Confusion

Two Family Law Attorneys on How to Balance Best Interests of Children and Doctor-Patient Privilege

IN THE ONGOING EFFORTS to protect the children of a divorce, much conflict has arisen in the law regarding the handling of parents' mental health records in their litigation. Among lawyers and mental health professionals, two strong camps of thought exist on the topic: The first is that the counseling and mental health records of a parent are sacrosanct and should be protected and held confidential at all costs, and the second is that the confidentiality of those records should be set aside when litigating the best interest of a child.

By Amy J. Amundsen and Jeffrey L. Levy

Clarity

In these pages we hope to enlighten the reader on the pros and cons of both positions as we walk you through the years of case history on the topic, including the currently applicable case law that is encompassed in the cases known as *Culbertson I* and *Culbertson II*, in which a parent's right to privacy is balanced against the court's need to do that which is best by children.

Any lawyer handling family law cases should stop and take the time to read both the point and counter-point articles here, along with the cases of *Culbertson I* and *Culbertson II* themselves.

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A State of Confusion and a Need for Clarity

The Fallout from *Culbertson I* and *II*

By Amy J. Amundsen

In Tennessee, trial courts have a duty to protect the best interests of children.[1] As early as 1918, the Tennessee Supreme Court acknowledged that the state has a right "paramount to any parental or other claim[] to dispose of such children as their best interests require" and that "the legal rights of a parent are very gravely considered[] but are not enforced to the disadvantage of the child."[2] Thus, in any proceeding requiring the court to make a custody determination, trial courts must make such determinations according to the best interests of the child.[3] This statutory requirement "comports with the long-standing notion that the state stands in *parens patriae* of the minor children within its borders."[4] Especially under the detrimental circumstances of divorce, protecting the care and custody of children often requires intervention by courts.[5]

The mental and emotional fitness of parents is an essential factor that must be considered in Tennessee's statutory best interest analysis.[6] However, it is difficult to analyze because parents' mental health information is protected by the psychologist-client privilege.[7] In the aftermath of the Court of Appeals' 2014 decision in *Culbertson v. Culbertson* (*Culbertson II*),[8] Tennessee law surrounding waiver of the privilege and disclosure of records is in disarray and places Tennessee with only six other states in favoring the privilege over the disclosure of mental health records.[9]

In the *Culbertson* case, the mother filed a complaint for divorce in which she alleged numerous instances of physical and emotional abuse by the father toward her and the parties' children.[10] Specifically, the father's abuse included threats to kill himself, mother and the children;[11] incidents where a knife was involved;[12] and other instances of physical and emotional abuse to the mother and children.[13] The father denied these allegations and demanded "strict proof thereof."[14] Thus, the mother issued subpoenas *duces tecum* and notices to take depositions *duces tecum* to the father's three psychologists who treated him over a two-year time span.[15] The trial court ordered release of the father's psychological records subject to a protective order, and, in response, the father filed a Rule 10 extraordinary appeal, resulting in the Court of Appeals' *Culbertson I* decision.[16]

In *Culbertson I*, the Court of Appeals, per Judge Farmer, allowed disclosure of the father's psychological records for an *in camera* review for the purpose of conducting a comparative fitness analysis.[17] The Court of Appeals based this decision on its concerns for the best interests of the children.[18] The *Culbertson I* court held that the trial court erred to the extent that it ordered disclosure of the father's psychological records without properly considering the application of the psychologist-client privilege or the father's waiver of the privilege.[19] Rejecting the approach taken by 11 states,[20] the Court of Appeals further held that "seeking custody does not, by itself, amount in an automatic waiver of the psychologist-client privilege" and that "denying allegations of mental instability and abuse, and demanding proof of the same, does not automatically waive the privilege protection afforded to [one's] psychological records."[21] These states that allow for the automatic waiver of the psychologist-client privilege when custody is sought recognize that the statutory factors considered by the courts in determining custody and what is in the children's best interests are elements of the custody case, and thus when a party files for custody, the privilege is waived as they place their mental health "at issue."[22]

Thereafter, despite the lack of a mandate from the Court of Appeals following *Culbertson I* (and therefore subject matter jurisdiction), the father urged the trial court to proceed with the divorce trial.[23] Instead, the trial court found that the father waived his psychologist-client privilege because he declared on direct testimony, as detailed in his previous testimony, that he was mentally

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Culbertson – The Court of Appeals Got It Right

By Jeffrey L. Levy

The issues faced by the Court of Appeals in addressing parents' mental health records are complex. Our courts do have a duty to protect the best interest of children.[1] Important as this may be, this is not the *only* duty that the courts have. They must also take into account a need to respect patient privacy, encourage individuals to seek treatment, focus on a parent's actual current ability to care for his or her children and not retroactively withdraw promises of confidentiality.

The essential facts of *Culbertson* are straightforward. The parties were in a contested divorce where custody was at issue. The husband had a history of treatment for mental health issues. The wife had also made allegations regarding the husband's behavior and supposed danger to the parties' children. During the course of litigation, at the wife's request the trial court ordered a Rule 35 examination of the husband that, as it turned out, was favorable to him. The wife, seeking additional grounds for limiting the husband's access to the children, then sought all of the husband's past mental health records, including statements he had made in confidence to his therapists. The trial court granted the wife's request. Husband appealed, and the Court of Appeals granted two separate interlocutory appeals.

In *Culbertson I*,[2] the court reviewed the psychologist-patient privilege found in *Tenn. Code Ann.* §63-11-213, found that the husband had not waived privilege simply by seeking custody or defending against the wife's allegations, further found that the trial court had erred by ordering disclosure of the records to the wife by failing to consider privilege or waiver but nevertheless ordered disclosure of the records to the trial court for an *in camera* review on the issue of comparative fitness.

