NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 24, 2019

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Re: *Lisa Sherfey v. Cameron Cushing*, CL-2011-16724

Dear Counsel:

This matter came before the Court on September 20, 2019 upon Dr. Jeffrey Schulman's Objections and Motion to Quash a *Subpoena Duces Tecum* of the fourteen-year-old minor child's mental health care records. Dr. Jeffrey Schulman is not a party to the litigation.

BACKGROUND

This motion is part of a divorce case that has had significant litigation over the past eight years. Prior to the filing of Dr. Schulman's Objections and Motion to Quash a *Subpoena Duces Tecum*, a three-day custody trial was scheduled, where each party was seeking sole legal and physical custody of the minor child whose mental health care records are at issue. Defendant, Dr. Cameron Cushing, states that the child's mental health concerns are a significant element of both filings. Accordingly, Dr. Schulman, the child's therapist, was deposed on July 15, 2019. On July 31, 2019, Defendant served Dr. Schulman with a *subpoena duces*

OPINION LETTER

tecum for copies of all documents relating to the minor child, "including but not limited to":

> notes, test results, written referrals to other treatment sources, prescriptions, treatments, therapy, consultation, diagnosis, prognosis or etiology and other related records, including email communications and texts, from April 1, 2017 to the date of [his] production of these documents.

Dr. Schulman has been treating the minor child since September 30, 2015. During these sessions with the minor child, it appears from Dr. Schulman's notes that one of the two parents was present and engaged in the counseling; nothing has been presented by Dr. Schulman to indicate otherwise. At an earlier custody hearing in February, 2017, Dr. Schulman released his entire file without objection to counsel for both parties pursuant to a validly issued *subpoena duces tecum* prior to the trial, and Dr. Schulman testified at length about his work with the minor child, his treatment of the patient and his opinions about the child's mental condition during the trial.

On August 6, 2019, after a phone consultation with another doctor, Dr. Schulman wrote in his notes:

> In exercise of my professional judgement the furnishing of or revealing of this record to the requesting parent could or would be reasonably likely to cause substantial harm to the minor child or his biological sisters.

This statement is essentially verbatim from the language used in Code § 20-124.6(B):

> B. In the case of health records, access may also be denied if the minor's treating physician or the minor's treating clinical psychologist has made a part of the minor's record a written statement that, in the exercise of his professional judgment, the furnishing to or review by the requesting parent of such health records *would be reasonably likely to cause substantial harm to the minor or another person*. (Emphasis added).

On August 9, 2019, Dr. Schulman filed a Motion to Quash the *subpoena duces tecum* "out of an abundance of caution," stating that statutory law on this topic prevents the court from having jurisdiction.

For the following reasons, the motion to quash the *subpoena duces tecum* is GRANTED.

THE ARGUMENTS OF DR. SHULMAN AND THE PARTIES

Dr. Schulman: Dr. Schulman objects to the *subpoena duces tecum* to the extent that it attempts to obtain copies or otherwise obtain access to psychotherapy notes as such records are precluded from production pursuant to Code § 32.1-127.1:03 and Code § 20-124.6. Dr. Schulman argues that it is his:

> professional judgement that the release of the health records would

> be reasonably likely to cause substantial harm to the minor and/or another person(s). The reasoning behind that determination includes, but is not limited to, destroying any feeling of privacy and safety that enables the minor child to freely seek counseling and therapy.

Because of this concern, he states that he made a good faith effort to resolve this matter prior to resorting to court action. Pursuant to Code § 32.1-127.1:03(F) and Code § 20-124.6, Dr. Schulman advised Defendant on August 6, 2019 of Defendant's option to designate a clinical psychologist to review the health records to make a judgment whether the minor child's health records should be made available or, in the alternative, to permit Dr. Schulman to designate a reviewing clinical psychologist to make such determination pursuant to Code § 32.1-127.1:03(F). Additionally, Dr. Schulman objects to the request within the *subpoena duces tecum* for any documents not related to his treatment of the minor child.

