

The psychotherapist-patient privilege rights of dependent minors were in no way diminished by case law until 2001. Ironically, the companion cases were a response to the legislature's strengthening of privilege in 2000, when Senate Bill 2160 codified the right of minors and their counsel to assert the privilege. The bill made specific amendments to Section 317(f) of the California Welfare and Institutions Code and added § 326.5 of the Welfare and Institutions Code, which made minor's counsel the child's guardian ad litem instead of the child welfare worker.¹⁸³ This was not a small or hastily considered change to the status quo. The Legislature amended this provision in the bill three times and its committees voted on the bill in five separate hearings.

The companion cases characterize SB 2160 as primarily an effort to obtain funding by meeting certain federal criteria, and to correct the archaic practice in California of allowing minors in dependency actions to be represented by the same counsel that represents the Agency.¹⁸⁴ While the funding was an important consideration, the second characterization misrepresented the policy priorities in the bill.

Actually, in most non-rural counties at that time, courts were appointing separate counsel for minors, in some cases in some jurisdictions, and in nearly all cases in others, paid for by state court funds. In the legislative analysis cited by the companion cases, the very first reason listed for the bill was to ensure that *all* children in dependency proceedings had separate counsel. The companion cases curiously omit this key fact. As described by the bill's author, "Even though all parents in child abuse and neglect proceedings are automatically afforded an advocate, and the county has its own attorney representing its interest, children are not automatically afforded counsel in these matters."¹⁸⁵ This bill constituted "a rule reversal" to Section 317(c) of the Welfare and Institutions Code, so that instead of the juvenile court only appointing counsel if the minor would benefit, the court could decline to appoint only if it made findings

on the record that the child would not benefit - in effect ensuring that minors without counsel would be a rare exception.¹⁸⁶

The companion cases' characterization of the reason for SB 2160 obscures the fact that at the time the most glaring example of an urban county falling short in counsel for minors was San Diego, the juvenile court from whence these cases came, supervised by the very same Fourth District Court of Appeal. In the bill's legislative analysis cited by the companion cases there are only three paragraphs describing the views of organizations in support of the bill. The first paragraph refers to the Judicial Council. The other two paragraphs are about the juvenile court in San Diego, with the key sentence being: "The Children's Advocacy Institute (CAI), point[ed] to a 'year-old policy change in the San Diego County Juvenile Court, in which children in dependency cases are routinely denied legal counsel, 'unless the need arises' or in the most complex of cases.'"¹⁸⁷ The "policy change" occurred because the state funding source was diverted for other purposes in that county. The new bill would force a big shift in San Diego.¹⁸⁸

As the companion cases explained, "Historically, the social worker in a dependency case was the child's guardian ad litem," and the holder of the psychotherapist-patient privilege.¹⁸⁹ The court then quoted from a brief submitted by the Agency. "Communication between children's therapists and social workers was, understandably, the norm Input from children's therapists has played a vital role in helping both the Agency and the juvenile court make decisions regarding the safety and welfare of dependent children."¹⁹⁰ In the enactment of SB 2160, the Court of Appeal appears to have seen a crisis, with the juvenile court and social workers unable to get "information from which reasoned recommendations and decisions regarding the child's welfare can be made."¹⁹¹ Unacknowledged, but undoubtedly known by the court, was that the Agency would incur more expense if the confidential information upon which it had heavily relied were no longer available, because more social work would be required to complete reports and caseloads would most likely have to be lowered to accomplish this.

Asserting that the amendments to Section 317(c) of the Welfare and Institutions Code did "not affect the substantive law on the privilege,"¹⁹² or "change the scope of the privilege itself,"¹⁹³ the Court of Appeal decided to respond by restricting the use of privilege. However, the Legislature included no language in Section 317(f), nor has any been added since, allowing a court to pierce this privilege. The Legislature found no need to limit under what circumstances the privilege's protections would be afforded. In fact, one year before the Legislature created Section 317(f), it amended the statute protecting dependents' case files to say that if information in those files is privileged under state or federal law,¹⁹⁴ those laws creating and maintaining the privileged status of that information prevail over other laws granting access.¹⁹⁵

In 2006, both Assembly Bill 2480 and Senate Bill 678 set the age at which a minor is presumed to have control over the release of his mental health information to twelve - establishing one of the lowest thresholds in the nation and rejecting calls to set the age a sixteen - in what was clearly an intent to expand the scope of minors' exercise of privilege.¹⁹⁶ The Assembly Judiciary Committee analysis concluded,

Ensuring that these privileges can be appropriately protected is very important for children in dependency proceedings. These children often rely extensively on doctors, therapists and clergy in dealing with the very difficult situation they are facing. Allowing them the ability to invoke or waive the privilege will help ensure they can be completely honest with these professionals.¹⁹⁷

A cosponsor of AB 2480, The National Center on Youth Law (NCYL), said "this presumption 'will ensure that these privileges ... protect youths who are confiding with therapists and their clergy.' NYCL further states that '[y]outh deserve to hold these privileges to the same extent that all others who enter into these confidential relationships.'"¹⁹⁸

The revision to the therapy privacy rights of minors subject to dependency actions made by Section

56.103(e)(1) of the California Civil Code in 2008 (described above in Part III) provided an opportunity for a contraction of privilege if the Legislature had seen a need, which it did not.

In 2002, the Legislature specifically rejected the companion cases' view of the "vital role" therapists play as the court's information spigots.¹⁹⁹ AB 1832 as introduced would have amended Section 317 of the Welfare and Institutions Code to read as follows:

(g)(1) Notwithstanding subdivision (f), any information that a child communicates during an assessment, evaluation, or treatment, that would otherwise be privileged, shall be excepted from those privileges for the limited purpose of providing information to the juvenile court, the county child welfare worker, and the child's attorney to assist the juvenile court in determining the child's case plan and any other orders that are in the best interests of the child.²⁰⁰

That version of the bill never received a hearing. Although a watered down, amended version that would have exempted from privilege a child's diagnosis and "the psychotherapist's recommendations for implementation of the case plan" passed through the Assembly, it never received a hearing in the Senate.²⁰¹

c. A Table with No Legs Cannot Stand

If one thinks of each authority cited by the companion cases in support of their holdings as a leg of a table, this analysis shows how each of those legs fails and the table does not stand.

i. Legislative History

Regarding information shielded by psychotherapist-patient privilege, the companion cases said that the "legislative history of section 317, subdivision (f) does not suggest the Legislature intended to make unavailable that important information."²⁰² But the cases offered absolutely no support for this assertion. There is nothing in the legislative history of SB 2160 to suggest that the Legislature intended for the courts to pierce minors' psychotherapist-patient privilege. The Legislature carefully crafted the amendments to Section 317(f) precisely to protect minors' privilege from intrusion. The Assembly Judiciary Committee analysis stated that it is important that a child of sufficient age and maturity be able to "exercise the privilege him or herself as to specific facts which he or she does not want disclosed to the court or others."²⁰³

ii. Pedro M.²⁰⁴

But the greatest problem with *In re Mark L.* and *In re Kristine W.* is their misappropriation of the holding of *In re Pedro M.*,²⁰⁵ a delinquency case from the previous year about a sex offender. The issue before the delinquency court was whether to remand him to the California Youth Authority because he presented a danger to society. While on probation, Pedro "had failed to cooperate in a plan for psychiatric and psychological treatment as ordered by the court."²⁰⁶

In upholding the testimony of Pedro's therapist in the face of an assertion of privilege, the court observed two key contrasts between delinquency and dependency cases that result in differences in the application of psychotherapist-patient privilege. The first is that the delinquent minor's participation in therapy is a court ordered condition of probation resulting from the minor's criminal acts - not the case for a dependent²⁰⁷ -and the second is that the delinquent patient has no expectation of privacy in that context:

Quite obviously, the court's ability to evaluate appellant's compliance with this particular condition of the court's disposition order and its effect on his rehabilitation would be severely

diminished in the absence of some type of feedback from the therapist, and it would be unreasonable for appellant to think otherwise. (Contrast *In re Eduardo A.* (1989) 209 Cal. App. 3d 1038 [261 Cal. Rptr. 68] [holding that the psychotherapist-patient privilege applies to confidential communications made in court-ordered counseling of a parent in a § 300 case but that the application of the privilege does not prevent the court from acquiring from other sources information needed for proper evaluation of dependency status].)²⁰⁸

Curiously, the companion cases quote the first sentence of the quotation above from *In re Pedro M.*, but not the subsequent contrasting citation and explanatory parenthetical.²⁰⁹ Could the court have wanted a casual reader of the companion cases to be unaware of the privilege ““contrast” *In re Pedro M.* drew between delinquency and dependency cases, and the acknowledgment by *In re Pedro M.* of the applicability of privilege to dependency proceedings? This contrast is most dramatic when comparing the circumstances of a delinquent to those of a parent in a dependency proceeding, both having been found by a court to have willfully engaged in reprehensible harmful behavior and then ordered to engage in remedial treatment.²¹⁰ Yet, the abusive or negligent parent is treated differently because the resources, procedures and goals in dependency court are unlike those in delinquency court. This contrast begs the question: if such parents are able to fully assert psychotherapist-patient privilege in dependency court, then why not their innocent children?

But the greatest problem with *In re Pedro M.* came in the next sentence, in which the opinion, with no cited authority, misinterpreted Section 1012 of the California Evidence Code.

Indeed, Evidence Code section 1012 itself permits the disclosure of a confidential communication between patient and psychotherapist to “those to whom disclosure is reasonably necessary for ... the accomplishment of the purpose for which the psychotherapist is consulted” In our view, this would include the juvenile court, where the patient is a delinquent minor who has been properly directed to participate and cooperate in a sex offender treatment program in conjunction with a disposition order placing the minor on probation.²¹¹

Again, *In re Mark L.* cites this phrase from the Evidence Code contained in the first sentence of this quotation from *In re Pedro M.* in its discussion of the “rationale” of *In re Pedro M.*,²¹² but does not cite the second sentence, which suggests that the *In re Pedro M.* holding is limited to sex offenders in delinquency cases.

In re Pedro M. cites no authority for its use of Section 1012 to expand the universe of those persons excepted from privilege, because there is none. The opinion violates the maxim: “the psychotherapist-patient privilege is to be liberally construed in favor of the patient.”²¹³ The other case law interpretations of the Section 1012 exception understand it to be limited to members of the therapy team supervised by the therapist, or to third persons whose presence in the room with the patient and therapist is necessary to accomplish the purpose of the therapy, such as an interpreter or a family member participating in conjoint therapy.²¹⁴

The companion cases transfer from *In re Pedro M.*, without citation to any other authority, the dubious assertion that “in the juvenile dependency context ... therapy has a dual purpose - treatment of the child to ameliorate the effects of abuse or neglect and the disclosure of information from which reasoned recommendations and decisions regarding the child’s welfare can be made.”²¹⁵ What these cases ignore is that delinquency courts’ authority to fashion a specifically tailored “condition of probation that would be unconstitutional or otherwise improper” if done by any other court,²¹⁶ does not give license to export those conditions of treatment to dependency court.

What is particularly misleading about the companion cases’ use of *In re Pedro M.* is that its invocation

comes immediately after the cases' recitation of how the changes wrought by SB 2160 in Section 317(f) of the California Welfare and Institutions Code did not alter the substantive law of psychotherapist-patient privilege dictated by Section 1012 of the California Evidence Code. The companion cases mistakenly imply that the Legislature was aware of *In re Pedro M.*'s unprecedented and freakish re-engineering of the privilege, which was issued on June 12, 2000, just one week before SB 2160 passed through its final policy committee in the Legislature. And why would anyone have taken notice? *In re Pedro M.* was a delinquency case, while SB 2160 was exclusively about dependency. The Court of Appeal division that authored the companion cases would be the only one to assault the privilege by reinventing it in this way. So it is not true, as the companion cases obliquely assert, that SB 2160 was in any way a stamp of approval of *In re Pedro M.*'s version of the privilege.