Culbertson II,[3] two years later, held:

- A Rule 35 examination is the preferred choice to determine a party's mental state.[4]
- Privilege attaches only to personal communication and not to the treating therapist's opinions, observations, diagnoses or suggested treatment alternatives.[5]
- Testimony as to the *existence* of a psychologist-client relationship does not itself constitute a waiver of privilege.[6]
- If a party relies on the favorable results of on a Rule 35 examination, this does not constitute a general waiver of privilege for all mental health records.[7]
- Consent given for an evaluating psychologist to have access to a patient's treating psychologist, or voluntary disclosure to the evaluating psychologist of some of a patient's mental health records, does not constitute a full and general waiver for all mental health records.[8]
- Waiver of privilege by a patient in a Rule 35 examination is limited to the information voluntarily disclosed to the examiner either directly by the patient or by a treating psychologist with the patient's specific and express permission.[9]
- In the absence of a court order compelling disclosure of privileged information, a patient may exercise privilege and withhold access to the information, even under Rule 35.[10]

Culbertson II is a closely argued 60-page ruling. It reviews the current state of the law in a variety of states and balances the interests of parents and children. It preserves an incentive for individuals to get the treatment they need and to be completely forthcoming to their therapists. It stops one parent from using the mere fact of counseling as a weapon against the other. It protects an individual's privacy unless there is no alternative and discourages the other parent from going on a discovery "fishing trip." It is fair, and it does not permit a therapist or counselor to promise complete confidentiality, only to be forced to break this promise, often

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stable and then supported his position with proof of his psychological treatment and a report by the Rule 35 evaluator, who relied upon the records of his prior treating psychologists.[24] The father then brought his second Rule 10 appeal, leading to the Court of Appeals' decision in *Culbertson II* on April 30, 2014.[25]

In *Culbertson II*, the Court of Appeals, relying almost exclusively on out-of-state case law, held that the father did not waive his psychologist-client privilege.[26] The Court of Appeals held that "neither Father's testimony nor his reliance on the reports of the evaluating psychologists resulted in a waiver of the psychologist-client privilege" and that "neither [f]ather's consent to giving [the Rule 35 evaluators] access to his treating psychologists nor his voluntary disclosure of some of his mental health records to [the Rule 35 evaluators] constitute[d] a full and general waiver of the psychologist-client privilege as to all of Father's mental health records."[27] In doing so, the Court of Appeals created new law distinguishing general and limited waiver — a distinction previously unrecognized in Tennessee.[28] Additionally, reversing its prior decision in *Culbertson I*, the *Culbertson II* court found that it did not have the authority to order the trial court to conduct an *in camera* review of the father's records for the purpose of conducting a comparative fitness analysis.[29] Rather, the Court of Appeals found that the trial court could perform an *in camera* review only to screen out any irrelevant or unduly prejudicial records.[30]

The findings of the *Culbertson I and II* courts have created confusion for Tennessee courts, parents and children in numerous ways. First, the *Culbertson II* decision negates the intent of the 2013 statutory amendment to *Tenn. Code Ann.* section 36-6-106(a)(5) and raises confusion about the amendment's applicability. Second, the contradictory decisions in *Culbertson I and II* leave Tennessee courts uncertain about the permissible parameters of *in camera* review of parents' mental health records in custody proceedings. Finally, *Culbertson II* provides no clarity as to the scope of mental health records available to Rule 35 evaluators, and thus allows litigants to "cherry-pick" the records they provide to Rule 35 evaluators.

The findings of the Culbertson I and II courts have created confusion for Tennessee courts, parents and children in numerous ways.

2013 Amendment to the Tennessee Child Custody Statute

To begin, the Court of Appeals' ruling in *Culbertson II* negates the purpose of the 2013 amendment. In amending the statute, the Tennessee General Assembly intended to provide a procedure for trial courts to obtain mental health records of parents when necessary for the proceedings.[31] The Court of Appeals' decisions seemingly ignored the fact that the Culbertson case involved a parent with a long history of mental instability and violent outbursts. Despite sustained evidence of the father's physical and emotional abuse to the mother and children, the Court of Appeals found that the psychologist-client privilege protected the father's mental health records, thus prioritizing a parent's privilege to the detriment of the best interests of the children.[32] This finding negates the intent of the 2013 amendment to allow disclosure of parent's mental health records when necessary for the proceedings.

If a parent's mental health records are not necessary in a case with sustained proof of serious abuse to a parent and children, will there ever be a case in which a parent's mental health records are necessary?

In addition, the *Culbertson II* decision raises confusion regarding the applicability of the 2013 amendment. As a means to order disclosure of parents' records, the amendment added a reference to section 33-3-105(3) of the *Tenn. Code Ann.*, which provides a procedural mechanism for the release of mental health records of those individuals in state custody.[33] In *Culbertson II*, the father argued that the amendment did not apply to him, asserting that it applies only to mental health recipients in the custody of the state.[34] In support of his interpretation, the father cited *Herman v. Herman*, which states that "Title 33 of the *Tennessee Code* deals with mentally ill and retarded persons in the care and custody of the State."[35] But *Herman* was decided before the enactment of the amendment. Further, courts must construe statutes so that they are not superfluous,[36] which would be the case if the legislature amended the statute for the purpose of allowing disclosure of records of those in state custody, as that was already provided for in Title 33.[37] Rather, a strict reading of the statute shows that the legislature intended, through its reference to only subsection (3), to adopt only the procedural mechanism provided by section 33-3-105(3) — not the entire statute or act.[38] Thus, section 33-3-105(3)'s procedure for disclosure of records applies to all parents.

The *Culbertson II* court declined to apply the amendment, but nonetheless, commented on father's "interesting" argument.[39] Further adding to the confusion, on May 14, 2014, 14 days after the issuance of *Culbertson II*, the Tennessee Attorney General issued an opinion in response to a question on the 2013 amendment.[40] The Attorney General implied that the amendment related only to mental health patients in state custody.[41] Again, however, *Herman* is cited for this proposition even though it was decided prior to the adoption of the amendment.[42] But *Herman* cannot interpret a statute that did not exist at the time it was decided.

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many years later. Moreover, where there is actual danger to a child from a parent, real protections for the child are already in place.

