IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

S.C., a minor child,
Appellant,

CASE No.: 4D02 - 3414
L.T. No.: 02DP300133JL

vs.

GUARDIAN AD LITEM, et al.,
Appellees.
_____/

UNIVERSITY OF MIAMI SCHOOL OF LAW CHILDREN & YOUTH LAW CLINIC *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT

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Interest of *Amicus Curiae* Children & Youth Law Clinic

The Children & Youth Law Clinic is an in-house legal clinic staffed by faculty and students of the School of Law. Students and supervising attorneys in the Clinic serve as attorneys ad litem for the legal interests of children and adolescents in the foster care system. The Clinic was counsel for the child in a lawsuit in this Court, certified to the Florida Supreme Court as a matter of great public importance, addressing fundamental due process and privacy rights, as well as therapeutic jurisprudence interests, of foster children facing involuntary commitment to mental health facilities by the State Department of Children and Family Services. *See M.W. v. Davis & Dept. of Children & Families,* 23 Fla. L. Weekly D2419 (Fla. 4th DCA, Oct. 27, 1998), *withdrawn on reh'g,* 722 So.2d 966 (Fla. 4th DCA 1999), *aff'd, M.W. v. Davis,* 756 So.2d 90 (Fla. 2000); *see also Amendments to the Rules of Juvenile Procedure, Rule 8.350,* 804 So.2d 1206 (Fla. 2001).

The Clinic has also been involved in recent federal court litigation which challenged the constitutionality of state policies conditioning foster care services on an adolescent's waiver of the right to refuse medical and mental health treatment. *See Leslie F. v. Bush, et al.,* Case Nos. 01-12965GG, 01-13665GG (11th Cir.).

Thus, the Clinic has an interest in protecting a foster child's rights of due process and privacy in matters involving medical and mental health treatment and in safeguarding the child's right to assert the psychotherapist-patient privilege.

Summary of Argument

The Appellant should be allowed to assert the statutory privilege in her psychotherapist-patient communications. No exceptions to the privilege apply in the instant case. The guardian ad litem's court order of appointment, allowing it *carte blanche* access to the Appellant's most private communications with her therapist, does not abrogate the privilege. Although the guardian has a legitimate need to know about whether the child is participating and progressing in therapy, the guardian's need to know cannot encroach on the privileged psychotherapist-patient relationship, which is rooted in the imperative need for confidence and trust, without following the statutory procedures for access to that information.

The child in this case is competent and mature enough to assert the privilege and has the capacity to participate in health care decisions. Consistent with a growing body of empirical research on adolescent autonomy in medical decisions, and growing legislative recognition of that right, the record in this proceeding establishes that the Appellant is competent and mature enough to assert the privilege. Allowing her to exercise some control over information about treatment may improve treatment effectiveness and facilitate competence.

There is therapeutic value in allowing the child to assert the privilege. Asserting the privilege gives the child voice and validation in the legal process and assures the integrity of the psychotherapist-patient relationship. Denying her the right to assert the privilege can have profound anti-therapeutic consequences for the child.

There is also value to society in allowing the child to assert the privilege. The psychotherapist-patient privilege serves an important public interest by facilitating the provision of appropriate treatment for individuals suffering from mental or emotional problems. The privilege also benefits the interests of foster children, who suffer disproportionately from serious health and mental health ailments. Patients such as Appellant must be given the assurance that they can trust their therapists with private disclosures, should be encouraged to seek mental health treatment, and must be able to establish clear boundaries of privacy within the framework of the psychotherapist relationship in order for treatment to succeed. Respect for confidentiality rights is particularly crucial for such children. It allows them to exert some measure of control over their world, and the ability to develop a degree of trust in those around them.

Finally, the child's right to assert the privilege is grounded in her right to privacy under the federal and state Constitutions. Although the guardian ad litem may claim a compelling need for this information, because the child has a substantial

privacy interest at stake, the guardian should use the least burdensome or intrusive means of obtaining information about the child's treatment from the therapist, to ensure that the privacy of the psychotherapist-patient relationship is not compromised. The least burdensome or intrusive means for a guardian to obtain privileged psychotherapist-patient communications from the child's therapist is to petition the court and give all of the parties notice before seeking these records.

Alternatively, the guardian can reword its order of appointment to make it less broad and intrusive, while permitting it to obtain non-privileged circumscribed information about treatment, without further leave of the court, unless the guardian establishes a compelling need for more detailed, privileged information from the therapist, in which case a court hearing is required.