Contrary to the holdings of *In re Kristine W.* and *In re Mark L.*, there is not a statutory exception to the psychotherapist-patient privilege for disclosing the information to the court or a social worker because it is "reasonably necessary for ... the accomplishment of the purpose for which the psychotherapist is consulted"²¹⁷ The only court ever to apply *In re Pedro M.* in a delinquency context was of course Division One of the Fourth District Court of Appeal, in the case of *In re Christopher M.*²¹⁸

iii. Eduardo A.²¹⁹

In re Kristine W. found unpersuasive:

Kristine's suggestion that the Agency "could gauge the success (or non-success) of the therapy by seeing how she interacted with her caregivers, her teachers, her siblings and peers" or "request a diagnostic study or a bonding study." Although undoubtedly there are many important sources of information concerning a child's progress, the therapist's input is invaluable. (Cf. *In re Eduardo A.*, ... 209 Cal. App. 3d at pp. 1043-1044; *In re Jasmon O.*, ... 8 Cal. 4th 398, 430.)²²⁰

The signal "Cf." means that the authority offers analogous support to the proposition and deserves further explanation. But *In re Eduardo A.* stands for the opposite proposition, as quoted at length in Part IV.B.1. above. In upholding psychotherapist-patient privilege, the case asserted that social workers' assessment of the safety and well-being of children comes "from a variety of sources including the social worker's personal observations as well as his or her interviews with the parent, neighbors, teachers, relatives, physicians, and even the children themselves; it need not depend on revelations by the treating psychotherapist."²²¹ More importantly, the case warns, "It would be unreasonable to expect a patient to freely participate in such treatment if he knew that what he said and what the therapist learned from what he said could all be revealed in court. A patient in therapy has and needs a justifiable expectation of confidentiality."²²²

iv. Jasmon O.²²³

A further misappropriation in *In re Mark L.* is from *In re Jasmon O.*²²⁴ Here the quotation was, "[w]ithout the testimony of psychologists, in many juvenile dependency and child custody cases superior courts and juvenile courts would have little or no evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court."²²⁵ *In re Kristine W.*, citing *In re Jasmon O.*, said "the therapist's input is invaluable."²²⁶

In *In re Jasmon O.* the Supreme Court majority opinion's author Stanley Mosk actually was squabbling with the opinion's dissenters that had argued the psychologists' testimony was not very useful. *But, the case had nothing to do with privilege.* It was a very complicated appeal of hearings that had occurred three years earlier in San Diego County concerning return of a four-year-old. The Supreme Court overturned the decision by the Fourth District Court of Appeal. Here is the full quotation from the case:

The dissent dismisses much of the evidence relied upon by the superior court as insubstantial because it was offered through the testimony of psychologists. In addition to the evidence already referred to, such evidence included the declaration of the psychologist treating the father near the time of the termination hearing that he no longer believed that the father was able to take on the responsibility of being a parent and that the father was unable to recognize the child's needs. It also included evidence of an independent psychologist that the father had a narcissistic personality disorder. Without the testimony of psychologists, in many juvenile dependency and child custody cases superior courts and juvenile courts would have little or no evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court. It cannot seriously be argued that such evidence should be excluded, or denied substantial weight.²²⁷

Again, because this opinion does not deal with privilege, the only question addressed by Justice Mosk was whether any testimony by psychologists is ever useful. Certainly it has some value, especially when there are no privacy concerns because it has come from a court ordered evaluation,²²⁸ or privilege has been waived by the holder. It is notable that this opinion was issued six years before S.B. 2160 codified dependent minor's rights to assert privilege.

v. Daniel C.H.²²⁹

The companion cases also relied on *In re Daniel C. H.*,²³⁰ opining that in “%7F*In re Daniel C. H.*, 220 Cal. App. 3d at 829-830 [court indicated minor's therapist could give limited testimony despite child's assertion of psychotherapist-patient privilege].”²³¹

But once again, this is a less than honest use of the holding. The case included the issue of visitation between Daniel and his father, who molested him, and says that the juvenile court did not err in refusing to hear the therapist's testimony because it would have been useless. Daniel's therapist invoked the privilege for his patient. “Dr. Niederman wrote the court a note stating that he did not wish to report directly to the court concerning visitation because it would jeopardize his therapeutic relationship with Daniel.”²³²

Father also argues that the trial court should have followed the procedures outlined in Evidence Code sections 400 et seq. and 914 to determine the claim of privilege, because there allegedly were numerous questions that Dr. Niederman could have answered that were not privileged, such as how often Niederman meets with Daniel and for how long; whether he had communicated with Mother, Dr. Heenan, or Dr. Sherwood; his qualifications to treat Daniel; and his general conclusions about Daniel's mental health. Father complains that Niederman should have been called to the stand and been permitted to answer those questions, and that once on the stand, the issue of privilege could have been addressed. This argument lacks merit.

The trial court heard argument before and during the trial concerning whether Dr. Niederman should have been permitted to testify. We find this sufficient. Although the court could have permitted Dr. Niederman to testify to the some of the questions posed above, we do not think the court was required to do so. In fact, such testimony would have been a waste of the court's time. Without further questions and answers that would clearly have been protected by the psychotherapist-patient privilege, the answers to the above questions would not have helped the court determine whether Daniel was molested, whether his mental state focuses on molest, or what disposition would be proper. Thus, the testimony would have served no real purpose.²³³

d. The Table Falls

None of the authorities cited by the companion cases support the holdings or rationale of the companion

cases. The companion cases could be described as a confused overreaction to a rebuke from the Legislature. These cases are contrary to the Legislature’s intent in several statutes strengthening the ability of minors to control release of their confidential mental health information.

But, assuming *arguendo* that these holdings have some utility, their facts, language and rationale make one aspect of their application is crystal clear. As a threshold matter there must be a specific and essential need for mental health information that cannot be obtained through any other means, and the court must weigh that impasse carefully against the privacy interests of a particular minor according to the unique circumstances of the case. There is nothing to suggest, as some have asserted, that these cases created a rule for piercing privilege that applies in the absence of a hearing followed by an individually and carefully crafted court order.

3. What a Difference a Decade Makes.

Subsequent to the companion cases, all two of the dependency cases dealing with minors’ psychotherapist-patient privilege originated in San Diego County, and were decided by the First Division of the Fourth District Court of Appeal.

a. Cole C.²³⁴

In *In re Cole C.*, the mother of foster children submitted to the court a letter from a therapist that she and the children saw prior to the filing of the original petition.²³⁵ The therapist’s letter said that the therapist had been seeing the mother individually, had family therapy with the mother and the children, and sometimes met with the oldest child individually.²³⁶ The letter contained details surrounding the therapy sessions with the mother and the children.²³⁷ The children’s attorney asserted the psychotherapist-patient privilege on behalf of his clients.²³⁸ The father argued that because the therapy occurred before the petition was filed, the mother was the holder of the privilege, and that she had waived it when she submitted the therapist’s letter to the court in her motion.²³⁹ He also argued that the privilege is not absolute, and under *In re Mark L.*,²⁴⁰ information necessary to allow reasonable recommendations and decisions concerning the child’s welfare may be disclosed.²⁴¹

In an opinion written by one of the concurring justices in the companion cases, the court concluded that the holder of the privilege is determined at the time that “the confidential communication is sought to be introduced into evidence.”²⁴² Once counsel was appointed for the children, counsel had authority under Sections of 317(f) and 326.5 of the California Welfare and Institutions Code to assert the privilege on behalf of the children, even though the statements were made prior to the dependency and to a therapist the children shared with their mother.²⁴³ The court did not use the analysis of *In re Mark L.*, because at the time the girls saw the therapist, there were no dependency proceedings and the purpose of the therapy at that time was not to assist the court in making appropriate findings.²⁴⁴ Ultimately the court concluded that disallowing the therapist’s letter under psychotherapist-patient privilege was proper and the therapist could only be called to testify as to therapy solely provided to the mother.²⁴⁵

b. S.A.²⁴⁶

In re S.A.,²⁴⁷ came from the Fourth District Division One panel that included one of the justices from the companion cases, the author of *In re Cole C.* The case also came from the same trial judge as the *In re Cole C.* case. The holding upheld S.A.’s assertion of privilege in spite of her father’s assertion that her psychotherapist-patient privilege had been waived because her therapist “‘disclosed many statements and made many oral disclosures to the police and social workers,’ which appeared in their reports”²⁴⁸ The court noted that S.A. did not authorize the disclosure.²⁴⁹ The court was unpersuaded by the father’s claim that privilege did not apply because he and his daughter had “some joint sessions” with her therapist.²⁵⁰

The court also upheld the privilege because S.A. admitted during her testimony that she did not tell her therapist about her father's alleged sexual molestation of her, and presumably the therapist's testimony would not have been helpful to the juvenile court in determining whether to take jurisdiction.²⁵¹ Finally, the court believed the father's goal "was to discredit S.A. and protect his reputation, and not to ... assist the Agency and the court"²⁵² "Under the circumstances, the [juvenile] court did not abuse its discretion by opting for full confidentiality to protect S.A.'s substantial privacy interest."²⁵³

4. Conflict with Agency's Duty to Report to the Court?

It has been argued that the prohibition in Section 56.103(e)(1) of the California Civil Code²⁵⁴ against further disclosure of mental health information by the statute's authorized recipients, as well as psychotherapist-patient privilege, are not barriers to the social worker's duty to provide the court with all information known by the Agency that is relevant to the welfare of the child. This assertion flows from Section 280 of the California Welfare and Institutions Code, which anachronistically states that for all disposition and status review hearings the "probation officer" shall prepare "a social study of the minor, containing such matters as may be relevant to a proper disposition of the case."²⁵⁵ (A similar sister statute, Section 281 of the Welfare and Institutions Code, sets the same requirements for a report if ordered by the court, and will be subject to the same analysis here.²⁵⁶) The sole additional authority for such a requirement is California Rule of Court 5.690(a), which only applies at disposition hearings, and requires the Agency's social study to "include a discussion of all matters relevant to disposition and a recommendation for disposition."²⁵⁷ There is as yet no case law interpreting Section 56.103(e)(1).

If the reporting requirement in Section 280 of the Welfare and Institutions Code were considered to be a further disclosure "authorized by law," as required by Section 56.103(e)(1) of the Civil Code, the first question to be answered is whether any higher authority trumps this interpretation. One obvious greater constraint on the duty to report relevant information, if it is a confidential communication with a therapist, is psychotherapist-patient privilege, effective in all fifty states for adults and upheld at the greatest level of protection by the U.S. Supreme Court.²⁵⁸ This evidentiary privilege is as important to privacy as is the attorney-client privilege, according to the Court's finding of "the imperative need for confidence and trust."²⁵⁹ This is especially true for foster children, because it is the therapists' job to heal, and children typically spend a lot more time with their therapists and have much more to say to them than their attorneys.

Case law more recent than the enactment of Section 56.103 of the Civil Code holds that psychotherapist-patient communications do not lose their privilege protection, absent a waiver by the dependent minor patient, simply by having been disclosed to the social worker by the therapist.²⁶⁰ Legislative intent is also instructive.²⁶¹ As Part IV.B.2.c. described, the Legislature has been increasingly protective of foster children's therapy privacy rights and psychotherapist-patient privilege in the past decade, not the reverse. Construing Section 56.103 to be less protective than its legislative history indicates also would fly in the face of the Legislature's intent in this and other dependency legislation.

While Section 56.103(e)(1) of the Civil Code on its face allows further disclosure if "authorized by law,"²⁶² such as if there is a valid release, that is only the second part of a two-pronged test. The first prong is that the subsequent disclosure be for the purpose of "coordinating mental health services and treatment."²⁶³ However, courts rarely coordinate treatment for foster children, because this function is within the Agency's discretion. A child welfare worker does not need a specific court order to commence therapy for a child.²⁶⁴ Nor is specific court approval needed for therapy by a school counselor or family therapy between child and a caregiver other than a parent.²⁶⁵ If mental health information disclosed to the child welfare worker under Section 56.103 were to be further disclosed to the court it would almost certainly be for deciding jurisdiction, disposition, visitation, custody, termination of rights or dismissal, purposes neither allowed by the plain language nor the legislative intent of the bill. None of the legislative

analyses for AB 1687 that created Section 56.103 mention these purposes.²⁶⁶

If Section 56.103(e)(1) were considered to be protective of disclosure to the court and thus in conflict with Section 280 of the Welfare and Institutions Code, does Section 280 trump and create a valid exception to the ban on further disclosure in Section 56.103(e)(1) of the Civil Code? If it were necessary for the court to order a specific treatment, would a disclosure be “authorized by law”? This question may be answered by looking at the Legislature’s intent, which is found in the preamble to AB 1687:

It is the further intent of the Legislature not to expand existing law and to clarify that existing provisions regarding confidentiality of medical records and the federal Health Insurance Portability and Accountability Act (HIPAA) authorizes psychotherapists to provide health care and mental health information to caregivers of children and youth in foster care to facilitate providing health care and mental health care that meets the needs of these children and youth.²⁶⁷

The legislative intent demonstrates the reality that the bill is merely a state codification of existing federal law,²⁶⁸ so as to better inform therapists of the law,²⁶⁹ and thus neither expands access, nor reduces protections. Courts are not children’s caregivers.

If the Legislature had intended to restrict psychotherapist-patient privilege and include courts in the list of the three persons authorized to receive information under the law, it surely would have done so. The only reference in the legislative analysis to the court as a recipient of information is a request by County Welfare Directors Association (CWDA) for an amendment to expand the bill to include children in custody, but not yet declared dependents by the court:

When children are brought into custody, a chain of events occurs prior to the child actually being found a dependent or ward. These events include multiple hearings, where petitions are filed and information [is] received by the court. In order to help the court determine whether a child should be declared a dependent or ward, it is necessary to have information about the child’s health and mental health.²⁷⁰

But the fact that the Legislature made the amendment does not presume that the Legislature made the amendment for the reasons proposed by CWDA. In addition to the author’s explanation of the need for the bill quoted above,²⁷¹ the only stakeholder argument presented in the “Background” section of the bill in the legislative analysis prepared for versions of the bill creating Section 56.103 of the Civil Code was the following:

The Inter-Agency Council on Child Abuse and Neglect cites a scenario where currently, a child could be released from probation supervision to the care of Child Welfare services, but a probation officer would be unable to share the medical and behavioral history of that child with a social worker. This information gap can result in a range of complications from duplication of diagnostic work to conflicting prescription drugs.²⁷²

The scenario described by the Inter-Agency Council is a more than adequate explanation for amending the bill to include children in custody, but not yet found to be dependents by the court.