Defendant: Defendant argues that Dr. Schulman, through his voluntary involvement in the litigation over the last several years, has waived his right to a "blanket objection to the production of his file." Defendant states that Dr. Schulman testified at length in 2017 during the last custody hearing and released his entire file without objection to counsel for both parties. More recently, Dr. Schulman was deposed on July 15, 2019, during which he referred to his notes throughout the deposition. He spoke extensively about his therapeutic relationship with the minor child and, during the three-hour deposition, he only declined to respond fully to one question.

Despite repeated requests by Defendant, Dr. Schulman refused to identify who could be harmed and the reasons the person(s) could be harmed; and, when asked, he refused to redact portions of his file that could cause such harm. Defendant argues that Code § 32.1-127.1:03(D)(2) provides for the release of medical records in compliance with a *subpoena* issued in accord with subsection (H) of that statute or pursuant to court order upon good cause shown. Further, Code § 32.1-127.1:03(H)(6) instructs the court to use the following factors in determining good cause:

> the Court must consider (i) the particular purpose for which the information was collected; (ii) the degree to which the disclosure of records would embarrass, injure, or invade the privacy of the individual; (iii) the effect of the disclosure on the individual's future health care; (iv) the importance of the information to the lawsuit or proceeding; and (v) any other relevant factor.

The only stated reason in Dr. Schulman's motion for his opinion that his response to the properly issued *subpoena duces tecum* would cause substantial harm is that the release of the records would "destroy any feeling of privacy and safety that enabled the minor child to freely seek counseling and therapy." Dr. Schulman's earlier extensive involvement in litigation since 2016 eliminates any argument that the minor child would be surprised or reasonably disturbed by the release of the file again at this time. If there are specific documents in the file that relate to an issue or issues on which Dr. Schulman declined to testify during his deposition, or which were not raised during the course of the deposition, and if Dr. Schulman or his counsel can make a proffer as to the nature of the substantial harm that would be caused by the release of the

document(s), then a proper analysis could be conducted.

In addition, the statute mandates that the mental condition of the minor child be considered. He has had extensive mental health problems since the last custody trial in February of 2017, including incidents of threatened self-harm and his hospitalization in May of 2018 following an attempted suicide. Further, Defendant's Cross-Motion for Modification of Child Custody contains allegations which include a deterioration in the mental health and wellness of the minor child as a result of action and inaction by Plaintiff, including, but not limited to, parental alienation. Therefore, the possibility of embarrassment, injury, or invasion of privacy is far outweighed by the importance of the evidence to the issues before the court. The information contained in the records is vital to ensure this court has the necessary information before it when making decisions regarding the custody. Furthermore, there are prophylactic measures which the court may put in place to limit any potential embarrassment, such as the entry of a protective order limiting access to a specific portion(s) of the file for a specific reason.

While Code § 20-124.6(B) states that, if a health care entity denies a parental request for access to, or copies of, a minor's health record, the health care entity denying the request shall comply with the provisions of subsection F of Code § 32.1-127.1:03, the request for Dr. Schulman's records has not been made by a parent but rather by a properly issued *subpoena duces tecum*, which places the analysis not within subsection (F) of Code § 32.1-127.1:03, but rather within sections (D) and (H) as addressed above. Assuming *arguendo* that Code § 32.1-127.1:03(F) is applicable to the instant inquiry, such a review is virtually impossible at this time given the lack of detail and specificity provided by Dr. Schulman.

Plaintiff: Plaintiff, Lisa Sherfy, asks that the Motion to Quash be granted. In support of this, Plaintiff argues that Dr. Schulman has already testified by deposition in this case as to all matters regarding his treatment of the parties' minor child and, therefore, the child's medical records are redundant, cumulative, and unnecessary. Additionally, to the extent that Defendant believes the production of the minor child's medical records is necessary, he has failed to comply with the procedures proscribed by Code § 32.1-127.1:03 for obtaining an independent review of the records. On August 6, 2019, in response to the *subpoena duces tecum* issued by Defendant for the minor child's mental health records, Dr. Schulman, through counsel, notified counsel for Defendant of his objection to providing the requested records pursuant to Code § 20-124.6 on the basis that, in his professional judgment, the furnishing of the records to Defendant would be reasonably likely to cause substantial harm to the child and/or another person(s). Defendant was further notified at that time that, pursuant to the procedures outlined in Code § 32.1-127.1:03, he was entitled to challenge Dr. Schulman's determination by either designating his own qualified mental health professional to review the mental health records and make an independent judgment as to whether the child's records should be turned over to Defendant or, by allowing Dr. Schulman to designate such a professional to make that judgment. The statute also states that, once a qualified professional has made such a judgment regarding the child's records, Dr. Schulman is obligated to comply with that professional's decision.