By way of background, there is an absolute client-psychotherapist privilege under federal law.[11] This privilege applies to confidential communications made to licensed psychiatrists, psychologists and social workers in the course of psychotherapy.[12] Generally, mental health records must be protected from discovery in federal law, pursuant to psychotherapist-patient privilege, unless it can be shown that the patient had no reasonable expectation that the communication would remain private.[13] As the U.S. Supreme Court noted, effective psychotherapy depends upon 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. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. A psychiatrist's ability to help her patients "is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure... patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule ..., there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment."[14]

> *While reasonable people can differ as to exactly where the trade-offs might be, the Court of Appeals in Culbertson appears to have got that balance just right.*

States, however, may apply their own standards, which range from fairly open access to mental health records to a protective approach. The Court of Appeals in *Culbertson II* undertook a wide-ranging analysis of other states' laws because there was little Tennessee case law on point.

As the many cases across the country at both the federal and state levels reveal, the law needs to balance a wide range of considerations, including privilege, the privacy interests of parents and children, the need to ensure necessary diagnosis and treatment of mental illness, the principle of not violating confidences retroactively, the need to ensure that a judge hearing a case is not tainted by evidence that is ultimately found inadmissible and the fact that information sought often is available by other means. While reasonable people can differ as to exactly where the trade-offs might be, the Court of Appeals in *Culbertson* appears to have got that balance just right.

Confidentiality of communications regarding mental health issues is specifically addressed in a number of Tennessee statutes, all of which provide protection when there are allegations of child or adult abuse. With that exception, our statutes are and long have been protective of privilege.

Tenn. Code. Ann. §24-1-207 provides that communications between a patient and a psychiatrist in connection with a therapeutic counseling relationship are privileged and may not be revealed

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Purpose of the Court's *In Camera* Review of Mental Health Records

Second, the conflicting decisions in *Culbertson I* and *II* and the Attorney General Opinion leave courts questioning the permissible parameters of *in camera* review in custody proceedings. In *Culbertson I*, the Court of Appeals allowed disclosure of the father's psychological records for an *in camera* review for the purpose of conducting a comparative fitness analysis.[43] But in *Culbertson II*, the Court of Appeals overturned its decision to allow the trial court to review the father's records *in camera* for the general purpose of conducting a comparative fitness analysis and found that the trial court could perform an *in camera* review only to screen out any irrelevant or unduly prejudicial records.[44]

Further confusing the issue, in the opinion released two weeks after *Culbertson II*, the Attorney General found that "[w]here a parent's mental health is at issue in a child-custody proceeding, a court may order *in camera* review of the parent's mental-health records."[45] This opinion directly contradicts the holding in *Culbertson II* that there is no authority for a trial court to order an *in camera* review for the purpose of conducting a comparative fitness analysis.[46] In addition, Professor W. Walton Garrett, in his July 2014 *Tennessee Family Law Letter,* asserted to practitioners that a judge may order a Rule 35 evaluation, an *in camera* review or both for the purpose of conducting a comparative fitness analysis.[47]

Scope of Mental Health Records in a Rule 35 Evaluation

Finally, *Culbertson II* provides little clarity as to the scope of mental health records available to Rule 35 evaluators and allows litigants to "cherry-pick" the records they give to Rule 35 evaluators.[48] In *Culbertson II*, the Court of Appeals found that courts may order a parent to undergo a Rule 35 evaluation but that a parent may decline an examiner's request for privileged psychological information absent a court order compelling same.[49]

Further, the Court of Appeals found that, in the event of disclosure of privileged information by a parent's treating psychologist to a Rule 35 evaluator, there is no waiver of privilege as to the privileged information disclosed unless the parent gave express permission for such disclosure.[50] Pursuant to these findings, it logically follows that a parent may decline to give a Rule 35 evaluator any of his privileged information or may give express permission for disclosure of only favorable privileged information (i.e., "cherry-picking"). This creates flawed results, and thus renders Rule 35 examinations useless because Rule 35 evaluations cannot produce accurate results if evaluators have access to only limited, and likely skewed, information.[51] More importantly, this holding from *Culbertson II* inhibits courts' ability to protect the best interests of children.

Does Empirical Data Support the Proponents' Claim that Disclosure of Mental Health Records Deters Parents from Seeking Help?

Studies cited in support of the psychologist-client privilege are not as clear-cut as proponents would like to assert. Researchers Daniel Shuman and Myron Weiner concluded that there is little empirical evidence for psychotherapist-client privilege.[52] Shuman and Weiner concluded after three different studies in three different jurisdictions that the lack of a psychotherapist-client privilege does not deter patients from seeking help nor impair the therapy's quality.[53] The researchers found that 96 percent of patients relied more on the therapist's ethics for confidentiality than on a privilege statute.[54] Even in those with stable trusting relationships with their therapist, 40 percent of patients withhold certain types of information anyway, such as sexual acts and thoughts, violence and financial issues.[55] Patients withhold this information because they are more concerned about the therapists' personal judgments of them than about the consequences if the information were disclosed.[56] The data suggest that the quality of treatment would be facilitated by a privilege statute but that it would in no way lead to full disclosure.[57] The existence of a privilege statute does not in any way guarantee that patients would fully disclose important information to their therapists.[58]

In addition, according to psychologist Leigh Hagan, the court needs all relevant information to make an informed ruling regarding a child's custody.[59] Criticizing the former Virginia law that allows the parent to retain the psychologist-client privilege in child custody proceedings, Dr. Hagan argues that "[h]iding the ball thwarts pursuit of truth."[60] The parent, he continues, is shielded from the "foreseeable and logical consequences of their own actions at the child's potential jeopardy."[61] Thus, Dr. Hagan believes that allowing secrets to be kept in child custody proceedings will make the party seeking disclosure of records lose faith in the court's ability to administer justice in the child's best interests.[62]

The U.S. Supreme Court's decision in

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without the patient's consent except (1) in proceedings in which the patient raises the issue of the patient's own mental or emotional condition; (2) in court-ordered examinations where the patient was advised that communication to the psychiatrist would not be privileged; or (3) in involuntary committal proceedings under title 33, chapter 6, parts 4 or 5. A further exception, at the discretion of the psychiatrist, is provided where the patient has made an actual threat to physically harm an identified victim and the psychiatrist has made a clinical judgment that the patient has the apparent ability to commit such an act and that it is more likely than not that this will happen in the near future. *Tenn. Code Ann.* §37-1-411 removes privilege and permits testimony about harm or cause of harm to a child in a dependency and neglect proceeding or a criminal prosecution for severe child abuse.