Argument

I. The Child Has A Right to Assert the Psychotherapist-Patient Privilege to Prohibit Her Therapist From Disclosing Communications to Her Court-Appointed Guardian ad Litem

The Appellant has a statutory right to assert the privilege in her psychotherapist-patient communications. There are no applicable exceptions to that right in this case. The guardian ad litem's order of appointment does not abrogate that privilege.

A. Legislative and Judicial Recognition of the Psychotherapist-Patient Privilege Is Universal in the U.S. Legal System

Legislative and judicial recognition of the public interest in the psychotherapist–patient privilege of confidentiality is universal in the U.S. legal system. All fifty states and the District of Columbia have enacted into law some form of psychotherapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1, 12, 116 S. Ct. 1923, 1929 (1996).[1] The U.S. Supreme Court characterizes the privilege as "rooted in the imperative need for confidence and trust" in the physician-patient relationship, noting that "the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906 (1980).

The need for confidentiality is even greater in psychotherapy. "The mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee*, 116 S. Ct. at 1928.

> A psychiatrist's ability to help her patients "is completely dependent upon [the patient's] 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 …Where there may be exceptions to this general rule…, there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment."

[1]Anne D. Lamkin, *Should Psychotherapist-Patient Privilege Be Recognized?,* 18 Am. J. Trial Advoc. 721, 723-25 (1995)(all fifty states and the District of Columbia have recognized the psychotherapist-patient privilege in some form). For a comprehensive overview of state privilege statutes, *see Jaffee v. Redmond*, 518 U.S. at 12, 116 S. Ct. at 1929 n. 11.

Id. (*citing* Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (*quoting* Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)).

B. Legislative Recognition of the Privilege in Florida

In this case, the Appellant has a privilege not to disclose to her court-appointed guardian ad litem the records of her psychotherapist, pursuant to §90.503, Fla. Stat. (2001). This statutory privilege is based on the established view "that confidentiality is essential to the conduct of successful psychiatric care." *See Attorney ad Litem of D.K. v. Parents of D.K.,* 780 So.2d 301, 306 (Fla. 4th DCA 2001), *citing* Law Revision Council Note to §90.503 (1976); *see also* Michael H. Graham & Robert S. Glazier, Handbook of Florida Evidence 2D §503.1 (2000) (recognizing a privilege for confidential communications between psychotherapist and patient based on the existence of a special need to maintain confidentiality in order to promote the patient's successful psychiatric treatment).

C. Exceptions to the Privilege Do Not Apply

The exceptions to this statutory privilege relate to proceedings to compel hospitalization, court ordered examinations, and actions in which the patient relies

upon his mental or emotional condition. *Id*. None of these exceptions are applicable to the instant case.[2]

A further exception is created in §39.204, stating in relevant part that,

> the privileged quality of communication…shall not apply to any *communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect* and shall not constitute grounds for failure to report as required by §39.201 regardless of the source of the information requiring the report, failure to cooperate with law enforcement or the department in its activities pursuant to this chapter, or failure to give evidence in any judicial proceeding relating to child abuse, abandonment, or neglect. (emphasis added).

§39.204, Fla. Stat. (2002). This exception is also inapplicable in this case. In *State v. Jett*, 626 So. 2d 691 (Fla. 1993), the Florida Supreme Court interpreted the now changed language of this statute[3] to waive the privilege of a child's confidential communications when the action or offense before the court meets "the statutory definition of child abuse or neglect, whether or not the child abuse or neglect is a necessary element of that action or offense." *Id.* at 693. *Jett* involved a perpetrator of various sexual crimes, none of which included a necessary element of child abuse or neglect. *Id.* at 692. While the new statutory language, and its

[2]Waivers of the privilege under §490.014, Fla. Stat. (2001) (psychologists), allowing for abrogation of the privilege when the therapist is a defendant to an action arising from a complaint filed by the patient, the patient agrees to the waiver, and there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society are also inapposite to the instant case.

[3]The previous statute (formerly §415.512 Fla. Stat. (1987)) most notably did not contain the modifying clause "the perpetrator or alleged perpetrator."

interpretation in *State v. Patterson*, 694 So.2d 55, 58 (Fla. 5th DCA 1997), clearly indicate that the section as presently worded does not waive psychotherapist-patient communications made by the victim, it is also clear that even the previous version of the statute could not have justified a blanket waiver of the psychotherapist-patient privilege as asserted by the guardian.