Since the time Defendant was notified of the statutory processes available

to him, on August 6, 2019, he has failed to take any action to obtain an independent review of the records by a qualified professional, nor has he instructed Dr. Schulman to select such a professional. Instead, he is seeking to ignore the process proscribed by law altogether and ask the court, which is not a mental health professional, to overrule the judgment of Dr. Schulman. Moreover, if the court were to grant Dr. Schulman's Motion to Quash, Defendant will not be prejudiced in his ability to prepare for Dr. Schulman's testimony at trial, as the same information is available to both parties. Neither has viewed or obtained copies of the mental health records underlying Dr. Schulman's testimony, and the parties are already aware of the substance of Dr. Schulman's testimony and expert opinions provided during his deposition testimony.

ANALYSIS

There are three statutes that deal with the release of health care records of minors that must be read in concert with each other to interpret properly Virginia statutory law dealing with parent's access to their children's medical records. They are Code § 32.1-127.1:03, Code § 20-124.6, and Code § 8.01-413. Each code section is referenced in each of the other statutes. Because Defendant wants access to his son's mental health records, the court starts with Code § 20-124.6.

Prior to 2005, Code § 20-124.6 read:

> Notwithstanding any other provision of law, neither parent shall be denied access to the academic, medical, hospital or other health records of that parent's minor child unless otherwise ordered by the court for good cause shown.

This aligns with American jurisprudence developed over the past hundred years by the United States Supreme Court, in that parents are ultimately and predominantly responsible for the safeguarding, development, and education of their children.

Parents have "the right, coupled with the high duty, to recognize and prepare [their child] for additional obligations." *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925). In *Parham v. J. R.*, 442 U.S. 584 (1979), where minor children challenged the constitutionality of a state law that gave parents the right to decide admission of minor children to mental hospitals, the Supreme Court echoed this sentiment: "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." 442 U.S. at 602.

The Court also dealt with the concern of those parents who fail to adhere to the obligations laid out in *Pierce*. The fact that some parents may not act in the best interest of their children "is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Id.* The Court recognized the parent's power over the child to make ultimate decisions, including medical decisions:

> Simply because the decision of a parent is not agreeable to a child, or because it involves risks, does not automatically transfer the

> power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.

Parham, 442 U.S. at 603.

This concept of parental duty, responsibility and decision making is present in Virginia jurisprudence as well. Just last year, the Virginia Court of Appeals cited to *Parham* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), adding that the United States Supreme Court "recognized that the 'primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Hawkins v. Grese*, 68 Va. App. 462, 481-82 (2018) (citing *Wisconsin v. Yoder*, 406 U.S. at 232). "Though this parental power is not absolute . . . it may only be contravened in rare cases where "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Id.*

But even the seminal cases recognized the need for some state intervention:

> Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.

Parham, 442 U.S. at 603.

In response to this heightened awareness of mental health risks of minor children, in 2005, the General Assembly added two paragraphs to Code § 20-124.6 which significantly limited a parent's rights to mental health records of minors where their provider believes disclosure of such records would "cause substantial harm to the minor or another person."

> A. Notwithstanding any other provision of law, neither parent, regardless of whether such parent has custody, shall be denied access to the academic, medical, hospital or other health records of that parent's minor child unless otherwise ordered by the court for good cause shown **or pursuant to subsection B.**
>
> **B. In the case of health records, access may also be denied if the minor's treating physician or the minor's treating clinical psychologist has made a part of the minor's record a written statement that, in the exercise of his professional judgment, the furnishing to or review by the requesting parent of such health records would be reasonably likely to cause substantial harm to the minor or another person. If a health care entity denies a parental request for access to, or copies of, a minor's health record, the health care entity denying the request shall comply with the provisions of *subsection F of § 32.1-127.1:03*. The minor or his parent, either or both, shall have the right to have the denial reviewed as specified in *subsection F of § 32.1-127.1:03* to determine whether to make the minor's health record available to the requesting**

parent.