Notwithstanding the analyses above, if there were a conflict between these two statutes, a compelled disclosure interpretation violates key rules of statutory construction. First, Section 280 of the Welfare and Institutions Code is a general rule, and Section 56.103(e) of the Civil Code is a specific prohibition. Absent any other rule compelling a different result, a specific statute trumps general one.²⁷³ Second, Section 280 of the Welfare and Institutions Code was last amended in 1987, but Section 56.103 of the Civil Code was enacted in 2007.²⁷⁴ A newer law prevails over an older one. Finally, compared to

California Rule of Court 5.690(a) regarding disposition hearing reports,²⁷⁵ a statute is higher authority than a rule of court.

Similar arguments regarding Sections 280 and 281 of the Welfare and Institutions Code also could be made as to information disclosed to the social worker via a court order or valid release. However, such disclosures do not by themselves waive privilege.

V. Recommendations

These recommendations to better protect confidential psychotherapist-patient communications are in three categories. The first is suggestions to minor's counsel for advising and protecting clients. The second is a protocol for all those potentially involved in handling confidential mental health information: therapists, social workers and attorneys. The third is legislative changes.

A. How Minor's Counsel Can Help Protect The Client's Privacy

Minor's counsel should discuss mental health information with clients early in the process, preferably at the detention or initial hearing. Clients should be educated about their privacy rights and encouraged to raise the issue with their therapist at the first therapy session. If clients are unclear or uncomfortable about their therapist's understanding or intentions concerning clients' privacy, clients should be advised to inform their attorney immediately so that the attorney can resolve the problem. Minors should also be warned not to waive or release any protected mental health information without advice of counsel.

Minor's counsel should do outreach education to therapists and social workers to explain the laws concerning privacy, because many social workers and therapists are not well versed in this area, or have not kept up with recent changes. Part of this education could encourage therapists to establish a routine early in therapy to discuss confidentiality with clients. It should also include a reminder that California law obligates therapists to assert privilege unless there has been a lawful waiver.

For example, parents whose children have been removed may be urged by the Agency to sign mental health information releases for themselves and their children. In California, therapists and social workers should be educated that for foster children placed out of home such releases are no longer valid, absent a court order, pursuant to SB 1407 (Cal. Civil Code Section 56.106, chaptered 2012). Nor are these releases valid for most foster youth age twelve or over placed in home, and in no event do such releases waive privilege.

Unless waived by the client age twelve or over, acting with the advice of counsel, counsel should aggressively assert privilege. For the client under twelve, counsel should assert privilege unless there is a clear detriment to the child in doing so - taking into account the benefits of the child's future expectation of privacy in therapy.

Minor's counsel should object to any proposed court order that conditions visitation on the therapist's input. Such an order may by itself be contrary to law,²⁷⁶ force a violation of confidentiality, or trigger a finding of "no reasonable services."²⁷⁷ The court or any party can always encourage the social worker to seek input from the therapist, subject to legal privacy protections.

B. A protocol to help therapists, social workers and judges to better protect therapy confidentiality

It is common for a social worker to want to consult a child's therapist concerning any number of issues in a dependency case. Sometimes a therapist may be aware of decisions that are being made in a case and

wish to provide input. The protocol in this subsection uses existing California law to protect confidentiality and at the same time permits some limited disclosures intended to benefit the child.

Disclosure is limited by the fact that absent a court order or valid release,²⁷⁸ the only disclosure a therapist may make to a social worker about a dependent child under the age of twelve is “information concerning the diagnosis and treatment of a mental health condition of a minor [that] is reasonably necessary for the purpose of assisting in coordinating the treatment and care of the minor.”²⁷⁹ This disclosure allows the therapist to suggest additional services for the minor, but to protect the confidentiality of therapy this disclosure should not include confidential statements the minor has made in therapy. In this information for treatment and care the therapist also should avoid including his opinion about an issue central to the court case such as reunification, which is often a crucial area of confidentiality for the child in therapy.²⁸⁰ (Other statutes mandate therapists’ obligations as child abuse reporters,²⁸¹ and duty to warn of imminent harm to a patient or others.²⁸²)

If either the therapist or the social worker desires communication with the other in the case of a child age twelve or over, they should discuss the situation with the child and his counsel. With the advice of counsel, the child can consider signing a release to permit the communication. Often, a release limited as to content and time can be crafted that meets the needs of all concerned.

Social workers are trained to make risk assessments regarding placement and visitation without guidance from others. However, sometimes the social worker may feel unable to fully assess the risk of return without additional information. If in the case of a child under the age of twelve when the therapist’s services recommendation is not adequate or the therapist is not willing to disclose anything, or in the case of a child age twelve or over when the child refuses to authorize disclosure, the worker has other options. One would be to ask the court to order a psychological evaluation or bonding study conducted by someone other than the therapist, which is not subject to privilege.²⁸³ Given the timeframes needed for these assessments, parties desiring them should not wait until just before the court hearing to make this request.

If an independent evaluator interviews the child, that evaluator often can avoid making communications within the child’s therapy an evidentiary issue by waiting to communicate with the therapist until after the interview. The evaluator can then present the evaluator’s observations and communications with the child to the therapist, and simply ask the therapist if that information is inconsistent with what is known by the therapist. If the answer is no, that simple exchange usually would not violate psychotherapist-patient privilege or create any basis for further query of the therapist by the court or any party. If the answer is yes, the evaluator can seek a limited waiver from the privilege holder.

Social workers sometimes submit external reports or letters to the court, or attach them to court reports. Any request to the child’s therapist for a written report intended for submission to the court, and thus to all parties, is subject to psychotherapist-patient privilege if it contains any diagnosis, information about what the child has said in therapy or advice the therapist has given the child.²⁸⁴ If under Section 56.103(e)(1) of the California Civil Code or pursuant to a limited release for disclosure to the worker signed by the child or legal representative, the therapist receives a request from a social worker for information that might reveal confidential therapist-patient communications, the therapist should refuse unless there has been a valid waiver. The therapist is required by law to assert privilege unless that has been waived.²⁸⁵

Furthermore, if the requested disclosure comes via Section 56.103(e)(1) of the Civil Code, but is not subject to privilege, and the social worker intends to disclose it to the parties or is not able or willing to prevent disclosure, the therapist should also point out that information disclosed under that statute “shall not be further disclosed by the recipient unless the disclosure is for the purpose of coordinating mental health services and treatment of the minor and the disclosure is authorized by law.”²⁸⁶ If the social worker responds by asserting a duty under Section 280 of the California Welfare and Institutions Code,²⁸⁷ the

therapist could simply decline to disclose anything under Section 56.103(e)(1) of the Civil Code, since the statute is discretionary.

Unless privilege has been waived,²⁸⁸ if the social worker comes into possession of privileged information, the social worker should place any written material or notes concerning the privileged information in the case file in a sealed envelope marked “privileged,” in order to avoid any inadvertent disclosure during discovery.

If a social worker finds it necessary to seek privileged therapist-patient communications for submission to the court (understanding that privileged information does not lose its status unless waived, even if the social worker has it), she should first consult the child’s counsel rather than the therapist. The therapist is not the holder of privilege. The child’s counsel should then consult with the therapist and the child regarding a waiver, with the child the presumed privilege holder if twelve or older, and the attorney the holder otherwise.²⁸⁹ If the child refuses to participate in an evaluation, privilege is not waived,²⁹⁰ and the needed information is absolutely critical to the child’s safety or well being, the worker should present the problem to the court.

The following is an example of how the protocol might work in practice, either under Section 56.103(e)(1) of the Civil Code for a younger child, or with a limited release in place for an older child: If the social worker needed additional information about emotional risks to the child if reunified with the parents, the worker could ask the therapist what services would need to be in place to protect the emotional health of the child if the child were reunified. The extent of services recommended could assist the social worker in assessing risk.

From the perspective of the therapist obligated to preserve the confidentiality of patient communications, an answer to a question about services could allow an indirect recommendation to the social worker that probably would maintain the confidentiality of therapist-patient communications without revealing the child’s confidential statements about the parents. If return did not seem problematic, that might give rise to a recommendation that no services would be needed. If return were very risky, the therapist might conclude that no combination of services could adequately protect the child’s emotional health. Depending on the circumstances of each case, there could be a range of services recommendations in between these extremes that would assist the social worker in assessing risk.

C. Reforms That Would Help Protect Therapy Confidentiality

Those states without protections for disclosure of confidential mental health information at least as strong as those in California should strengthen their laws. States with exceptions for psychotherapist-patient privilege in dependency cases should eliminate these lapses in protection. In states where privilege is protected, minor’s counsel should assert it unless waived.

1. Cleanup

Some have interpreted the *In re Kristine W.* and *In re Mark L.* cases as creating a blanket rule in dependency cases for automatically waiving privilege. The California Legislature should explicitly declare that these cases are not good law.

Sections 280 and 281 of the California Welfare and Institutions Code should be amended to bar the inclusion of privileged information in a social study presented to the court, absent a valid waiver or a court order. (If the Agency believes such information should be before the court, it should file an individualized motion to that effect.²⁹¹) Such an amendment would simply restate existing law,²⁹² but is needed because practice has not caught up with the law. In some counties, review reports often still include a detailed

report from the child's therapist.

Section 827(a)(3)(A) of the California Welfare and Institutions Code should be amended so that, absent a valid release or waiver, the juvenile court cannot release information in case files that is otherwise confidential or privileged. The wording of the existing law is confusing.

Section 1027 of the California Evidence Code was enacted in 1970,²⁹³ decades before the Legislature codified a dependent minor's right to invoke psychotherapist-patient privilege. It provides that the privilege is inapplicable if the patient is under sixteen, the victim of a crime, and disclosure "is in the best interests of the child."²⁹⁴ Its use in a dependency case has not been documented in an appellate opinion in thirty years.²⁹⁵ It should be amended to clarify that it does not apply in dependency cases.

2. Limiting Disclosures About Children Placed Out of Home.

California children younger than twelve do not have an expectation of privacy in their therapy, because their parents presumptively have access to it. Therapists currently can shield confidential therapy information from parents or guardians when disclosure "would have a detrimental effect on the provider's professional relationship with the minor patient or the minor's physical safety or psychological well-being."²⁹⁶ However, the presumption is that such disclosures are not detrimental. Another reform should reverse this presumption as to children removed from their parents' care - so that such disclosures are by default barred as detrimental, unless the court determines that disclosure would not be detrimental. This would shield most confidential therapy information from parents or guardians when their children are placed out of home.²⁹⁷

Under current law the child's counsel holds privilege, and thus controls the use of such information in court subject to the narrow circumstances described in *In re Mark L.*²⁹⁸ If it is good public policy for parents not to use of the children's therapy confidences in court (and it is), it doesn't make sense for noncustodial parents to routinely have access to these confidences out of court. The potential for the misuse of such information in litigation is only partly diminished if the only bar is that it cannot directly be presented as evidence.

In order to complete the shield for a child removed from the physical custody of a parent, the law should also bar that parent from using disclosure releases to allow others to access the child's confidential therapy information. If a minor's counsel is considered to be the child's "legal representative" under Section 56.11(c) of the California Civil Code, then counsel could perform this function. However, as described below this does create a potential for conflict if counsel turns the disclosure spigot on or off in order to further best interests advocacy - if such advocacy is against the client's wishes.

3. Codify Loyalty at Age Twelve

California instructs counsel to maintain the highest duty of loyalty to the client.²⁹⁹ Yet Section 317(e) of the California Welfare and Institutions Code creates an enigma by on the one hand requiring the child's dependency counsel to advocate for the client's "interests" and not to advocate for return if safety is jeopardized, while on the other hand directing counsel to tell the court the child's stated interests. But the Court of Appeal seems to have limited the role of minor's counsel to advocating for "best interests,"³⁰⁰ in part relying on the fact that counsel is appointed as the child's CAPTA guardian ad litem pursuant to federal law.³⁰¹ Some dependency attorneys in California nonetheless follow the recommendation of the National Association of Counsel for Children (NACC) to use a sliding scale: best interests for non-verbal or less mature children, stated interests for older teens, and a mixture for those in between. The mix is based on the maturity and mental health of the child, and her ability to understand how the issues at hand affect her safety and emotional well-being.³⁰²

The NACC has also published a hybrid standard, combining the stated interests standard of the American Bar Association (ABA) with the NACC's blended representation model. NACC's revised standard recommends advocating only stated interests unless the client is unable or unwilling to express a meaningful opinion, and then using a substituted judgment standard: what desires the attorney determines the child most likely would express if mature enough to do so.³⁰³ This standard reflects the fact that it is usually difficult, even impossible, for counsel to advocate for both the client's best interests and stated interests where the two are in conflict.³⁰⁴ One reason to use the ABA/NACC hybrid standard is the reality that if a client believes that his lawyer may advocate against his stated interests, the client's trust in his lawyer often is compromised - sometimes completely and irrevocably. The problem is worse if the lawyer has so advocated.