D. The Guardian ad Litem's Order of Appointment Cannot Waive the Privilege

The disputed guardian appointment order in this case does not by its terms seek records or information disclosed by a *perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect*. The only way the guardian can justify its broadly worded order as a proper abrogation of privileged communications under §39.204, Fla. Stat., is to argue that because all children represented by court appointed guardians in dependency court have *likely* experienced abuse or neglect in the past, their psychotherapeutic-patient privilege is abrogated.[4] However, that interpretation is impossible in light of the wording of the current statute and the Supreme Court's reasoning in *Jett*.

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[4]The order of appointment that Appellant sought to enjoin in the lower court reads, in pertinent part:

> Upon presentation of this Order to any agency, hospital, school, person, or office including the Clerk of this Court, Department of Children and Families, human services agencies, and/or child caring agencies, public and private health facilities, medical and mental health professionals, including doctors, nurses, pediatricians, psychologists, psychiatrists, counselors and staff, and law enforcement agencies, the individual designated in this cause and the Circuit

Although the guardian has a legitimate need to know about whether Appellant is participating in therapy, and is making progress in therapy, the guardian's interest should not trump the child's right to be heard by the court before the information is disclosed. Furthermore, as argued in §V below, the court should permit at most only limited, circumscribed information about the treatment, not the details about therapy obtained through a forced disclosure that does not serve the child's best interests and violates her need for privacy.[5]

E. Florida Statute §61.403 Governs Guardian Access to Confidential Records

In contrast, the statutory provision upon which the Appellant relies, §61.403, Fla. Stat. (2001), provides the *only* legislatively authorized mechanism for a court appointed guardian ad litem to obtain confidential medical, mental health or other records pertaining to a child. The statute provides that the guardian must petition the court through counsel for an order directing that the guardian be allowed to

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> Director or program staff are hereby authorized to inspect and copy any records relating to the above named child(ren) without consent of said child(ren), parents of said child(ren), or caregiver of said child(ren), regardless of the confidentiality or classification status of said records or information.

[5]The only instances outside of the presently disputed appointment order where the privilege of confidentiality of psychotherapist records is waived without a court hearing are in the cases of "clear and immediate probability of physical harm to the patient or client, to other individuals…," or in accordance with the mandatory reporting requirements of abuse and neglect in §39.201, Fla. Stat. (2001). The requirement of a court hearing in all cases outside of emergencies is sensible in light of the fact that the burden is on the party seeking to avoid the application of the privilege to demonstrate that one of the exceptions applies. Charles W. Ehrhardt, 1 Fla. Prac., Evidence § 503.5 (2002).

inspect and copy any records or documents which relate to the minor child, and states that "such order shall be obtained only after notice to all parties and hearing thereon." *Id.* In the instant case, the guardian did not comply with this statutory mandate, which deprived the child of the ability to assert the privilege to protect her confidential communications with her therapist under §90.503, Fla. Stat (2001).[6]

F. Case Law From Other Jurisdictions

While there is no Florida authority that directly addresses the issue of whether a dependent child may assert the privilege to deny a court-appointed guardian ad litem access to therapeutic records, there is authority in at least one other state operating under a similar privilege statute that recognizes the right of a dependent

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[6]The guardian attempted to argue in the lower court that it cannot fulfill its duties under §§39.820, 39.822, 39.407, and 39.810, Fla. Stat. (2001), without abrogating the child's §90.503 privilege. In essence the guardian argued, without providing any supporting authority, that Chapter 39 creates an implied waiver of the privilege that permits it to ignore the mandates of §§90.503 and 61.403. *See* Guardian ad Litem's Memorandum of Law in Response and Motion to Strike Juvenile Advocacy Project's Motion for Injunctive Relief.

However, with the possible exception of §39.407(5), governing the placement of dependent children in residential treatment centers (which cross-references the procedures in Chapter 394, a statute that expressly allows guardians access to patient clinical records), no provision in Chapter 39 specifically authorizes the guardian ad litem to obtain confidential record information about treatment from a therapist, without following the procedures set out in §61.403.