Tenn. Code Ann. §63-7-115 provides that the exact same provisions apply to a registered nurse certified and practicing in psychiatric and mental health nursing, with a specific exception for mandatory child abuse reports or mandatory adult abuse reports.

Tenn. Code Ann. §63-11-213 provides that the confidential relations and communications between a licensed psychologist, psychological examiner, senior psychological examiner or certified psychological assistant on the one hand, and a client on the other, are to be on the same basis as attorney-client privilege. Again, the child abuse protections of *Tenn. Code Ann.* §37-1-411 apply. *Tenn. Code Ann.* §63-29-109 extends the same privilege to communications with licensed social workers, and Tenn. Code § 63-22-114 extends it to communications with licensed marital and family therapists, licensed professional counselors and certified clinical pastoral therapists (again with exception for mandatory child abuse reports). In turn, *Tenn. Code Ann.* §23-3-105 provides that, "No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury." Attorney communications to clients are protected to the extent that they were based on the client's confidential communications or would otherwise, if disclosed, reveal the nature of a confidential communication.[15]

In all cases, *Tenn. Code Ann.* §37-1-614 removes "the privileged quality of communication" between any professional person and that person's client (except for attorney-client privilege) in any case of known or suspected child

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Jaffee v. Redmond[63] in 1996, which recognized a federal psychotherapist-client privilege, used as support "studies and authorities" cited by the American Psychological and Psychiatric Associations in its amicus briefs. According to law professor Edward Imwinkelried, the support cited fails in many ways.[64]

First, the brief by the American Psychiatric Association in support of the privilege never cited to any studies but rather cited to mental health experts (not patients) who all seemingly agreed that the privilege is important and necessary.[65] Psychotherapists are also biased toward wanting the privilege, so the American Psychiatric Association should have surveyed the actual patients and not just psychotherapists who have a monetary stake in the outcome of the case.[66]

Second, a survey cited by the American Psychological Association in its brief in support of the privilege did not ask exactly the question at issue. Professor Imwinkelried pointed out that the questions did not ask the patients their attitudes toward revelations in court but only asked about disclosures to police, friends, family and authorities.[67] Even within the confidentiality questions, the answers differ based on the severity of the problem.[68] A 1983 study by Thomas Merluzzi and Cheryl Brischetto found that confidentiality was important to subjects with problems of a very serious nature and less important to those with "moderately serious" problems.[69] In the highly serious situations in which the consequences are more severe, the breach in confidentiality may erode the counselor's trustworthiness.[70] With moderately serious problems, the subjects did not think that disclosure of information led to serious consequences.[71] For these problems, there was no difference whether the counselor revealed information or maintained confidentiality — trustworthiness was not compromised.[72]

Another study cited was a 1984 article led by Paul S. Appelbaum.[73] According to Professor Imwinkelried, the American Psychological Association only cited from Appelbaum the statistic that 57 percent of patients answered that their therapists' disclosure without their consent would adversely affect the therapeutic relationship.[74] Looking at the results of the study, the American Psychological Association seemed to have ignored the statistic that most patients had negative reactions to the disclosure of that information specifically to employers (76 percent of outpatients and 83 percent of inpatients reacted negatively if their therapists disclosed confidential information to employers).[75] According to Appelbaum, only 43 percent of outpatients and 33 percent of inpatients reacted negatively if their therapists disclosed information to courts without their consent.[76] Professor Imwinkelried found that the APA brief also ignored the conclusion reached by these researchers: "the outpatients … interviewed did not appear concerned about absolute confidentiality"[77] and that "[p]atients may value confidentiality, but still seek and participate in … treatment even in its absence."[78]

TBA Family Law Section Reviews Statute and Case Law

In 2014, the TBA Family Law Section chair formed a task force of lawyers, judges and psychologists to study Tennessee case law and the other states' statutes, case law and scientific evidence. After studying and meeting over an eight-month period, the task force made a proposal to clarify the statute, which passed the TBA family law section and awaits consideration and acceptance before the TBA House of Delegates and Board of Governors. The proposed amended statute seeks to achieve the following:

(a) To clarify the 2013 amendment by adopting the middle ground approach used by many states across the county that allows for the disclosure of parents' mental health records after a hearing and finding by the court that the disclosure of the mental health records are necessary for the proceedings.[79] This approach would allow the disclosure of mental health records only after a

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Ask the TBA Membership Maven

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Signed, Skeptical

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XOXO, Maven

To ask the TBA Membership Maven a question please email maven@tnbar.org or her alter-ego, Kathy Prescott, the Tennessee Bar Association's membership director.

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sexual abuse.

Notwithstanding these protections, objections to the *Culbertson* decisions flow from the supposed inability they impose on a court's ability to assess the "moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child."[16] This is different from protecting a child from imminent harm from an openly dangerous parent. The protections cited above protect the children in such cases. The question posed by *Culbertson* is how much further courts may go when there is no clear and present danger of imminent harm. It is well established in Tennessee that allegations alone concerning a parent's mental health and/or his defense against those allegations is not enough to place his or her mental condition in controversy. Cases going back at least as far as *Odom v. Odom*[17] make clear that more is required, at least in a custody context. If *any* claim for custody or defenses against them were sufficient to raise the issue, mental health records of parents could conceivably be required in *every* case involving children, presumably along with church attendance records, medical records, dating history, records of dietary preferences and even gym attendance records, for how else can the trial court assess the moral, physical, mental and emotional fitness of each parent? In fact, the trial court can determine how well each parent functions without seeking information that has traditionally been privileged, by assessing the actions of each parent and, when necessary (and as was done in this case) ordering a Rule 35 examination.

The Rule 35 examination in this case is instructive, in part because the Court of Appeals called into question Ms. Culbertson's motivation in seeking further records. It was Ms. Culbertson who requested the examination. The examiner had administered a variety of tests to the parties and conducted interviews. It was only after the examiner issued a report and recommendations that Mr. Culbertson be afforded unsupervised and uninterrupted visitation with the children on a graduated basis that Ms. Culbertson sought his detailed psychological records. Ms. Culbertson was not foreclosed from bringing her husband's current mental state and actions to the trial court's attention. She only needed to present the court with proof of his current behavior and state of mind plus expert opinion on the impact on the parties' children. Instead, Ms. Culbertson wanted to go back into history and/or outside the scope of the already-completed Rule 35 examination and present to the court statements that Mr. Culbertson had made to his treating mental health professionals. She wanted to retroactively expose confidences he had shared, confidences that were intended to support his recovery, and use them against him. Her justification was "protecting the best interest of the children."