It is tempting for counsel to contact the child's therapist to attempt to gain insight into the child's motivations, and sometimes that is a necessary part of counsel's investigation - especially when using a blended or best interests approach. But the potential damage caused by the possibility that counsel may advocate against the child's stated interests becomes more extensive, as well as more complicated, where counsel has access to confidential communications between the client and her therapist.³⁰⁵

Out of respect for the client's privacy, the child's attorney normally should avoid querying the therapist about details of therapy unless there is no other less intrusive means for counsel to perform his duties as a protector of that privacy. And if there is some need for counsel to query the therapist, counsel should take care to first consult with the client as to the purpose of the discussion so as to avoid undermining therapeutic progress and trust. California law giving child's counsel unfettered access to the therapist was created at the same time counsel was designated as the presumed holder of privilege for a child under twelve, and became obligated to assert privilege unless waived by a child aged twelve or over.³⁰⁶ Arguably, the primary purpose of that access is for counsel to better perform the gatekeeper role by knowing what information needs to be protected if that information is actively being sought by the Agency or other parties.

If counsel's access to confidential therapist-patient communications is presumed to be a vehicle for counsel to second-guess the client's desires, the therapist may withhold information out of loyalty to the patient and to preserve the patient's candor and trust in the therapist and in therapy. Alternatively, if the therapist lacks confidence in the attorney's ability to determine best interests, she may withhold certain information she believes is inconsistent with what she believes is in the child's best interests. But the worst outcome could be that the child who understands this process withholds information from both the therapist and the attorney that might raise safety or mental health concerns about what the child desires. Anyone who has ever worked with children in foster care knows that children often are surprisingly perceptive about how the system works, and may be distrustful of adults trying to help them.

One way to reduce the negative consequences of communications between attorneys and therapists about foster youth would be for all counsel to follow the suggestions described above. Unfortunately, foster youth have no guarantees that this will occur. And even a lawyer acting as the most careful protector of privacy may nevertheless learn of confidential patient-therapist communications - in the course of conversations with therapists or social workers about non-confidential matters - that may influence best interests advocacy.

Unless foster youth can be certain their confidences will not be used against them, a clear line should be drawn. One approach to partially resolve this dilemma would be to set a presumed age threshold for clients above which counsel must advocate for stated interests only. If that standard were presumed to apply at age twelve and above, those older children could speak freely with their therapists and be assured that their attorneys could not use those communications against their wishes. Such a presumed maturity

standard would work in the same fashion as the privilege holder standard in Section 317(f) of the California Welfare and Institutions Code, and be subject to individualized rebuttal as determined by the juvenile court.³⁰⁷

One of the reasons to examine this issue now is that in 2012 California implemented laws extending foster care to age twenty-one. For non-minor dependents, as adults in foster care are called, it is unreasonable to expect that counsel would represent best interests over the client's stated interests. But advocating best interests is what the law seems to say, because the legislature has not spoken on this point.

It may be that states wishing to create a stated interests standard for representation of dependent minors could only partially implement such a change, because the federal Child Abuse and Prevention Treatment Act ("CAPTA") conditions certain foster care grants on states' appointment of a best interests guardian ad litem for all dependent minors. However, Texas has not lost CAPTA funding despite mandating a stated interests standard of representation.³⁰⁸

If California desires to stay compliant with the letter of CAPTA, California could amend either Rule of Court 5.662 or Section 326.5 of the Welfare and Institutions Code so that the juvenile court could appoint counsel for stated interests representation of a minor, age twelve or over, mature enough to understand the nature and effect of the proceedings,³⁰⁹ and also appoint a Court Appointed Special Advocate ("CASA") to report best interests.³¹⁰ In most California counties, however, there are not enough CASAs for all foster youth. Thus, if California desires to stay compliant with the letter of CAPTA, full implementation of stated interests representation may depend on Congress' amending 42 U.S.C. § 5106a(b)(2)(A)(xiii) so that if an attorney is appointed as a CAPTA guardian ad litem for a minor, age twelve and over, mature enough to understand the nature and effect of the proceedings, that attorney may choose to represent stated interests only. Or, given that the Feds have chosen not to "mess with Texas," federal approval may not be needed.

To avoid confusion, a bill enacting a threshold for stated interests representation should include a statement of intent by the legislature not to change existing law applicable to youth not affected by the legislation. In this way, the legislation would not create a presumption that immature or under age twelve foster children necessarily should be represented only according to a best interests standard.

VI. Conclusion

Therapists, social workers, attorneys and courts should absolutely protect the confidentiality of psychotherapist-patient communications in dependency cases. If any compromises are to be made in the cases of children under the age of twelve, the scale that balances confidentiality of psychotherapist-patient communications against information gathering should have a much longer arm on the confidentiality side. The greatest obligation we owe foster children is to help them heal from the trauma they have experienced. Anything that serves as a barrier to treatment should be presumed to be detrimental to foster children.

The primary objection to walling off therapy raised by some professionals in the foster care system is that it would deprive decision makers of essential information about children. Just as the Court of Appeal concluded in upholding therapist-patient privilege for parents in *In re Eduardo A*, good social work is at the heart of good decision making concerning foster children.³¹¹ Social workers are trained and experienced in risk assessment regarding placement and visitation,³¹² while most therapists are not. In many courts, social workers frequently are qualified as expert witnesses for such assessments. In performing risk assessment, their primary job function, social workers gather information from a variety of sources,³¹³ one of which may be therapists. Social workers may need additional training to help them

respect the critical importance of trust in the therapeutic relationship. Judges and lawyers who have become inappropriately reliant on detailed reports from therapists also may need to be retrained to accept placement and visitation recommendations from social workers, rather than from therapists.

Just as the doctrine of mutual assured destruction was nuclear madness during the cold war, so is the idea that meaningful information will be obtained from therapy in which confidentiality is compromised. The reality is that the patient is unlikely to reveal information that he or she knows may be disclosed by the therapist.³¹⁴

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- 1 David R. Katner, *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, 12 WM. & MARY BILL RTS. J. 511, 559-75 (2004).
- 2 Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat. 500; see Judge Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 45 JUV. & FAM. CT. J. 3, 3-28 (1994).
- 3 Adoption of Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115.
- 4 Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 429-30 (Cal. 1971), but see CAL. BUS. & PROF. CODE § 6068(e)(2) (West 2012) (permitting counsel to disclose confidences reasonably necessary to prevent a crime likely to cause “substantial bodily harm”).
- 5 CAL. WELF. & INST. CODE § 317(e) (West 2012).
- 6 *In re Kristen B.*, 78 Cal. Rptr. 3d 495, 500 (Ct. App. 2008) (relying in part on appointment of minor’s counsel as CAPTA guardian ad litem) (quoting *In re Zamer G.* (2007) 63 Cal. Rptr. 3d 769, 779). CAL. WELF. & INST. CODE § 326.5 (West 2012) and CAL. R. CT. 5.662(c) (2012) effectively require appointment of minor’s counsel as guardian ad litem pursuant to the federal Child Abuse and Prevention Treatment Act.
- 7 CAL. WELF. & INST. CODE § 317(f) (West 2012) (permitting counsel’s access).
- 8 Deborah Paruch, *The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics, and the Current State of the Law*, 29 N. ILL. U. L. REV. 499, 539 (2009).
- 9 CAL. WELF. & INST. CODE § 364(c) (West 2012).
- 10 CAL. WELF. & INST. CODE § 300 (West 2012).
- 11 Jennifer A. v. Super. Ct., 12 Cal. Rptr. 3d 572, 575 (Ct. App. 2004); David B. v. Super. Ct., 20 Cal. Rptr. 3d 336, 352 (Ct. App. 2004).
- 12 Clark M. Peters et al., *Extending Foster Care to Age 21: Weighing the Costs to Government against the Benefits to Youth*, CHAPIN HALL ISSUE BRIEF 1, 1-4 (June 2009) (comparing Illinois with Wisconsin and Iowa); WASH. STATE INST. FOR PUB. POLICY, *EXTENDING FOSTER CARE TO AGE 21: MEASURING COSTS AND BENEFITS IN WASHINGTON STATE 12-14* (2010) [hereinafter WASHINGTON STATE]; MARK E. COURTNEY ET AL., *PARTNERS FOR OUR CHILDREN, CALIFORNIA’S FOSTERING CONNECTIONS TO SUCCESS ACT AND THE COSTS AND BENEFITS OF EXTENDING FOSTER CARE TO 21, 11-12* (2009).
- 13 WASHINGTON STATE, *supra* note 12, at 14.

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- 14 See Omar *ex rel.* Cannon v. Lindsey, 328 F. Supp. 2d 1287 (M.D. Fla. 2004) (summary judgment denied in 42 U.S.C. § 1983 action brought by a mother of a boy tortured by his foster mother).
- 15 See Currier v. Doran, 23 F. Supp. 2d 1277 (D.N.M. 1998) (summary judgment denied in section 1983 action brought by a mother of a boy removed from his mother’s care and placed with his infanticidal father); Tazioly v. City of Phila., No. 97-CV-1219, 1998 U.S. Dist. LEXIS 14603 (E.D. Pa. Sept. 10, 1998) (summary judgment denied in section 1983 action against the city child welfare agency brought by former foster parents of a boy brutally abused by his mother to whom he was returned).
- 16 DeShaney v. Winnebago County Dept. of Soc. Services, 489 U.S. 189, 194-196 (1989).
- 17 *In re* Mark L., 114 Cal. Rptr. 2d 499, 506 n.8 (Ct. App. 2001).
- 18 An analogy to this balancing analysis is the debate that for decades has divided family law mediation services in California. In some counties, divorce and custody mediators only present settlements to the judge. They do not make a recommendation to the judge if no settlement is reached and the details of mediation remain confidential. In others counties, if no settlement is reached, mediators then recommend a resolution to the judge and report on the statements and conduct of the parties during mediation. Bench officers in each of the two systems tend to prefer the system they use, and often cannot comprehend how courts function in the counties that do not. The arguments made on one side are that a bench officer could not competently settle such disputes without a recommendation, and that parties in mediation may act in bad faith if their conduct remains secret. The recommending approach costs less, because if there is no settlement there is rarely a need to have another evaluator assess the case to make a recommendation to the judge. On the other side, it is argued that parties are not likely to air their true feelings and reach a lasting settlement if they know anything they say could be reported to the judge.
- 19 Katner, *supra* note 1, at 546.
- 20 CAL. HEALTH & SAFETY CODE § 123115(a)(2) (West 2012); *see* discussion *infra* Part III.A.
- 21 Katner, *supra* note 1, at 546.
- 22 Paruch, *supra* note 8, at 526-32.
- 23 Brief for Paul M. Smith et al. as Amicus Curiae of the American Psychological Association in Support of Respondents at 23, Jaffee v. Redmond, 518 U.S. 1 (1996) (No. 95-266).
- 24 Katner, *supra* note 1, at 539.
- 25 *In re* Kristine W., 114 Cal. Rptr. 2d 369, 374 (Ct. App. 2001).
- 26 Katner, *supra* note 1, at 525-26.
- 27 During an era in which it was physically impossible to stop an attack launched with nuclear warheads atop intercontinental ballistic missiles, under the MAD doctrine each superpower sought to deter the other by building a force of these missiles that could obliterate the attacker’s homeland afterwards - thus leaving both nations completely destroyed.
- 28 TILLMAN FURNISS, THE MULTI-PROFESSIONAL HANDBOOK OF CHILD SEXUAL ABUSE 22 (1991).
- 29 *Id.* at 36.
- 30 Therapists treating the same patient can communicate with each other without a release from the patient. CAL. CIV. CODE § 56.10(c)(1) (West 2012); 45 C.F.R. § 164.502(a)(1) (2012). It is good practice to so inform the patient. Because such communications do not occur during treatment sessions, the therapist receiving information has time for reflection and can take greater care to preserve the patient’s confidentiality.
- 31 ELLEN F. WACHTEL & PAUL L. WACHTEL, FAMILY DYNAMICS IN INDIVIDUAL PSYCHOTHERAPY: A GUIDE TO CLINICAL STRATEGIES 234 (1986) (“Ellen F. Wachtel, JD, PhD, is a graduate of Harvard Law School and New York University’s

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doctoral program in Clinical Psychology. She has taught and supervised individual and family therapy in the doctoral programs at New York University and the City University of New York.”).