C. For the purposes of this section, the meaning of the term "health record" or the plural thereof and the term "health care entity" shall be as defined in subsection B of § 32.1-127.1:03.

2005 Acts of Assembly, Ch. 227 (S.B. 1109) (2005 language in bold) (emphasis added).

The first thing that is apparent from Code § 20-124.6 is that it is the exclusive and governing law with respect to "access to the academic, medical, hospital or other health records of that parent's minor child" when it states at the outset: "Notwithstanding any other provision of law . . . . ." Accordingly, unless Code § 20-124.6 somehow relies upon another statute which authorizes the disclosure of a minor's health record, Code § 20-124.6(B) is controlling.

The only other statute mentioned in Code § 20-124.6(B) is "subsection F of § 32.1-127.1:03." With respect to those references, the court finds that they refer only to the following language of subsection F of Code § 32.1-127.1:03:

> If any health care entity denies a request for copies of or electronic access to health records based on such statement, the health care entity shall inform the individual of the individual's right to designate, in writing, at his own expense, another reviewing physician or clinical psychologist, whose licensure, training and experience relative to the individual's condition are at least equivalent to that of the physician or clinical psychologist upon whose opinion the denial is based. The designated reviewing physician or clinical psychologist shall make a judgment as to whether to make the health record available to the individual. The designated reviewing physician or clinical psychologist shall make a judgment as to whether to make the health record available to the individual.
>
> The health care entity denying the request shall also inform the individual of the individual's right to request in writing that such health care entity designate, at its own expense, a physician or clinical psychologist, whose licensure, training, and experience relative to the individual's condition are at least equivalent to that of the physician or clinical psychologist upon whose professional judgment the denial is based and who did not participate in the original decision to deny the health records, who shall make a judgment as to whether to make the health record available to the individual. The health care entity shall comply with the judgment of the reviewing physician or clinical psychologist. The health care entity shall permit copying and examination of the health record by such other physician or clinical psychologist designated by either the individual at his own expense or by the health care entity at its expense.

The court further finds that the first sentence of "subsection F of § 32.1-127.1:03" is not is what is referred to in Code § 20-124.6 for two

reasons.[1]

First, the two references in Code § 20-124.6 to "subsection F of § 32.1-127.1:03" relate only to procedures upon the denial of a request (health care entity denying request "shall comply with the provisions of subsection F of § 32.1-127.1:03"; minor or parent "shall have the right to have the denial reviewed as specified in subsection F of § 32.1-127.1:03").

Second, the first sentence of "subsection F of § 32.1-127.1:03" establishes a different standard for denial. Whereas Code § 20-124.6 allows a denial to a requesting parent if the records "would be reasonably likely to cause substantial harm to the minor or another person," the first sentence of "subsection F of § 32.1-127.1:03" allows a denial if the records "would be reasonably likely to endanger the life or physical safety of the individual or another person, or that such health record makes reference to a person other than a health care provider and the access requested would be reasonably likely to cause substantial harm to such referenced person." Applying the first sentence of subsection F of § 32.1-127.1:03 to Code § 20-124.6 would result in two conflicting standards for denial. It is, however, a fundamental rule of statutory construction that, "when two statutes seemingly conflict, they should be harmonized, if at all possible, to give effect to both." *Commonwealth v. Zamani*, 256 Va. 391, 395 (1998). By not applying the first sentence of subsection F of § 32.1-127.1:03 to Code § 20-124.6, the two statutes are harmonized. Accordingly, the court finds that the statutory provision mentioned in the first sentence of "subsection F of § 32.1-127.1:03" ("subsection B of § 8.01-413") has no applicability to the question before the court.[2]

If the statute left access of medical records to parents at the discretion of the health care provider, the law would be a denial of information needed by parents in what our courts have determined is an "essential" duty: a duty of parents to raise their children which is protected by the First and Fourteenth Amendments. *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990). A law that prevented parental access to medical records would hamper the parents' informed decision making and would be "repugnant to American tradition." *Parham*, 442 U.S. at 603. Subsection F of Code § 32.1-127.1:03, however, allows for an

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[1] That sentence states:

> Except as provided in subsection B of 8.01-413, copies of or electronic access to an individual's health records shall not be furnished to such individual or anyone authorized to act on the individual's behalf when the individual's treating physician or the individual's treating clinical psychologist has made a part of the individual's record a written statement that, in the exercise of his professional judgment, the furnishing to or review by the individual of such health records would be reasonably likely to endanger the life or physical safety of the individual or another person, or that such health record makes reference to a person other than a health care provider and the access requested would be reasonably likely to cause substantial harm to such referenced person.