> *The cost of narrowing the privilege would be excessive. One issue is judicial taint, i.e., how do you put the genie back in the bottle?*

The action of the legislature in 2013 in passing a law [now found in *Tenn. Code Ann.* §36-6-106(a)(8)] that allowed the trial court to order a Rule 35 examination and order the disclosure of records under specified circumstances pursuant to *Tenn. Code Ann.* §33-3-105(3) *when necessary for the conduct of the proceedings,* does not broaden access to mental health records. As the Court of Appeals noted, this amendment came after the records request in *Culbertson*. Even if it had not, the Attorney General in Op. No. 14-55[18] suggested that this reference applied only to sevices applied for, provided under or regulated under Title 33; *i.e.*, to persons who are mentally ill or intellectually disabled in the care and custody of the state.

Culbertson II does not leave any question as to the proper subject of an *in camera* review of mental health records. Review is limited to material that is within the scope of the patient's waiver. If the records fall outside the scope of waiver, they cannot be considered by the trial court; if they fall within the waiver, the trial court will be able to consider them against the usual standards of relevance and materiality.[19] The *in camera* review is not to be used for the general purpose of conducting a comparative fitness analysis.[20]

Finally, a party does not really have the scope to "cherry-pick" the records that are furnished to Rule 35 examiners. A party would not have an ability to omit the identity of any mental health professionals whom he or she consulted, since the court has made clear that the identification of such professionals does not implicate privilege — it is only the substance of the communications themselves that are privileged. Similarly, the professional's observations, diagnoses or treatment recommendations are not privileged. Should the examiner, as a result of his or her own evaluation, seek additional information that is then withheld on the grounds of privilege, the examiner can — and typically will — note that the analysis may be unreliable for that very reason. The trial court can weigh this in its custody determination.

The Court of Appeals found that Mr. Culbertson did not waive a broad psychologist-client privilege because he declared that he was currently mentally stable, because he relied on the Rule 35 examination that he was currently in a position to resume regular visits with his children on a graduated basis and because the examination reflected, in some part, reports from his treating psychologists. What the Court of Appeals said was that to the extent that Mr. Culbertson voluntarily provided information, privilege was indeed waived, but that the waiver would not extend to where he did not himself or authorize others to release such infor-

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hearing and a finding that the records are necessary for the proceeding and the best interest of the child.[80] The production of the mental health records is by the health care provider to the court by a certain date and time, subject to a protective order, and the records are filed under seal with the court if they were subsequently introduced into evidence. Because of this amended statute, the legislature would need to amend the Tennessee privilege statutes[81] to incorporate a reference to this best-interests-of-the-child "exception."[82]

(b) The confusion regarding *in camera* review of parents' mental health records is diffused by adding that after the court conducts a hearing and makes a finding that a parent's mental health records are necessary for the proceedings, it then conducts an *in camera* review of the parent's records for the purpose of redacting irrelevant or unduly prejudicial material. The court would thereafter provide the records relating to the parent's ability to parent the child to both parties, subject to a protective order, for use in the comparative fitness analysis. Should the court find itself unable to perform the *in camera* review due to time constraints or any other reason, it would appoint a neutral third party, such as a special master or fellow judge, to complete the task.

(c) To address the "cherry-picking" of records given to Rule 35 evaluators, the amended statute requires a parent to sign a release so mental health records are sent directly to the evaluator. The psychologist on the Task Force opined that old mental health records are extremely important and that a look back of 10 years should be the default time span; and, thus, the amended statute provides for such time frame. Lastly, if a parent chooses to rely on his or her privilege and not sign the release, then the Tennessee courts have the ability to draw a negative inference. Specifically, if a parent declines a Rule 35 evaluator's request for privileged information, the court may draw a negative inference that the information would be adverse.[83] The negative inference should be allowed when there is independent corroborating evidence of abuse, violence, or mental instability. This same protection is allowed when the Fifth Amendment testimonial privilege is claimed in a civil case.[84] If an exception is provided for a constitutional privilege, surely the same would be applicable to a statutory privilege.

Conclusion

Because child custody cases are not run-of-the-mill disputes that implicate only the parties' interests, the court must uphold its *parens patriae* role while balancing the countervailing interest of protecting parents' privileged mental health records.[85] The above proposal by the TBA Task Force of the Family Law Section adequately balances the competing interests at stake by maintaining the confidentiality of the parent's privileged information while acknowledging that the court can better determine the best interests of the child when it has full evidence before it. Further, by instituting these changes, Tennessee courts, parents and children would no longer face the confusion caused by the conflicting holdings in *Culbertson I* and *II* and the Attorney General's Opinion.

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Notes

1. *Tuetken v. Teutken*, 320 S.W.3d 262, 271 (Tenn. 2010). Courts "must respect the child and acknowledge that they are [the] most vulnerable parties in the proceedings; thus regardless of circumstances their best interest must be the central concern." *Barker v. Chandler*, No. W2010-01151-COA-R3-CV, 2010 WL 2593810, at *12 (Tenn. Ct. App. June 29, 2010).

2. *State v. West*, 201 S.W. 743, 744 (Tenn. 1918).

3. *Tenn. Code Ann.* § 36-6-106(a) (2013). Effective July 1, 2014, the factors listed in section 36-6-106(a) of Tennessee Code Annotated apply to parental relocation and permanent parenting plan determinations as well. See *Tenn. Code Ann.* §§ 36-6-108(a), 36-6-404(b) (2014). This in turn expands the ability of courts to pierce the psychologist-client privilege in such proceedings.

4. *Tuetken*, 320 S.W.3d at 271. Parens patriae power refers to the state's role as sovereign and guardian of persons under legal disability, such as minors. See Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* 95–96 (rev. 2d ed. 2008).