Furthermore, § 39.407(5)(f) merely authorizes the guardian to receive a "written report of [a residential treatment center's] findings," not the intimate details of the child's treatment in the facility. Significantly, §394.4615(2) states that "a patient *or* the patient's guardian" may authorize release of the clinical record, and it further allows the patient to deny the guardian access to the record after a court proceeding in which "the court shall weigh the need for information to be disclosed against the possible harm of disclosure to the person to whom such information pertains." §394.4615(2)(c), Fla. Stat. (2001).

child to assert the privilege when a state social worker seeks detailed information from the child's therapist to report to the juvenile court about the child's treatment.

In *In re Kristine W.,* 94 Cal.App.4th 521, 528, 114 Cal.Rptr.2d 369, 373 (App. 4th Dist. 2001), a California appeals court held that the psychotherapist-patient privilege applies to the relationship between a dependent child and her therapist when a state social worker seeks information relating to the child's communications with the therapist, including detailed records of the therapy.

The court held that these details were protected by the privilege, recognizing that the child "'has a substantial privacy interest' in the therapy she clearly needs." The court further held that "[i]n view of the foreseeable 'emotional harm to [Kristine] from a forced disclosure" the social worker was only entitled to "circumscribed information" about the treatment Kristine was receiving from her therapist. The court limited the information that the therapist was expected to provide to "matters that reasonably assist the court in evaluating whether further orders are necessary for Kristine's benefit and preserv[ing] the confidentiality of the details of her treatment." *Id.* at 528.

The Appellant should be entitled to no less protection of her substantial privacy interest in her psychotherapist-patient communications. Although the guardian has a legitimate need to know about whether the child is participating and progressing in therapy, the guardian's need to know cannot encroach on the

privileged psychotherapist-patient relationship, which is rooted in the imperative need for confidence and trust in that relationship, without following the statutory procedures for access to that information.

II. The Record Establishes That Appellant Has The Maturity and Competence to Assert the Psychotherapist-Patient Privilege

The Appellant has sufficient maturity and competence to assert the privilege in this case. This Court has previously held that the parents of a 17 year old were not entitled to either assert or waive psychotherapist-patient privilege on their minor child's behalf in a marital dissolution action, and that the child herself was entitled to assert the privilege. *See Attorney ad Litem for D.K. v. Parents of D.K.,* 780 So.2d 301 (Fla. 4th DCA); *see also Kasdaglis v. Dept. of Health,* 27 Fla.L.Weekly D2112 (Fla. 4th DCA, Sept. 25, 2002) (social worker is under no obligation to furnish privileged therapy records of a 16 year old to the child's mother without the child's consent). As this Court noted in *D.K.*:

> [T]he age of the minor is a factor which the court must look to in determining whether the child himself or herself can assert the privilege. A child less than twelve years old does not have the emotional maturity or capacity of a seventeen year old. A court faced with the child's desire to assert the privilege in such circumstances should determine whether the child is of sufficient emotional and intellectual maturity to make the decision on his or her own. If the court decides that the child is sufficiently mature, then the court should appoint an attorney ad litem to assert the child's position, as the court did here.

Id. at 308.

The 14 year old Appellant in the instant proceeding is old enough, mature enough and competent enough to satisfy the test for competency and maturity articulated by this court in *D.K.* as a threshold requirement for whether she is entitled to assert the psychotherapist-patient privilege through her court-appointed attorney ad litem, as opposed to allowing her guardian ad litem to assert or waive the privilege on her behalf.[7] Indeed, the mere fact that she exercised her legal right to assert the privilege is evidence that she is competent and mature enough not to be forced to cede that right to her guardian.

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[7]The guardian may attempt to distinguish this court's ruling in *D.K.,* which was a custody dispute between the child's parents, on the theory that, unlike the parents in *D.K.,* a guardian always acts in the child's best interests and thus should be able to access confidential mental health records to make recommendations to the court about the child's needs. Leaving aside the question of whether it is truly in the Appellant's "best interests" for the guardian to breach the Appellant's psychotherapist-patient relationship, a guardian ad litem cannot claim greater rights than a parent with respect to certain fundamental decisions concerning a child. *See, e.g., In the Interest of J.D.,* 510 So.2d 623, 629 (Fla. 1st DCA 1987)(guardian ad litem may not usurp altogether parent's role in deciding child's educational placement as the "'historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment,'" *quoting Santosky v. Kramer,* 455 U.S. 745 (1982)). Moreover, "[t]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the 'intimacy of daily association….'" *In Re E.A.W.,* 658 So.2d 961, 973 (Fla. 1995)(Kogan, J., concurring in part, dissenting in part)(*quoting Smith v. Org. of Foster Families for Equality and Reform,* 431 U.S. 816, 844 (1977)). Even the most conscientious and caring guardian cannot claim the same "intimacy of daily association" with the child that a less than exemplary parent can claim. *See Santosky v. Kramer,* 455 U.S. at 753 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