32 IRA D. GLICK ET AL., MARITAL AND FAMILY THERAPY 317 (4th ed. 2000).

33 Katner, *supra* note 1, at 524, 529-36.

34 CAL. WELF. & INST. CODE § 369 (West 2012).

35 CAL. WELF. & INST. CODE § 366.27(a) (West 2012).

36 CAL. WELF. & INST. CODE § 361(a) (West 2012).

37 *See infra* text accompanying note 59.

38 45 C.F.R. § 164.512(e) (2012) (Health Insurance Portability and Accountability Act of 1996 (HIPAA) Administrative Simplification Rule); CAL. CIVIL CODE § 56.10(b)(1),(3) (West 2012). But such disclosures by themselves do not abrogate the patient’s psychotherapist-patient privilege rights unless by specific operation of a court order. *See discussion infra* Part IV.B.

39 CAL. WELF. & INST. CODE § 361(a) (West 2012).

40 CAL. HEALTH & SAFETY CODE § 123115(a)(2) (West 2012).

41 CAL. CIV. CODE § 56.103(e)(1) (West 2012).

42 CAL. FAM. CODE § 6924(b) (West 2012) (The therapist determines the minor’s “maturity.”).

43 CAL. HEALTH & SAFETY CODE § 124260(b) (West 2012); CAL. WELF. & INST. CODE § 14029.8 (West 2012).

44 Sen. Appropriations Comm., Analysis of SB 543, 2 (Cal. 2009) (as amended May, 13, 2009), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0501-0550/sb_543_cfa_20090529_104539_sen_comm.html.

45 *Id.* Additional support for this conclusion comes from the fact that wherever “neglect” appears in the Welfare and Institutions Code pertaining to foster children it is joined to “abuse” using “or,” providing no difference in legal consequence between the two terms. By analogy, the term “elder abuse” encompasses neglect, because elder abuse “means an act, or failure to act” CAL. WELF. & INST. CODE § 4900(b) (West 2012).

46 CAL. CIV. CODE §§ 56.05(g), 56.10(b)(7) (West 2012). A “patient who is a minor shall be entitled to inspect patient records pertaining only to health care of a type for which the minor is lawfully authorized to consent.” CAL. HEALTH & SAFETY CODE § 123110(a) (West 2012).

47 CAL. HEALTH & SAFETY CODE § 123105(e)(1) (West 2012).

48 *See discussion of* CAL. WELF. & INST. CODE § 326.5 *infra* in Part IV.B.2.b. Nor is the social worker a mental health treatment provider under statutes that allow a patient’s treatment providers to communicate with each other without a release by the patient. *See* 45 C.F.R. § 164.502(a)(1) (2012) (HIPAA Administrative Simplification Rule); CAL. CIV. CODE § 56.10(c)(1) (West 2012).

49 CAL. HEALTH & SAFETY CODE § 123115(a) (West 2012). This statute went into effect in 1996. In a case where a minor cannot consent to treatment, this section enables the therapist to prevent parental access that would be detrimental to the minor. Without knowing the intentions of the therapist, minor’s counsel might have to seek a protective order if detriment could occur.

50 HEALTH & SAFETY § 123110(a). This statute was effective in 1996. It is not necessary for a minor to actually have authorized the specific treatment at issue, only that he lawfully could have.

51 *See* CAL. FAM. CODE § 6924(b) (West 2012) (The therapist determines the minor’s “maturity.”).

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- 52 See CAL. WELF. & INST. CODE § 361(c)(1) (West 2012).
- 53 Cal. Assemb., Floor Analysis of Assemb., AB 1687, 4 (Cal. 2007) (as amended Sept. 4, 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1651-1700/ab_1687_bill_20070904_amended_sen_v91.html.
- 54 CAL. CIV. CODE § 56.103(e)(1) (West 2012). “Any other person” includes a foster parent, guardian or parent with whom the child lives. This statute covers “a minor taken into temporary custody or as to who a petition has been filed with the court, or who has been adjudged to be a dependent child.” CAL. CIV. CODE § 56.103(g) (West 2012).
- 55 CAL. CIV. CODE § 56.103(h)(1) (West 2012).
- 56 CAL. CIV. CODE § 56.11(c)(2) (West 2012), relying on FAM. § 6924(b) (The therapist determines the minor’s “maturity.”).
- 57 CIV. § 56.103(e)(2) (West 2012).
- 58 CIV. § 56.103(e)(1).
- 59 CAL. PENAL CODE §§ 11165.7, 11166 (West 2012).
- 60 CAL. CIV. CODE § 56.10(c)(19) (West 2012) (subsection created by AB 1178 in 2007 as part of a package of three bills including AB 1687); *see* CAL. CIV. CODE § 43.92 (West 2012).
- 61 Sen. Judiciary Comm., Analysis of AB 1687, 4 (Cal.2007) (as amended Jul. 3, 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1651-1700/ab_1687_cfa_20070711_153214_sen_comm.html [hereinafter Sen. Judiciary AB 1687].
- 62 CAL. WELF. & INST. CODE § 317(f).
- 63 CAL. CIV. CODE § 56.11(c) (West 2012).
- 64 CIV. § 56.11(c)(2). There is no requirement that the minor actually consented to the specific treatment at issue, only that she lawfully could have.
- 65 Paruch, *supra* note 8, at 501.
- 66 *Id.* at 504.
- 67 *Id.* at 501-08.
- 68 *Id.* at 509, citing *Binder v. Ruvell*, No. 52C2535 (Cir. Ct. Cook Cnty. June 24, 1952), *available at* <http://jaffee-redmond.org/cases/binder.htm>.
- 69 *Id.*
- 70 *Binder*, No. 52C2535.
- 71 *Id.*, quoting 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 2285, 527 (John T. McNaughton rev. 1961).
- 72 *Id.*
- 73 Paruch, *supra* note 8 at 509-10,
- 74 *Id.* at 511-13.
- 75 *Id.* at 514.

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- 76 Jaffee v Redmon, 518 U.S. 1 (1996).
- 77 *Id.* at 10.
- 78 *Id.*
- 79 *Id.* at 17.
- 80 *Id.* at 11.
- 81 *Id.* at 11-12.
- 82 *Id.*
- 83 *Id.* at 22 (Scalia, J., dissenting).
- 84 Paruch, *supra* note 8, at 519-520.
- 85 *Id.* at 520-21.
- 86 *Id.* at 545.
- 87 *Id.* at 553-60.
- 88 *Id.* at 546-47.
- 89 *Id.* at 545 n.242,& 546 n.247.
- 90 Katner, *supra* note 1, at 559 & n.251 (citing Attorney ad Litem for *D.K. v. Parents of D.K.*, 780 So. 2d 301, 304-08 (Fla. Dist. Ct. App. 2001) (describing and applying the statutory privilege to minors)).
- 91 D.C. CODE § 4-1321.05 (2012).
- 92 *In re O.L.*, 584 A.2d 1230, 1241 (D.C.1990).
- 93 LA. CHILD. CODE ANN. art. 663D (2012).
- 94 LA. CHILD. CODE ANN. art.1034 (2012) (governing evidence at hearings to terminate parental rights is similarly worded). But according to Margot Hammond, Attorney Supervisor of the Louisiana Mental Health Advocacy Service, because youths age sixteen or older can sign themselves into psychiatric or substance abuse treatment in Louisiana, if they are in such treatment Federal HIPAA law overrides and gives the patient exclusive control over release of treatment information. Telephone interview by the author (Jun. 2010).
- 95 LOURDES M. ROSADO ET AL., JUVENILE LAW CTR., CONSENT TO TREATMENT AND CONFIDENTIALITY PROVISIONS AFFECTING MINORS IN PENNSYLVANIA (2d ed. 2006). As the citations in this treatise are to numerous Pennsylvania statutes and codes not verified by this writer, the reader is referred to the publication on line at http://www.jlc.org/sites/default/files/publication_pdfs/consent2ndedition.pdf.
- 96 *Id.* at 21-25, 35, 39.
- 97 *Id.* at 23, 25, 39.
- 98 42 PA. CONS. STAT. § 5944 (West 2012).

- 99 The other Juvenile Law Center publication that addresses confidentiality is ALISA G. FIELD & NINA W. CHERNOFF, JUVENILE LAW CTR., PENNSYLVANIA JUDICIAL DESKBOOK: A GUIDE TO STATUTES, JUDICIAL DECISIONS AND RECOMMENDED PRACTICES FOR CASES INVOLVING DEPENDENT CHILDREN IN PENNSYLVANIA 144-145 (4th ed. 2004), available at http://www.jlc.org/sites/default/files/publication_pdfs/pajudicialdeskbook.pdf. Neither publication contains any guidance for attorneys or the court as to how to address psychotherapist-patient privilege. One of the authors of CONSENT TO TREATMENT AND CONFIDENTIALITY PROVISIONS AFFECTING MINORS IN PENNSYLVANIA, *supra* note 95, reported her understanding that if treatment is court ordered, a dependent minor's counsel would not assert privilege. Telephone Interview with Riya Shah, Attorney, Juvenile Law Center (Sept. 23, 2011).
- 100 Email from Jonathan Budd, Assoc. Executive Dir., Kid's Voice (Jan. 5, 2011) (on file with author).
- 101 Survey response from Julia Hillel Larsen, Children's Law Center of Minnesota, Saint Paul, Minn., Dec. 2, 2010.
1. Does the Child Welfare Agency have complete access to what foster children say to their therapists? If not, what are the limitations on access? *Yes, they have access to what they say.*
 2. In answering the question above, does it matter whether children are placed in home or out of home? *Yes, it makes a difference. If the child is placed in the home and the parents still have parental rights then the parent has to sign a waiver.*
 3. How common is it for counsel for child to try to block such Agency access? *Not very common.*
 4. Do parents of foster children have complete access to what foster children say to their therapists? If not, what are the limitations on access? *No. The parent does not have any access if the parent's parental rights have been terminated or if the child is in Long Term Foster Care. If there is no termination, then the parent has the usual rights subject to the client/therapist duty of confidentiality.*
 5. In answering the question above, does it matter whether children are placed in home or out of home? *Yes, see above.*
 6. How common is it for counsel for child to try to block such access by parents? *It is rare, but it has been done for example when a child discloses information to his therapist that he is not ready for the parent to hear.*
 7. Does the court have complete access to what foster children say to their therapists? If not, what are the limitations on access? *Almost. They don't have access to the therapist's notes.*
Does it matter whether the information comes via a report or testimony by the therapist, or second hand via a report or testimony by the social worker? *No. Usually the social worker has the therapist write a written report.*
 8. In answering the question above, does it matter whether children are placed in home or out of home? *Yes, if the child is a state ward then the court will have more access.*
 9. How common is it for counsel for child to try to block such access by the court? *Not very common at all.*
- 102 Survey response from Jennifer C. Hoffman, Child Advocacy Attorney, Voices for Children, St. Louis, Mo., Oct. 26, 2010.
1. Does the Child Welfare Agency have complete access to what foster children say to their therapists? If not, what are the limitations on access? *Typically, the only information provided by therapists regarding therapy is whether the child is attending, whether they are participating, what general topics they are addressing, goals and whether they are meeting those goals. Specific statements made by the child are only typically shared when there is a concern for the safety of the child or others. In that case, the therapist would report to our child welfare organization and then to the Child Abuse and Neglect Hotline. Occasionally what the child states regarding where they would like to live or what their wishes are will be disclosed.*
 2. In answering the question above, does it matter whether children are placed in home or out of home? *No*
 3. How common is it for counsel for child to try to block such access by the Agency? *Not common. Typically any information that I receive as the child's counsel is information also provided to the agency.*
 4. Do parents of foster children have complete access to what foster children say to their therapists? If not, what are the limitations on access? *No. Unless the statements relate to the safety of the child or another person, no information would be provided to the foster parent or biological parent.*
 5. In answering the question above, does it matter whether children are placed in home or out of home? *No.*
 6. How common is it for counsel for child to try to block such access by parents? *Not all that common. In the 7 years I've been practicing in this field, I have only blocked any access on a handful of occasions and those instances were when I believed the therapist or psychologist disclosed something inappropriate or harmful to the child's relationship with the family or the child's emotional well-being.*
 7. Does the court have complete access to what foster children say to their therapists? If not, what are the limitations on access? Does it matter whether the information comes via a report or testimony by the therapist, or second hand via a report or testimony by the social worker? *Typically the reports we receive from therapists only include whether the child is attending, whether they are participating, what general topics they are addressing, goals and whether they are meeting those goals. If the court wanted more information they could certainly obtain it through testimony of the therapist or scheduling a hearing for more information, so in that respect there are no limitations to that access.*
 8. In answering the question above, does it matter whether children are placed in home or out of home? *No*
 9. How common is it for counsel for child to try to block such access by the court? *There are definitely occasions when counsel for the parents or the child will attempt to block admission of testimony and reports that are detrimental to their clients. This happens pretty often. The Judge then decides whether the information is relevant and appropriate to be disclosed. If the information is contained in reports without the therapist present to testify to this information or is only being reported second hand by the social worker, the information is objectionable and it happens often that we attempt to prohibit access. In my experience, yes the Judge can determine whatever he thinks is relevant. I suppose we could*

object, but will probably be overruled if the Judge believes it is pertinent.