5. See *Lee v. Lee*, 66 S.W.3d 837, 847 (Tenn. Ct. App. 2001) ("Because the harm to a child is implicit in a divorce proceeding, parents involved in such a proceeding automatically submit the issue of custody of a minor child to the court …. [D]ivorce [is] one circumstance that invites, and indeed requires, governmental intervention into [parents'] constitutionally protected fundamental liberty interest in the care and custody of their children.") (internal quotation marks omitted).

6. See *In re C.K.G.*, 173 S.W.3d 714, 732 (Tenn. 2005) (stating that the court "must take into consideration numerous factors insofar as they are applicable"). Pursuant to the July 1, 2014, amendment to section 36-6-106, this

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mation. This is straightforward and hardly confusing.

The cost of narrowing the privilege would be excessive. One issue is judicial taint, *i.e.,* how do you put the genie back in the bottle? In *Ford v. Ford*,[21] the trial court had reviewed the mother's mental health records prepared by a licensed clinical psychologist and removed custody from her. The trial court initially, and correctly, determined that the records were not properly admissible but went on to say that the information helped the court make a decision. It would have been difficult for the court not to have been influenced by what it read. The Court of Appeals restored custody to the mother.

A second problem involves discouragement to obtaining necessary treatment. Most attorneys must have confronted a similar problem. Can you advise a client to pursue necessary counseling if this means that one day the confidences that the client shared will be used against him or her?

The proposal to "pierce the privilege" focuses only on digging out more information on the parent who is accused of having mental health issues.

While this article was being written, a letter appeared in "Dear Abby" on March 24, 2016:

> I find myself sometimes wanting to commit the most heinous of crimes. The desire to do this has been with me my entire life. I was sexually abused by my mother and oldest brother. While that's no excuse, I understand why I may be the way I am. At 51, I have never committed any act against a young girl, but the desire is clearly there for me. The issue before me is that if I seek help for this problem, those who can provide it are required by law in this state [which is unspecified] to report me. How am I to overcome these urges when no matter what I do I am considered guilty?
>
> Signed
>
> Anonymous in America

Could an attorney ever send such a client for assessment, diagnosis and treatment? Can the client ever be told to be forthright when that information at some unknown time, possibly many years in the future, can and will be used against him or her?

There is no need to "resolve" the issues in *Culbertson I* and *Culbertson II*. The law is clear as it now stands, and it strikes the proper balance between the best interest of a child and that parent in establishing a custodial and parenting time arrangement. The proposal to "pierce the privilege" focuses only on digging out more information on the parent who is accused of having mental health issues. It will provide a further incentive to drag in ancient history that is not relevant to a parent's current mental health or ability to parent. "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."[22]

Information that is necessary to make custodial and parenting time determinations based on current facts is already available through Rule 35 examinations that focus on the mental health of a party today. The privilege statutes already protect children from abuse. *In camera* reviews are always going to be problematic, because of the risk of taint. A negative inference to be drawn when someone refuses to waive a mental health record privilege would serve to neutralize the purpose of the privilege. Furthermore, allowing a negative inference when there is independent corroborating evidence of abuse, violence or mental instability is completely unnecessary —such evidence, by itself, is sufficient to restrict parenting time without involving the results of mental health treatment.

The law is appropriate as it stands, and it is clear no change is needed.

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Notes

1. *Tuetken v. Tuetken,* 320 S.W.3d 262, 271 (Tenn. 2010).
2. 393 S.W.3d 678 (Tenn. App. 2012) (Perm. App. Den. Sept. 26, 2012).
3. 455 S.W.3d 107 (Tenn. App. 2014) (Perm. App. Den. Oct. 17, 2014). Judge Farmer, who had written the opinion in *Culbertson I*, joined in *Culbertson II,* which was written by Judge (now Justice) Kirby.
4. *Id.*, at 152-53.
5. *Id.*, at 151.
6. *Id.*, at 137.
7. *Id.*, at 139-40.
8. *Id.*, at 149.
9. *Id.*,150.
10. *Id.*, at 149.
11. *Jaffee v. Redmond,* 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 337.
12. *Green v. St. Vincent's Medical Center,* 252 F.R.D. 125, 127 (D. Conn. 2008).
13. *Estate of Turnbow v. Ogden City,* 254 F.R.D. 434, 437 (D. Utah 2008).
14. *Jaffee v. Redmond*, 518 U.S. 1, at 10-11 (citations omitted).
15. *State v. Buford,* 216 S.W.3d 323, 326. (Tenn. 2007).
16. *Tenn. Code Ann.* §36-6-108(a).

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factor is now provided as "moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child." *Tenn. Code Ann.* § 36-6-106(a)(8) (2014).

7. *Tenn. Code Ann.* § 63-11-213 (2013) ("[T]he confidential relations and communications between licensed psychologist … and client are placed upon the same basis as those provided by law between attorney and client.").

8. 455 S.W.3d 107 (Tenn. Ct. App. 2014).

9. See Amy Amundsen, "Balancing the Court's Parens Patriae Obligations and The Psychological-Parent Privilege in Custody Disputes," 28 *J. Am. Acad. of Matrimonial Law*. 1, 6 (2015).

10. See *Culbertson I*, 393 S.W.3d at 681.

11. *Culbertson II*, 455 S.W.3d 107, 118 (Tenn. Ct. App. 2014).

12. *Culbertson I*, 393 S.W.3d at 686.

13. *Id.* at 681.

14. *Id.* The father also sought sole decision-making authority and sole custody of the children. *Id*.

15. *Id.*

16. *Id.* at 682.

17. *Id.* at 687.

18. See *id.* Specifically, in deciding to allow disclosure of the father's mental health records, the Court of Appeals was mindful of the trial court's concerns regarding the facts behind the mother's allegations of abuse. See *id.* The trial court could not ignore allegations of an incident that occurred at church and of other incidents where a knife was allegedly involved. See *id.* at 686.

19. *Id.* at 686 (noting that "the trial court provided no reasoning as to why [the father's] psychological records were not protected from discovery by the psychologist-client privilege, or the extent to which [the father] possibly waived the privilege").