A. Empirical Research Supports Appellant's Competence to Assert Privilege

Indeed, there is a growing body of empirical research suggesting that minors such as Appellant should be accorded greater rights in medical decisions.[8] As one author, after summarizing the accumulating social science literature on children's decision-making capacity, has concluded:

> A sizeable body of empirical research has accumulated over the last decade suggesting that children have much more competence than has been recognized by the legal community. The general picture which emerges is that children are capable of quite a lot, if you just let them participate in the decisionmaking process. Adolescents, and frequently even younger children, are capable of adult-like understanding and decisionmaking. For instance, children as young as about twelve appear to have a factual understanding and appreciation for the risks and benefits of psychotherapy. Discussing unpleasant or uncomfortable issues, discomfort with the therapist, violations of confidentiality, and poor treatment effectiveness are identified as risks; having someone to talk with, learning things, and solving problems are seen as benefits. Even nine-year-olds appear to understand many basic aspects of treatment, including differences between various diagnoses and prognoses and treatment risks and benefits. Twelve-year-olds are able to define accurately many basic legal concepts. Significantly, children as young as six can be astute in perceiving procedural injustice; thus, allowing children to participate in decisionmaking regarding their own health may enhance children's perception that they have been treated fairly.

[8] *See, e.g.,* Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions,* 53 Child Dev. 1589 (1982)(research study finding that although there were significant differences between nine-year-old children and adults in decision-making capacity, little or no difference existed between 14 year old adolescents and adults); *see also* Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective,* 9 Prof. Psychol.: Res. & Prac. 412, 423 (1978)(finding that minors age 15 and above are no less competent than are adults, that no assumptions can be made about the ability of minors age 11-14 to consent to treatment, and that minors below age 11 generally do not have the intellectual ability to satisfy a legal standard for competent consent).

> There is also evidence that allowing children to participate in treatment decisionmaking improves treatment by facilitating the child's willingness to cooperate. Such participation may also help reduce the stress of therapy, lead to better attitudes about treatment, reduce resistance to therapy, and foster appropriate treatment expectations. The children achieves a sense of control and self-efficacy critical for mental health and positive therapeutic outcomes…

Richard E. Redding, *Children's Competence to Provide Informed Consent for Mental Health Treatment,* 50 Wash. L. Rev. 695, 708-709 (1993)(citations omitted).

B. Legislative and Medical Profession Recognitions of Mature Minors' Competence to Participate in Health Care Decisions

The record evidence in this case is in accord with growing recognitions by legislatures and the medical profession of the capacity of mature minors to make health care decisions without involvement or interference by parents or guardians. In Florida, for example, §394.4784, Fla. Stat. (2001), removes the disability of nonage for any minor age 13 or over to access outpatient diagnostic and evaluation services, "when [the minor] experiences an emotional crisis to such degree that he or she perceives the need for professional assistance…" In such cases, the minor has "the right to request, consent to, and receive mental health and diagnostic and evaluative services provided by a mental health professional…." *Id.*

Minors 13 and older are also permitted to request, consent to, and receive outpatient crisis intervention services, "including individual psychotherapy, group

therapy, counseling, and other forms of verbal therapy provided by a licensed mental health professional…." *Id.* Similarly, §397.601(4)(a), Fla. Stat. (2001), removes the disability of minority for persons under age 18 "solely for the purpose of obtaining voluntary substance abuse impairment services from a licensed provided, and consent to such services by a minor has the same force and effect as if executed by a client who has reached the age of majority."

Furthermore, the federal rule on confidentiality of alcohol and drug abuse patient records specifically contemplates that if state law permits a minor to apply for and obtain alcohol or drug abuse treatment, then the minor patient alone may give written consent for disclosure of such records, without first obtaining prior parental consent. *See* 42 C.F.R. § 2.14(b). Florida statutory law also allows unwed pregnant minors or minor mothers to give consent to medical services for themselves and for their children. *See* §743.065, Fla. Stat. (2001).