[2] The plain language of Code § 8.01-413(B) only serves to emphasize the court's finding since it refers to providing copies of a health care provider's records or papers "upon such patient's, attorney's, executor's, administrator's, or authorized insurer's written request . . . "

independent review of the medical records by "another reviewing physician or clinical psychologist, whose licensure, training and experience relative to the individual's condition are at least equivalent to that of the physician or clinical psychologist upon whose opinion the denial is based." And if that independent reviewer decides that the health records should be made available the provider who originally denied the access must "comply with the judgment of the reviewing physician or clinical psychologist" and make such records available.

Defendant argues that Code § 32.1-127.1:03 only applies when the parents request the records and does not apply when the records are sought through a *subpoena duces tecum*. But, as noted above, Code § 20-124.6 makes evident that it is the exclusive and governing law with respect to "access to the academic, medical, hospital or other health records of that parent's minor child" when it states at the outset: "Notwithstanding any other provision of law . . . . ." And nothing in Code § 20-124.6 suggests that it excludes records sought by *subpoena duces tecum*. Indeed, nothing in Code § 20-124.6 suggests that a *subpoena duces tecum* could not be mechanism through which access to the records is sought by a parent.

Defendant contended that his authority to issue a subpoena for his minor child's records might be found in Code § 32.1-127.1:03(D)(2), which provides in pertinent part:

> D. Health care entities may, and, when required by other provisions of state law, shall, disclose health records: . . .
>
> 2. In compliance with a subpoena issued in accord with subsection H . . . or in compliance with a subpoena issued pursuant to subsection C of § 8.01-413. . . .

It is, first of all, obvious that, because no "other provisions of state law" are relied upon, that the health care entity merely "may" disclose health records. If the health care entity declines to do so, as here, the court lacks authority to compel the health care entity to do so.

Moreover, the subpoena must be issued "in accord with subsection H . . . or in compliance with a subpoena issued pursuant to subsection C of § 8.01-413. . . ." As the court has already explained, *supra*, Code § 8.01-413 has no applicability to the question before the court. That leaves subsection H, but it merely provides the *mechanisms* for the issuance of a *subpoena duces tecum*, not a substantive right to a *subpoena duces tecum* for health records. Thus, Code § 32.1-127.1:03(D)(2) does not provide an independent route around the barrier set up by Code § 20-124.6.

The court notes that Defendant referenced Code § 32.1-127.1:03(H)(6) when discussing the factors this court should use to evaluate Dr. Schulman's motion to quash, but this provision deals only with motions to quash that are raised by "the individual whose health records are being sought," which is plainly not the case here as it is not the minor child who has filed the motion to quash.

Defendant argues that Dr. Shulman waived the right of a blanket protection by testifying at the earlier custody trial in 2017 and during the latest

deposition in July 2019. But waiver is not applicable here as the bar to the records arises from the authority of Code § 20-124.6, under which Dr. Shulman has stated that there is a current potential for harm.[3]

Although Defendant correctly points out the lack of cooperation or proof given by Dr. Shulman in showing that there is the requisite harm to the minor child or others, nowhere in Code § 20-124.6 is there a requirement that the health care provider bear such a burden. The only requirement is for the provider, in this case Dr. Schulman, to allow a second physician or clinical psychologist of equivalent credentials to review the files to give a second opinion. Dr. Schulman did exactly what § 32.1-127.1:03(F) required of him. Defendant declined to pursue that available route.

The Third Party's Motion to Quash is GRANTED.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

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[3] In any event, a doctor does not have the right to waive a privilege held by the patient; only the patient may do so. See Code § 8.01-399(A):

> Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.