20. See, e.g., *Black v. Black*, 625 So. 2d 450 (Ala. Civ. App. 1993); *Thompson v. Thompson*, 624 So. 2d 619 (Ala. Civ. App. 1993); *Harbin v. Harbi*n, 495 So. 2d 72 (Ala. Civ. App. 1986); *In re Marriage of Gove*, 572 P.2d 458 (Ariz. Ct. App. 1977); *Shumaker v. Andrews*, 1992 WL 510196 (Del. Fam. Ct. Dec. 3, 1992); *Owen v. Owen*, 563 N.E.2d 605 (Ind. 1990); *Werner v. Kliewer*, 710 P.2d 1250 (Kan. 1985); *Bond v. Bond*, 887 S.W.2d 558 (Ky. Ct. App. 1994); *Atwood v. Atwood*, 550 S.W.2d 465 (Ky. 1976); *Kirkley v. Kirkley*, 575 So. 2d 509 (La. Ct. App. 1991); *Carney v. Carney*, 525 So. 2d 357 (La. Ct. App. 1988); *Clark v. Clark*, 371 N.W.2d 749 (Neb. 1985); *Baecher v. Baecher*, 396 N.Y.S.2d 447 (N.Y. App. Div. 1977); *Perry v. Flumano*, 403 N.Y.S.2d 382 (N.Y. App. Div. 1978); *Neftzer v. Neftzer*, 748 N.E.2d 608 (Ohio Ct. App. 2000).

21. *Culbertson I*, 393 S.W.3d at 686.

22. See, e.g., *In re Marriage of Gove*, 572 P.2d 458, 462 (Ariz. Ct. App. 1977) ("In seeking custody of the children [mother] placed her mental condition at issue.").

23. *Culbertson II*, 455 S.W.3d 107, 122 (Tenn. Ct. App. 2014).

24. *Id.* at 122–23. Specifically, in claiming that he was mentally stable, the father admitted that he had suffered from depression but had been cured due to his psychological treatment. *Id.* at 119. The Rule 35 evaluator received access to and relied upon the opinions and records of the father's treating psychologists because the father authorized a release granting the evaluator access to his records from previous medical and psychological providers. *Id.* at 120–21.

25. *Id.* at 124.

26. See *id.* at 140–51.

27. See *id.* at 140, 149.

28. See *id.* at 149–51.

29. *Id.* at 156 ("[T]he trial court is no longer either directed or authorized to conduct an in camera review of Father's privileged mental health records for the general purpose of conducting its comparative fitness analysis.").

30. *Id.* at 155–56.

31. See Hearing on S.B. 0028 Before the S. Comm. on the Judiciary, 108th Gen. Assemb., 1st Reg. Sess. (Tenn. Mar. 26, 2013) (statement of Steve Cobb, Legislative Counsel, Tennessee Bar Association) ("What we're doing is tying into that, at that very point in the Code, the tool kit that lawyers should use to get to that information if necessary.").

32. See *Culbertson II*, 455 S.W.3d at 140, 149.

33. See supra note 8.

34. *Culbertson II*, 455 S.W.3d at 155.

35. *Herman v. Herman*, No. M2012-00395-COA-R10-CV, 2012 Tenn. App. LEXIS 296, at *4 (Tenn. Ct. App. May 9, 2012) (quoting *State v. Fox*, 733 S.W.2d 116, 118 n.1 (Tenn. Crim. App. 1987)).

36. See *Tidwell v. Collins*, 522 S.W.2d 674, 676 (Tenn. 1975) ("It is the duty of the Court … to construe a statute so that no part will be inoperative, superfluous, void or insignificant … ").

37. Not to mention, the 2013 amendment would do nothing to assist courts because it would not affect the typical parent, who likely receives mental health treatment through a private provider.

38. See supra note 8.

39. See *Culbertson II*, 455 S.W.3d at 155.

40. See Obtaining a Parent's Mental-Health Information in Child-Custody Cases, Op. No. 14-55, State of Tenn. Office of the Att'y Gen. (May 14, 2014), http://www.tn.gov/attorneygeneral/op/2014/op14-55.pdf.

41. See *id.*

42. See *id*.

43. See *Culbertson I*, 393 S.W.3d 678, 687 (Tenn. Ct. App. 2012).

44. See *Culbertson II*, 455 S.W.3d at 155–56. The Court of Appeals noted that it could "find no authority for allowing the trial court to consider the substance of privileged documents in camera for the purpose of making a parenting decision, without giving both parties access to the documents." *Id.* at 155 n.39.

45. See Obtaining a Parent's Mental-Health Information in Child-Custody Cases, Op. No. 14-55, State of Tenn. Office of the Att'y Gen. (May 14, 2014), http://www.tn.gov/attorneygeneral/op/2014/op14-55.pdf.

46. See *Culbertson II*, 455 S.W.3d at 155 & n.39, 156.

47. See W. Walton Garrett, Tenn. Fam. L. Letter, July 2014, at 20 (commenting that "[m]ental health information is privileged but that privilege is not absolute when it would adversely affect a child's best interest").

48. In *Culbertson I*, the Court of Appeals was silent altogether regarding Rule 35 evaluations. See generally *Culbertson I*, 393 S.W.3d 678 (Tenn. Ct. App. 2012).

49. *Culbertson II*, 455 S.W.3d at 149.

50. *Id.* at 151.

51. This is especially true in the case of a parent with long-term mental health problems, such as the father in *Culbertson*. Further, the *Culbertson II* holding is at odds with Rule 703 of the Tennessee Rules of Evidence and Guidelines 9.02 and 9.03 of the Specialty Guidelines for Forensic Psychologists. Rule 703 "disallow[s]

testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness." Tenn. R. Evid. 703. Guidelines 9.02 and 9.03 require forensic practitioners to identify the "uncorroborated status" or "substantial limitations" of any data upon which they rely to formulate their opinions and recommendations. Am. Psychological Ass'n, Specialty Guidelines for Forensic Psychology, 68 *Am. Psychol.* 7, 15 (2013). If a parent declines to comply with a Rule 35 evaluator's request for information or simply provides only specific information to the evaluator, the Rule 35 evaluator will in turn be unable to form a complete and accurate opinion, inherently making the opinion untrustworthy, uncorroborated, and limited. See *id.* Rule 35 examinations are also problematic because they are extremely costly, and therefore, many parties cannot pay for them. See *Leeper v. Leeper,* No. E2012-02544-COA-R3-CV, 2013 WL 5206344, at *1 (Tenn. Ct. App. Sept. 13, 2013) (acknowledging that a psychological evaluation is "a very expensive proposition" but was ordered in the case as a "last resort").