103

Survey response from Michele McGee, Office of the Cook County Public Guardian, Chicago, Ill., Dec. 2, 2010.

Question 1: Does the Child Welfare Agency have complete access to what foster children say to their therapists? If not, what are the limitations on access?

Answer: Generally, CWA access depends on the age of the child.

In addition to HIPAA constraints, the Illinois Mental Health and Developmental Disabilities Confidentiality Act (IMHDDCA) governs access to children’s mental health records. The following individuals have access: (1) children over 12; (2) parents of children under 12; (3) parents/guardians for children 12-18 if the child consents and the therapist believes access is consistent with the child’s best interests; (4) guardians for individuals over 18; and (5) attorneys/GALS for children over 12 if the court has authorized such access. (Other individuals are also entitled to notice but their right of access is uncommon in juvenile court cases.) See 740 ILCS 110/4.

For children under 12 living in foster care, the CWA has access to their mental health records, both oral statements and written reports. The CWA Guardianship Administrator issues consents permitting the therapist to talk to CWA staff. Likewise for children over 12, the CWA Guardianship Administrator also issues consents permitting the therapist to talk to CWA staff. However, CWA access is limited to cases in which the child over 12 consents. The practice in Illinois is for the CWA to request a child over 12 sign a consent to release information at the time treatment is initiated. In most cases CWA staff receives information about therapy via a therapy report or oral conversation with the therapist. Generally CWA staff receives a summary of the treatment objectives and progress in treatment, not extensive detail about the child’s statements. However, detail regarding the child’s statements is available to the CWA when either the CWA or the child have signed consents. It is uncommon for a child to refuse to sign a consent or to revoke a consent, but it occurs occasionally. It is very rare for the CWA to request a judicial override because most clients sign.

Question 2: In answering the question above, does it matter whether children are placed in home or out of home?

Answer: By in home or out of home, we assume you mean living in the care of a parent. Yes the CWA access to mental health records is limited if a child is living in the custody of a parent. In Cook County, Illinois, most children living with their parents are NOT in the guardianship of the CWA. In these cases, unless the parent signs a consent (or the child if over 12), the CWA cannot access the information. If a parent refuses to sign a consent, the court can order the parent to execute a consent or can enter a court order permitting the CWA access.

Question 3: How common is it for counsel for child to try to block such access by the agency?

Answer: It is not common for counsel for child to block CWA access.

Question 4: Do parents of foster children have complete access to what foster children say to their therapists? If not, what are the limitations on access?

Answer: As described in question 1 and assuming parental rights have not been terminated, it depends on the age of the child. For children under 12 the parents have a right of access to the information. For children over 12 the parents can only access the information if the child consents and the child’s therapist believes the release of information is in the child’s best interests. If the child or therapist refuses access, the parent can request the court enter and order for release. Under Illinois law, noncustodial parents maintain a right of access. As such, for children in foster care, the parents maintain a right of access consistent (depending on the age of the child). In limited cases, parents have abused this right to receive therapeutic information. In those cases, the court has issued a protective order to limit the parent’s right of access.

Question 5: In answering the questions above, does it matter whether children are placed in home or out of home?

Answer: No. Under the IMHDDCA, custodial and non-custodial parents both have access to records. Parents of children under the guardianship of a CWA may seek access to records in the same manner as parents who have full guardianship/custody of their children.

Question 6: How common is it for counsel for child to try to block such access by parents?

Answer: Our office has sought protective orders to prohibit access in a limited number of cases. In most of those cases, the parents have utilized the internet to re-disclose the children’s information. Our office requested and received a protective order to limit parental access to information and by limiting such access we limited re-disclosure. Attorneys from our office may seek orders to block access when parental access is contrary to the child’s best interests and/or when the parents have abused their rights of access.

Question 7: Does the court have complete access to what foster children say to their therapists? If not, what are the limitations on access? Does it matter whether the information comes via a report or testimony by the therapist or second hand via a report or testimony by the social worker?

Answer: The court’s access to a court ward’s therapy is generally not limited as the court can order the release of the information or introduce the information as part of the court proceeding. See 705 ILCS 405/1-2, 740 ILCS 110/10. Illinois Juvenile Court judges are charged with ferreting out relevant information, which in may include therapeutic information. In some cases, however, the court may need to provide advance notice to the therapist prior to entering an order to release records or summons to testify. See 740 ILCS 110/10(d).

However, in the vast majority of court proceedings in Cook County, Illinois, therapeutic information is disclosed by (1) caseworker summaries of conversations with the therapist; (2) therapy reports; (3) and/or testimony of the therapists. Often this testimony involves therapy goals, progress towards these goals, attendance, and any additional needs. Unless directly relevant to a particular hearing, the exact statements of a child are not regularly disclosed. Rather a summary of the needs and progress are presented to the court. However, if the exact statement a child made to a therapist is relevant to the proceedings, the court can seek this evidence.

Question 8: In answering the question above, does it matter whether children are placed in home or out of home?

Answer: No.

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Question 9: How common is it for counsel for child to try to block access by the court?

Answer: Motions seeking orders blocking court access are not common. The Juvenile Court Act states that “[i]n all proceedings under this Act the court may direct the course thereof so as promptly to ascertain the jurisdictional facts and fully to gather information bearing upon the current condition and future welfare of persons subject to this Act. This Act shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court.” 705 ILCS 405/1-2(2). Information is generally shared with the Juvenile Court so as to fully assist the court in protecting the child’s best interests.

104 Author’s email exchange with Indiana attorney in 2011.

105 See *In re Daniel C.H.*, 269 Cal. Rptr. 624 (Ct. App. 1990) (The Court of Appeal held child therapist allowed to assert therapist-patient privilege.); *In re Cole C.*, 95 Cal. Rptr. 3d 62 (Ct. App. 2009) (The Court of Appeal held that disallowing evidence of therapist’s statements under psychotherapist-patient privilege was proper.).

106 CAL. EVID. CODE § 1012 (West 2012).

107 *In re Daniel C. H.*, 269 Cal. Rptr. at 630.

108 CAL. CIV. CODE §§ 56.05(g), 56.10(c)(16) (West 2012); 45 C.F.R. § 160.103 (2012).

109 *In re Eduardo A.*, 261 Cal. Rptr. 68, 69 (Ct. App. 1989).

110 CAL. EVID. CODE § 1024 (West 2012).

111 *San Diego Trolley, Inc. v. Super. Ct.*, 105 Cal. Rptr. 2d 476, 481 (Ct. App. 2001).

112 *People v. Wharton*, 809 P.2d 290, 305 n.3 (Cal. 1991).

113 CAL. WELF. & INST. CODE § 317(f) (West 2012).

114 *Id.*

115 *Id.*

116 *In re Eduardo A.*, 261 Cal. Rptr. 68, 70 (Ct. App. 1989).

117 *Id.* at 70-71

118 *Id.* at 70.

119 *Id.*

120 *In re Mark L.*, 114 Cal. Rptr. 2d 499, 501 (Ct. App. 2001).

121 *In re Kristine W.*, 114 Cal. Rptr. 2d, 369, 369 (Ct. App. 2001).

122 In California, the Court of Appeal has six districts, with as many as eight divisions of four justices each in each district. Three justices from each division rotate to form a panel to rule on individual cases. Any Court of Appeal ruling has effect throughout the state, *Auto Equity Sales, Inc. v. Super. Ct. of Santa Clara Cnty.*, 369 P.2d 937, 939-40 (Cal. 1962), with the Supreme Court expected to resolve differences in holdings that may arise. CAL. R. CT. 8.500(b)(1) (2012).

123 In one of the cases, *In re Cole C.*, 95 Cal. Rptr. 3d 62, 73 (Ct. App. 2009), discussed in Part IV.B.3.a., *infra*, review was denied, but there a parent would have been asking the Supreme Court to pierce the privilege, which the Court of Appeal had declined to do. It should be noted that while privilege protections are discussed here as they apply to minors in the dependency court, minors whose parents are in family court for custody proceedings may face similar privacy violations.

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- 124 *In re Kristine W.*, 114 Cal. Rptr. 2d, 369 (Ct. App. 2001).
- 125 *Id.* at 369-70.
- 126 *Id.* at 370.
- 127 *Id.*
- 128 *Id.* at 374.
- 129 *Id.* at 370.
- 130 *Id.*
- 131 *Id.*
- 132 *Id.*
- 133 *Id.*
- 134 *Id.*
- 135 The opinion observes that Kristine’s refusal was “on advice of counsel,” *id.*, but it is not clear what significance that had since at all times it was her counsel’s responsibility to advise her.
- 136 *Id.* at 371.
- 137 *Id.*
- 138 *Id.* at 371 n. 4.
- 139 *In re William B.*, 78 Cal. Rptr. 3d 91, 98 (Ct. App. 2008); *In re Robert L.*, 24 Cal. Rptr. 2d 654, 659 (Ct. App. 1993).
- 140 *In re Kristine W.*, 114 Cal. Rptr. 2d at 371 n. 4 (citing *In re Chantal S.*, 913 P.2d 1075, 1081-82 (Cal. 1996)). *In re Chantal S.* is not directly on point. It simply says that juvenile courts should not use Family Law presumptions in crafting custody exit orders because although both courts “focus on the best interests of the child, the juvenile court has a special responsibility” greater than that of the family court. *In re Chantal S.*, 913 P.2d at 1082.
- 141 The referee might have meant that applying his ruling to other cases with different facts might not be in the best interests of those children. But that is not how the Court of Appeal appeared to interpret the comment.
- 142 *In re Kristine W.*, 114 Cal. Rptr. 2d at 371.
- 143 A footnote explains the scope of the ruling using the phrase ““required to disclose,” *id.* at 374 n.8, but the rest of the opinion and the order uses the phrases “permitting ... to receive” and “permits disclosure,” *id.* at 369, 374.
- 144 See CAL. CIV. CODE § 56.103 (West 2012) (effective Jan. 1, 2009).
- 145 *In re Kristine W.*, 114 Cal. Rptr. 2d at 374.
- 146 See *id.* at 369-71; CAL. WELF. & INST. CODE § 362(a) (West 2012). Absent joinder, Kristine’s other options were to stop seeing that therapist, report the therapist to the state licensing agency, or bring a civil privacy suit. The author’s experience today is that simply invoking the acronym *HIPAA* is enough to scare most therapists into silence.
- 147 *In re Kristine W.*, 114 Cal. Rptr. 2d at 371.

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- 148 *Id.*
- 149 *Id.* at 374.
- 150 *Id.*; *In re Pedro M.*, 96 Cal. Rptr. 2d 839 (Ct. App. 2000).
- 151 *In re Kristine W.*, 114 Cal. Rptr. 2d at 373 (quoting *In re Pedro M.*, 96 Cal. Rptr. 2d at 841).
- 152 *In re Pedro M.*, 96 Cal. Rptr. 2d at 841.
- 153 *Id.* at 842.
- 154 *In re Kristine W.*, 114 Cal. Rptr. 2d at, 525.
- 155 *Id.*
- 156 *In re Mark L.*, 114 Cal. Rptr. 2d 499 (Ct. App. 2001).
- 157 *Id.* at 501-02.
- 158 *Id.* at 502.
- 159 *Id.*
- 160 *Id.*
- 161 *Id.*
- 162 *Id.* at 504.
- 163 *Id.*
- 164 *Id.* at 502. Not stated in the opinion is the therapist's obligation under Section 1015 of the California Evidence Code to assert the privilege in the face of any and all requests for confidential information, unless there is a valid waiver. See *Roberts v. Super. Ct. of Butte Cnty.*, 508 P.2d 309, 316 (Cal. 1973).
- 165 *In re Mark L.*, 114 Cal. Rptr. 2d at 502-03.
- 166 *Id.* at 503.
- 167 *Id.*
- 168 *Id.*
- 169 *Id.*
- 170 *Id.*
- 171 *Id.* at 507.
- 172 *Id.*