52. Daniel W. Shuman & Myron S. Weiner, "The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege," 60 *N.C. L. Rev.* 893 (1981); Daniel W. Shuman & Myron F. Weiner, "Privilege — A Comparative Study," 12 *J. Psychiatry & L.* 373 (1984); Gilbert Pinard, Daniel W. Shuman & Myron F. Weiner, "The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada," 9 *Inter. J.L. & Psychiatry* 393 (1987).

53. Shuman & Weiner, "The Privilege Study," supra note 79; Shuman & Weiner, "Privilege — A Comparative Study," supra note 79; Pinard, Shuman & Weiner, supra note 79.

54. Shuman & Weiner, "The Privilege Study," supra note 79, at 920.

55. *Id*.

56. *Id*.

57. *Id.* at 926.

58. *Id*.

59. Leigh Hagan, CLE Presentation at the Richmond Bar Association: "My Spouse Is Crazy but I Can't Prove It" 3 (Mar. 22, 2004).

60. *Id.* at 4.

61. *Id*.

62. *Id.* at 5.

63. 518 U.S. 1 (1996).

64. See generally Edward Imwinkelried, "The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in *Jaffee v. Redmond*," 518 U.S. 1 (1996), 49 *Hastings L.J.* 969 (1998).

65. *Id.* at 974–75.

66. *Id*.

67. Imwinkelried, supra note 91, at 976.

68. Thomas V. Merluzzi & Cheryl S. Brischetto, "Breach of Confidentiality and Perceived Trustworthiness of Counselors," 30 *J. Counseling Psychol.* 245, 250 (1983).

69. *Id*.

70. *Id*.

71. *Id*.

72. *Id*.

73. Paul S. Appelbaum et al., "Confidentiality: An Empirical Test of the Utilitarian Perspective," 12 *Bull. Am. Acad. Psychiatry & L.* 109 (1984).

74. Imwinkelried, supra note 91, at 977 & n.53.

75. See *id.* ("However, on the whole, the findings reached in the study undercut that position.").

76. Appelbaum et al., supra note 110, at 113.

77. *Id.* at 115.

78. *Id.* at 114.

79. See, e.g., *Laurie S. v. Superior Court*, 114 Cal. Rptr. 3d 765 (Cal. Ct. App. 2010); *Helbig v. Helbig*, No. FA114115685S, 2014 WL 1283427 (Conn. Super. Ct. Mar. 5, 2014); *A.A. v. S.A.*, 141 DWLR 21 (D.C. Super. Ct. Fam. Operations Div. 2012); *Leonard v. Leonard*, 673 So. 2d 97 (Fla. Dist. Ct. App. 1996); *Miraglia v. Miraglia*, 462 So. 2d 507 (Fla. Dist. Ct. App. 1984); *McIntyre v. McIntyre*, 404 So. 2d 208 (Fla. Dist. Ct. App. 1981); *Critchlow v. Critchlow*, 347 So. 2d 453 (Fla. Dist. Ct. App. 1977); *State ex rel. Husgen v. Stussie*, 617 S.W.2d 414 (Mo. Ct. App. 1981); *McGinnis v. McGinnis*, 311 S.E.2d 669 (N.C. Ct. App. 1984); *In re Berg*, 886 A.2d 980 (N.H. 2005); *Kinsella v. Kinsella*, 696 A.2d 556 (N.J. 1997); *Perry v. Flumano*, 403 N.Y.S.2d 382 (N.Y. App. Div. 1978); *Gates v. Gates*, 967 A.2d 1024 (Pa. Super. Ct. 2009).

80. In determining necessity, the court could consider factors, such as "whether: (1) the treatment was recent enough to be relevant; (2) substantive independent evidence of serious impairment exists; (3) sufficient evidence is unavailable elsewhere; (4) court ordered evaluations are an inadequate substitute; and (5) given the severity of the alleged disorder, communications made in the course of treatment are likely to be relevant." Miss. R. Evid. 503(d)(4) cmt.

81. See, e.g., *Tenn. Code Ann.* §§ 24-1-207, 33-3-105, 63-11-213, 63-23-109 (2013).

82. See, e.g., Ala. R. Evid. 503(d)(5); Ky. R. Evid. 506(d)(2); Miss. R. Evid. 503(d)(4).

83. See, e.g., La. Code Evid. Ann. art. 503.B; Mass. Guide to Evid. § 525; *Griggs v. Saginaw & Flint Ry. Co.*, 162 N.W. 960 (Mich. 1917); *Brodsky v. Brodsky*, 233 S.W.2d 829 (Mo. Ct. App. 1950); *Deutschmann v. Third Ave. R.R. Co.*, 84 N.Y.S. 887 (N.Y. App. Div. 1903).

84. See *Levine v. March*, 266 S.W.3d 426, 442 (Tenn. Ct. App. 2007) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)) ("[T]here is no constitutional impediment to drawing an inference against a party invoking his or her Fifth Amendment privilege in a civil case.").

85. See Amy J. Amundsen, "Balancing the Court's Parens Patriae Obligations and the Psychological-Patient Privilege in Custody Disputes," 28 *J. Am. Acad. of Matrimonial Law.* 1 (2015).

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17. *Odom v. Odom*, 2001 WL 1543476 (Tenn. App.)

18. Op. No. 14-55, State of Tenn. Office of the Attorney General. (May 14, 2014).

19. While the Attorney General had stated that a trial court may order an *in camera* review for comparative fitness purposes, Op. No.14-55 refers specifically to *Culbertson I*, which did envisage such review. *Culbertson II* clearly overruled that earlier holding and the portion of the opinion concerning *in camera* review is no longer relevant.

20. *Culbertson* II, at 155-56.

21. *Ford v. Ford*, 1990 WL 107492 (Tenn. App.).

22. *Jaffee v Redmond*, 518 U.S. 1, 18. (1996).