- 173 *Id.* at 504.
- 174 The U.S. Supreme Court defined dicta thusly:
 It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.
 Cohens v. Virginia, 19 U.S. 264, 399-400 (1821). In this criminal case involving the sale of District of Columbia lottery tickets in Virginia in contravention of that state’s law, the Court slapped down defense counsel’s attempt to argue using dictum from Marbury v. Madison, 5 U.S. 137 (1803). *Cohens*, 19 U.S. at 399-402. The term *dicta* is so widely used, one has to go back that far to find a definition in a Supreme Court opinion. The California Supreme Court does not appear to have ever offered its own definition, which is remarkable given that Stanley Mosk, the court’s longest serving justice, was known for his aggravation at the improper use of the plural form of the word in reference to a single instance.
- 175 *In re Mark L.*, 114 Cal. Rptr. 2d at 504. It is not clear whether information supposedly stricken from the record included that substantial evidence. “The information the court struck from the Agency’s reports at the six-month review hearing was unhelpful to Paul. The therapist initially reported that Mark did not mention Paul in therapy, and later reported that Mark did not want any contact with Paul.” *Id.* at 504 n.6. The Court of Appeal does not explain on what basis it was examining this stricken information. Given that the court was looking, it can be assumed that if anything was stricken indicating that the therapist might have been in anyway inclined to support visitation or conjoint therapy in the future, this would have been mentioned in the opinion to support its remand - based entirely on the possibility that Mark would agree to see his father if ordered by the court.
- 176 *Id.* at 506 (citations omitted).
- 177 *Id.* at 506 n.8.
- 178 It may be argued that this order was an improper delegation of authority. *In re Donovan J.*, 68 Cal. Rptr. 2d 714, 715-16 (Ct. App. 1997) (Court cannot delegate sole discretion as to whether visits occur to therapist.). In what may be form over substance, the Court of Appeal has permitted others to determine when visitation should commence as long as the court makes an underlying order that visitation should occur at some point. *In re Moriah T.*, 28 Cal. Rptr. 2d 705, 708 (Ct. App. 1994) (Visitation order that delegates “time, place and manner” to the Agency is valid, unless the Agency has “complete discretion” as to whether visits occur.). However, in Mark’s case, the referee said, “I don’t have evidence before me to indicate that the conjoint therapy would ... be appropriate.” *In re Mark L.*, 114 Cal. Rptr. 2d at 579. From a practical standpoint, he really was delegating the decision as to whether visits should occur to the therapist and minor’s counsel. See *supra* text accompanying note 165. The Court of Appeal could have decided the case on this issue alone if it had wished to do so.
- 179 *In re Mark L.*, 114 Cal. Rptr. 2d at 507.
- 180 *Id.* at 504.
- 181 *In re Kristine W.*, 114 Cal. Rptr. 2d 369, 371 (Ct. App. 2001).
- 182 See discussion *infra* Part IV.B.3.
- 183 *In re Mark L.*, 114 Cal. Rptr. 2d at 505; *In re Kristine W.*, 114 Cal. Rptr. 2d at 372.
- 184 *In re Kristine W.*, 114 Cal. Rptr. 2d at 372.(citing Assemb.Comm. on Judiciary, Analysis of SB 2160 (1999-2000 Reg. Sess.) as amended Apr. 25, 2000, at 6.).
- 185 Assemb.Comm. on Judiciary, Analysis of SB 2160, 4 (Cal. 2000) (as amended Apr. 25, 2000), available at http://info.sen.ca.gov/pub/99-00/bill/sen/sb_2151-2200/sb_2160_cfa_20000619_115406_asm_comm.html.
- 186 *Id.* In 2000, the author of this article was Legislative Counsel for the California Judges Association and was urged by the Chief Executive Officer of the Administrative Office of the Courts to support SB 2160. San Diego County’s situation was part of these discussions. The Association fully supported the bill.

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- 187 *Id* at 8. According to the former head of the San Diego Public Defender’s Child Advocacy Unit, charged with representing dependent minors, it was the practice during the year or two preceding the enactment of SB 2160 for minors’ counsel to be relieved of their duties when cases were permanently planned - that is when the goal for children placed out of home became adoption, legal guardianship or long term foster care. Email from Gary Seiser, Deputy County Counsel (appellate counsel for the companion cases) (Dec. 29, 2011) (on file with author) (citing Seiser’s email exchange with San Diego County Superior Court Judge Ana Espana). Seiser is a lead author of the authoritative treatise, CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE.
- 188 Not that there would be an appropriation to pay for it. The bill’s big charade was that “[b]ecause courts are already required to appoint counsel if they determine that the minor would benefit from same, it is not anticipated that there would be any significant change in the number of cases involving court-appointed counsel”, and therefore no significant cost impact. Appropriations Comm. Fiscal Summary, Analysis of SB 2160, 2 (Cal. 2000) (as amended Apr. 25, 2000), available at http://leginfo.ca.gov/pub/99-00/bill/sen/sb_2151-2200/sb_2160_cfa_20000519_105908_sen_comm.html.
- 189 *In re* Kristine W., 114 Cal. Rptr. 2d at 372; see *In re* Mark L., 114 Cal. Rptr. 2d at 505.
- 190 *In re* Kristine W., 114 Cal. Rptr. 2d at 372; see *In re* Mark L., 114 Cal. Rptr. 2d at 505.
- 191 *In re* Mark L., 114 Cal. Rptr. 2d at 506; *In re* Kristine W., 114 Cal. Rptr. 2d at 373 The justices in the companion cases seem to be saying that minor’s therapy in dependency actions should be similar to the recommending mediation model in family court, discussed in *supra* note 18. To this day, San Diego remains a recommending county in family law.
- 192 *In re* Mark L., 114 Cal. Rptr. 2d at 505; *In re* Kristine W., 114 Cal. Rptr. 2d at 373.
- 193 *In re* Kristine W., 114 Cal. Rptr. 2d at 373.
- 194 Case files include both those kept by the court and the Agency. CAL. WELF. & INST. CODE § 827(e) (West 2012). Long before this legislation, however, federal statutes prevailed when in conflict with state law because of the federal Supremacy Clause. U.S. Const., art. VI, cl. 2.
- 195 CAL. WELF. & INST. CODE § 827(a)(3)(A) (West 2012) (enacted 1999 by SB 199 (Cal. 1999)). SB 199 was intended to open for public scrutiny the files of children that die in foster care, but it has spawned much confusion. There is as yet no case law interpreting it. Because subsequent sentences in the paragraph that is § 827(a)(3)(A) do not explicitly bar the release of privileged documents, the result has been mixed interpretations such as Los Angeles Superior Court Local Rule 7.2(a)(2) (2012) that says that persons entitled to inspect juvenile court records without a court order under CAL. WELF. & INST. CODE § 827(West 2012) are not entitled to inspect privileged documents. However, Los Angeles Superior Court Local Rule 7.2(b)(2)(d) (2012) says that persons seeking access by court order under § 827 may be granted access “if good cause exists.” But this local rule and § 827(a)(3)(A) arose from the era in 1999, when § 827(a)(3)(A) was created, when the social worker was the dependent’s guardian ad litem and held therapist-patient privilege, and not all foster children had attorneys. In this context, the standard for privilege probably often was regarded as nothing more than clear detriment to the minor. See CAL. WELF. & INST. CODE § 827(a)(3)(A) (West 2012) (court may only release protected information if not detrimental to the minor).
The catch-all sentence at the end of the paragraph that is § 827(a)(3)(A) that says the paragraph does not limit the ability of the court to perform its duties could perhaps be interpreted to negate privilege in certain situations. Outside of *in camera* review of the file, however, to the extent that § 827(a)(3)(A) somehow might be interpreted to allow the court or others to pierce privilege - it is superseded by the more recent protective statute CAL. WELF. & INST. CODE § 317(f) (West 2012). And, the specific operation of § 317(f) supersedes the general provision in § 827(a)(3)(A), according the statutory interpretation mandate of CAL. CIV. PROC. CODE. § 1859 (West 2012). For more about statutory interpretation, see discussion *infra* Part IV.B.4.
- 196 Sen. Judiciary Comm., Analysis of AB 2480, 7 (Cal. 2006) (as amended Aug. 7, 2006), available at http://leginfo.ca.gov/pub/05-06/bill/asm/ab_2451-2500/ab_2480_cfa_20060810_103305_sen_comm.html [hereinafter Sen. Judiciary AB 2480].
- 197 Assemb. Comm. on Judiciary, Analysis of AB 2480, 5-6 (Cal. 2006) (as amended Mar. 27, 2006), available at http://leginfo.ca.gov/pub/05-06/bill/asm/ab_2451-2500/ab_2480_cfa_20060330_165833_asm_comm.html
- 198 Sen. Judiciary AB 2480, *supra* note 197, 6.
- 199 *In re* Mark L., 114 Cal. Rptr. 2d 499, 505 (Ct. App. 2001); *In re* Kristine W., 114 Cal. Rptr. 2d 369, 372 (Ct. App. 2001).
- 200 Assemb., AB 1832 Introduced (Cal. 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1801-1850/ab_1832_bill_20020123_introduced.html.

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- 201 Assemb., AB 1832 Amended (Cal. 2002) (as amended Apr. 18, 2002), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1801-1850/ab_1832_bill_20020418_amended_asm.html.
- 202 *In re* Mark L., 114 Cal. Rptr. 2d at 506-07; *In re* Kristine W., 114 Cal. Rptr. 2d at 374.
- 203 Assemb. Comm. on Judiciary, Analysis of SB 2160, 7-8 (Cal. 2000) (as amended Apr. 25, 2000), *available at* http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_2151-2200/sb_2160_cfa_20000619_115406_asm_comm.html.
- 204 *In re* Pedro M., 96 Cal. Rptr. 2d 839 (Ct. App. 2000).
- 205 *Id.*
- 206 *Id.* at 840.
- 207 *Id.* at 841.
- 208 *Id.*
- 209 *In re* Mark L., 114 Cal. Rptr. 2d 499, 506 (Ct. App. 2001); *In re* Kristine W., 114 Cal. Rptr. 2d 369, 373 (Ct. App. 2001).
- 210 A dependency court can make treatment a condition of returning the children, but it cannot otherwise force a parent to engage in treatment. *In re* Nolan W., 203 P.3d 454, 463 (Cal. 2009) (habeas corpus petition).
- 211 *In re* Pedro M., 96 Cal. Rptr. 2d at 841 (emphasis omitted).
- 212 *In re* Mark L., 114 Cal. Rptr. 2d at 506.
- 213 Roberts v. Super. Ct. of Butte Cnty., 508 P.2d 309, 313 (Cal. 1973).
- 214 *E.g.*, Luhdorff v. Super. Ct. of Tulare Cnty., 212 Cal. Rptr. 516, 518-19 (Ct. App. 1985).
- 215 *In re* Mark L., 114 Cal. Rptr. 2d at 506; *In re* Kristine W., 114 Cal. Rptr. 2d at 373 In fact, Deputy County Counsel Gary Seiser, appellate counsel in the cases, claims credit for the “dual purpose” concept. Email from Gary Seiser, Deputy County Counsel (Dec. 6, 2011) (on file with author).
- 216 *In re* Pedro M., 96 Cal. Rptr. 2d at 841.
- 217 *Id.*
- 218 *In re* Christopher M., 26 Cal. Rptr. 3d 61 (Ct. App. 2005).
- 219 *In re* Eduardo A., 261 Cal. Rptr. 68, 209 Cal. App. 3d 1038 (Ct. App. 1989).
- 220 *In re* Kristine W., 114 Cal. Rptr. 2d at 374.
- 221 *In re* Eduardo A., 261 Cal. Rptr. at 70.
- 222 *Id.*
- 223 *In re* Jasmon O., 878 P.2d 1297 (Cal. 1994)
- 224 *Id.*
- 225 *In re* Mark L., 114 Cal. Rptr. 2d at 506 (quoting *In re* Jasmon O., 878 P.2d at 1314-15).
- 226 *In re* Kristine W., 114 Cal. Rptr. 2d at 374 (citing *In re* Jasmon O., 878 P.2d at 1314-15).
- 227 *In re* Jasmon O., 878 P.2d at 1314-15.
- 228 CAL. EVID. CODE § 1017 (West 2012); *see In re* Mark L., 114 Cal. Rptr. 2d at 506 n.8 (suggesting use of an independent

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evaluator instead of the therapist).

229

In re Daniel C. H., 269 Cal. Rptr. 624, 220 Cal. App. 3d 814 (Ct. App. 1990).

230

Id.

231

In re Mark L., 114 Cal. Rptr. 2d at 506; *see In re Kristine W.*, 114 Cal. Rptr. 2d at 373 (nearly identical parenthetical).

232

In re Daniel C. H., 269 Cal. Rptr.at 628.

233

Id. at 632-33.

234

In re Cole C., 95 Cal. Rptr. 3d 62 (Ct. App. 2009).

235

Id. at 70.

236

Id.

237

Id.

238

Id. at 71.

239

Id. at 70.

240

In re Mark L., 114 Cal. Rptr. 2d 499 (Ct. App. 2001).

241

In re Cole C., 95 Cal. Rptr. 3d at 72-73.

242

Id. at 72.

243

Id.

244

Id. at 73.

245

Id.

246

In re S.A., 106 Cal. Rptr. 3d 382 (Ct. App. 2010).

247

Id.

248

Id. at 390.

249

Id. at 389.

250

Id. at 390.

251

Id. at 391. The court did not reveal whether the result would have been different if S.A. had testified that she had told the therapist about the molestation.

252

Id.

253

Id.

254

CAL. CIV. CODE § 56.103(e)(1) (West 2012).

255

CAL. WELF. & INST. CODE § 280 (West 2012). "The board of supervisors may delegate to the county welfare department all or part of the duties of the probation officer concerning dependent children described in Section 300." CAL. WELF. & INST. CODE § 272(a)(1) (West 2012).

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- 256 CAL. WELF. & INST. CODE § 272(a)(1) (West 2012).
- 257 CAL. R. CT. 5.690(a) (2012).
- 258 *Jaffee v. Redmond*, 518 U.S. 1 (1996) (civil case involving shooting by police); CAL. EVID. CODE § 1012 (West 2012).
- 259 *Jaffee*, 518 U.S. at 10 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).
- 260 *In re S.A.*, 106 Cal. Rptr. 3d 382, 390 (Ct. App. 2010).
- 261 CAL. CODE OF CIV. PROC. § 1859 (West 2012); *People v. Black*, 113 P.2d 746, 750-51 (Cal. Ct. App. 1941) (“Once the intention of the legislature is ascertained it will be given effect even though it may not be consistent with the strict letter of the statute. In construing a statute it must be remembered that no law is to be construed in such a manner as to result in a palpable absurdity.” (citations omitted)); *Silver v. Brown*, 409 P.2d 689, 692 (Cal. 1966) (“The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute’s legislative history, appear from its provisions considered as a whole.”).
- 262 CAL. CIV. CODE § 56.103(e)(1) (West 2012).
- 263 CIV. § 56.103(e)(1).
- 264 Even if a child needing therapy absolutely refuses to participate it has not been the author’s experience that such an order would be sought, because the lack of available sanctions against the child essentially makes such an order unenforceable. If a social worker believes a reluctant child needs therapy before returning home, usually that worker simply declines to make a recommendation for return until the child agrees to engage. If the reunification clock runs out, the issue of the child’s therapy is never the sole deciding factor for return, and upon return the child’s therapy becomes the parents’ responsibility.
- 265 It is conceivable that a court might want some supporting information from the child’s individual therapist before ordering a reluctant parent to engage in family therapy. However, it has not been the author’s experience that courts want or need anything more than the knowledge that the therapist is not opposed to this recommendation by the child welfare worker before agreeing to include family therapy in the case plan. When an abused or neglected child old enough to engage in family therapy recently has been or is about to be returned home, the need for family therapy generally is presumed.
- 266 *See, e.g.*, Sen. Judiciary AB 1687, *supra* note 61.
- 267 Assemb. Bill No. 1687, § 1(c) (as chaptered Oct. 12, 2007); *See* CAL. CIV. CODE § 56.103(h) (West 2012) (“(1) Except as described in paragraph (1) of subdivision (e), nothing in this section shall be construed to limit or otherwise affect existing privacy protections provided for in state or federal law. (2) Nothing in this section shall be construed to expand the authority of a social worker, probation officer, or custodial caregiver beyond the authority provided under existing law to a parent or a patient representative regarding access to medical information.”)
- 268 45 C.F.R. §§ 164.502(a)(1)(ii), 164.506 (2012), *cited by* Sen. Judiciary AB 1687, *supra* note 61, at 3; Assemb. Floor, Analysis of AB 1687, 4 (Cal. 2007) (as amended Sept. 4, 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1651-1700/ab_1687_cfa_20070910_231705_asm_floor.html.
- 269 Sen. Judiciary AB 1687, *supra* note 61, at 4.
- 270 *Id.* at 6 (quoting CWDA).
- 271 *See supra* text accompanying note 61.
- 272 Sen. Judiciary AB 1687, *supra* note 61, at 4; Senate Floor, Analysis of AB 1687, 3 (Cal.2007) (as amended Aug. 20, 2007), *available at* ftp://leginfo.ca.gov/pub/07-08/bill/asm/ab_1651-1700/ab_1687_cfa_20070821_143745_sen_floor.html; Senate Floor, Analysis of AB 1687, 3 (Cal. 2007) (as amended Sept. 4, 2007), *available at* http://leginfo.ca.gov/pub/07-08/bill/asm/ab_1651-1700/ab_1687_cfa_20070905_133136_sen_floor.html.
- 273 CAL. CODE OF CIV. PROC. § 1859 (West 2012).
- 274 CAL. WELF. & INST. CODE § 280 (West 2012); CAL. CIV. CODE § 56.103 (West 2012).

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- 275 CAL. R. CT. 5.690(a) (2012).
- 276 *See supra* text accompanying note 178.
- 277 *In re* Mark L., 114 Cal. Rptr. 2d 499, 507 (Ct. App. 2001).
- 278 45 C.F.R. § 164.512(e) (2012) (HIPAA Administrative Simplification Rule); CAL. CIV. CODE, § 56.10(b)(1),(3) (West 2012). Otherwise, if the child age twelve or over “is the alleged victim of incest or child abuse” or a danger to self or others, and “is mature enough to participate intelligently” in treatment, then only the child controls access to his mental health information. CAL. FAM. CODE § 6924(b) (West 2012); CAL. HEALTH & SAFETY CODE §§ 123110(a), 123115(a)(1) (West 2012). If the child is under twelve, the parent might be able to sign a release, CAL. HEALTH & SAFETY CODE § 123105(e)(1) (West 2012), but the therapist could refuse to disclose based on best interests. CAL. HEALTH & SAFETY CODE § 123115(a)(2) (West 2012). There is no legal authority for social workers to sign mental health information releases. *See supra* Part III.B.
- 279 CAL. CIV. CODE § 56.103(e)(1) (West 2012). The therapist may disclose this information, but is not required to do so. Care most likely means mental health services. *See supra* Part III.A. Disclosure of such information about a foster child age twelve or over requires a release signed by the child. CAL. CIV. CODE § 56.103(h) (West 2012).
- 280 In the author’s experience, many children’s therapists already refuse to provide an opinion about reunification or custody.
- 281 CAL. PENAL CODE §§ 11165.7, 11166 (West 2012).
- 282 CAL. CIV. CODE § 56.10(c)(19) (West 2012); *see* CAL. CIV. CODE § 43.92 (West 2012).
- 283 CAL. EVID. CODE § 1017 (West 2012); *see In re* Mark L., 114 Cal. Rptr. 2d 499, 506 n.8 (Ct. App. 2001) (suggesting use of an independent evaluator instead of the therapist).
- 284 CAL. EVID. CODE § 1012 (West 2012). While obviously there is a tension between privilege and the disclosure of diagnosis permitted by CAL.CIV. CODE § 56.103(e)(1), the conditions for disclosure of diagnosis to persons other than the social worker or caregiver are very limited, unless privilege has been waived. *See supra* Part IV.B.4.
- 285 CAL. EVID. CODE § 1015 (West 2012). Absent a court order, a therapist now is also barred from releasing mental health information to the parents of a foster child placed out of home, pursuant to SB 1407 (Cal. Health and Safety Code Section 123116, chaptered 2012).
- 286 CIV. § 56.103(e)(1).
- 287 *See supra* Part IV.B.4.
- 288 Only the child, if twelve or older, presumably can waive privilege. If under twelve, only the child’s attorney can. CAL. WELF. & INST. CODE § 317(f) (West 2012).
- 289 Although a child age twelve or over presumably can waive privilege, the child’s counsel should be notified if waiver is sought so that the child can fully understand the consequences of waiver - for example, that a report submitted by the therapist to the court will be shared with all parties and may subject the therapist to cross-examination in a hearing.
- 290 *See In re* Kristine W., 114 Cal. Rptr. 2d 369, 373-74 (Ct. App. 2001); *see* discussion *supra* Part IV.B.2.a.i.
- 291 *See supra* Part IV.B.2.d.
- 292 *See supra* Part IV.B.4.
- 293 CAL. EVID. CODE § 1027 (West 2012).
- 294 *Id.*
- 295 There has been but a single application of CAL. EVID. CODE § 1027 reported in dependency law, used against a mother three decades ago who tried to invoke the privilege on behalf her child to prevent the admission of her child’s psychotherapist-patient communications that supported the allegations against the mother. *In re Courtney S.*, 181 Cal. Rptr. 843, 847 (Ct. App. 1982). Given that the statute likely was enacted in contemplation of this possibility, but impossible today because of *In re S.A.*, 106 Cal. Rptr. 3d 382, 391-92 (Ct. App. 2010), it would seem to be irrelevant in the

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new millennium and ripe for repeal.

296 CAL. HEALTH & SAFETY CODE § 123115(a)(2) (West 2012).

297 Here, children “removed from a parent’s care” or “placed out of home” mean children who are the subject of a petition
filed for their removal. (Just before this article was sent to the printer, the author’s proposal here to limit disclosures was
enacted unanimously via California Senate Bill 1407 (Reg. Sess 2011-2012).)

298 *See supra* Part IV.B.2.a.ii.

299 *Neel v. Magana*, 491 P.2d 421, 420-30 (Cal. 1971).

300 *See In re Kristen B.*, 78 Cal. Rptr. 3d 495, 500 (Ct. App. 2008).

301 CAL. WELF. & INST. CODE § 326.5 (West 2012); CAL. R. CT. 5.662(c) (2012); Child Abuse Prevention and Treatment Act, 42
U.S.C. § 5106a(b)(2)(B)(xiii) (West 2012) (guardian “to make recommendations to the court concerning the best interests
of the child.”).

302 *See* NAT’L ASS’N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE
AND NEGLECT CASES (2001). The NACC also recommends:

Client directed representation [that] does not include “robotic allegiance” to each directive of the client. Client directed
representation involves the attorney’s counseling function and requires good communication between attorney and
client. The goal of the relationship is an outcome which serves the client, mutually arrived upon by attorney and client,
following exploration of all available options.

NAT’L ASS’N OF COUNSEL FOR CHILDREN, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO
REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (NACC REVISED VERSION) 8 (1999) [hereinafter ABA STANDARDS].

303 ABA STANDARDS, *supra* note 302, at 9 (recommending using “objective criteria” for substituted judgment).

304 *Id.* at 4, 7. Where stated interests would put the child in serious danger, the hybrid standard urges the attorney to first
counsel the client on the wisdom of her position, and if that fails, request the juvenile court to appoint a separate
guardian ad litem to represent best interests while the attorney represents stated interests. In circumstances where the
attorney believes the child is in imminent danger, the attorney should take whatever steps are necessary to protect child.
Id. at 7.

305 *In re Kristine W.*, 114 Cal. Rptr. 2d 369, 374 (Ct. App. 2001).

306 Sen. SB 2160 (Cal. 2000) (amending CAL. WELF. & INST. CODE § 317 and creating § 326.5), *available at*
http://leginfo.public.ca.gov/pub/99-00/bill/sen/sb_2151-2200/sb_2160_bill_20000914_chaptered.html.

307 Janet Sherwood, Chair of the Executive Committee of the NACC Board of Directors, suggested the following amendment
to CAL. WELF. & INST. CODE § 317 (West 2012):

(e) (1) Counsel shall be charged in general with the representation of the child’s interests. To that end, counsel shall make
or cause to have made any further investigations that he or she deems in good faith to be reasonably necessary to
ascertain the facts, including the interviewing of witnesses, and shall examine and cross-examine witnesses in ... *all*
contested hearings. Counsel may also introduce and examine his or her own witnesses ..., and *shall* participate ... in the
proceedings to the degree necessary to adequately represent the child. *If the child is age 12 or older and is not under a
disability that prevents the child from being able to formulate a position on the issues before the court, counsel must
represent the child’s stated interests. If the child is under the age of 12, counsel must represent the child’s stated interests
to the extent that the child is mature enough to formulate a position. If the child cannot meaningfully participate in
formulating a position on a specific issue, the attorney may substitute his or her judgment for the child’s and formulate
and present a position which serves the child’s interests.*

(2) If the child is four years of age or older, counsel shall interview the child to determine the child’s wishes and assess
the child’s well-being *Counsel shall advise the court of the child’s wishes and present any nonprivileged evidence that
is relevant to the child’s safety, protection, or well-being*

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- 308 Email from Janet Sherwood, Chair of the Executive Committee of the NACC Board of Directors (Feb. 18, 2012) (on file with author).
- 309 Nothing in the language of CAL. WELF. & INST. CODE § 326.5 (West 2012) presently would prohibit the Judicial Council from amending CAL. R. CT. 5.662 (2012).
- 310 A CASA is a trained volunteer who may act as an “officer of the court appointed to investigate proceedings on behalf of the court.” CAL. WELF. & INST. CODE § 103(h) (West 2012).
A CASA shall do all of the following:
(1) Provide independent, factual information to the court regarding the cases to which he or she is appointed.
(2) Represent the best interests of the children involved, and consider the best interests of the family, in the cases to which he or she is appointed.
(3) At the request of the judge, monitor cases to which he or she has been appointed to assure that the court’s orders have been fulfilled.
CAL. WELF. & INST. CODE § 102(c) (West 2012).
- 311 *In re Eduardo A.*, 261 Cal. Rptr. 68, 70 (Ct. App. 1989).
- 312 *Id.*
- 313 *Id.*