Furthermore, many state statutes in other jurisdictions and empirical studies on the competence of minors to give consent to medical treatment now support giving minors the same protections of confidentiality and privacy in the patient-physician relationship accorded to adults.[9] Additionally, health care organizations

[9]For a comprehensive overview of state minor consent statutes, *see* Abigail English, et al., Center for Adolescent Health & the Law, *State Minor Consent Statutes: A Summary* (March 2001). One study reported in the Journal of the American Medical Association found that "physician confidentiality assurances increase adolescents' willingness to discuss sensitive topics related to sexuality, substance use, and mental health and increase adolescents' willingness to return for future health care." Carol A. Ford et al., *Influence of Physician Confidentiality*

such as the Society for Adolescent Medicine and the American Medical Association recognize the importance of providing assurances of confidentiality to encourage adolescents to seek health care.[10]

III. Children Obtain Therapeutic Benefits From Having a Voice in Proceedings Involving the Psychotherapist-Patient Privilege

A. Procedural Justice Research Supports Giving Appellant Voice in a Judicial Process That Validates Her Right to Assert Privilege

Allowing the Appellant to be heard by the court to assert the psychotherapist-patient privilege also provides important therapeutic benefits in that it gives her "voice" in the judicial process and "validation" from the experience of participating in that process. Empirical studies of how litigants experience judicial and

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Assurances on Adolescents' Willingness to Disclose Information and Seek Future Health Care, 278 J. Am. Med Ass'n 1029, 1033 (1997); another study indicated that less than 20% would seek health care for reproductive health or substance abuse if their parents were notified. Advocates for Youth, *Assessing State Policies to Promote Adolescent Sexual and Reproductive Health* 16 (1988)(*citing* A. Marks et al., *Assessment of Health Needs and Willingness to Utilize Health Care Resources in a Suburban Population,* 102 J. Pediatrics 456 (1983)); *see also* Society for Adolescent Medicine, *Confidential Health Care for Adolescents: A Position Paper of the Society for Adolescent Medicine,* at http://www.adolescenthealth.org/html/confidential.html.

[10]The Society for Adolescent Medicine states: "Adolescents should be encouraged to involve their families in health care decisions whenever possible; however, when such involvement is not in the best interest of the adolescent or when parental involvement may prevent the adolescent from seeking care, confidentiality must be assured." American Medical Association, *Policy Compendium on Confidential Health Services for Adolescents* 12-13 (Janet E. Gans, ed. 1994); the American Medical Association similarly acknowledges that when a physician believes "parental involvement would not be beneficial, parental consent or notification should not be a barrier to [providing] care." *Id. See also* Janet P. Felsman, Note, *Eliminating Parental Consent and Notification for Adolescent HIV Testimony: A Legitimate Statutory Response to the AIDS Epidemic,* 5 J.L. & Pol'y 339 (1996) (urging statutory changes that allow teenagers to independently consent to confidential HIV testing and counseling because the states' interests in promoting HIV awareness and reducing HIV transmission outweigh countervailing right to parental autonomy.).

administrative hearings have led to the development of a literature on the psychology of procedural justice.[11] Research on the psychology of procedural justice suggests that people are more satisfied with and comply more with the outcome of legal proceedings when they perceive those proceedings to be fair and have an opportunity to participate in them. The process or dignitary value of a hearing is important to litigants. People who feel that they have been treated fairly at a hearing—dealt with in good faith and with respect and dignity—experience greater litigant satisfaction than those who feel treated unfairly, with disrespect, and in bad faith. People highly value "voice," the ability to tell their story, and "validation," the feeling that what they have had to say was taken seriously by the judge or other decision-maker. Even when the result of the hearing is adverse, people treated fairly, in good faith and with respect are more satisfied with the result and comply more readily with the outcome of the hearing. Moreover, they perceive the result as less coercive than when these conditions are violated, and even feel that they have voluntarily chosen the course that is judicially imposed. Such feelings of voluntariness rather than coercion tend to produce more effective behavior on their part.

The use by the guardian ad litem of a blanket order giving it *carte blanche* access to all of the Appellant's treatment records, without first giving the child an

[11]*See, e.g.,* E. Allen Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (1988); Tom R. Tyler, Why People Obey the Law (1990); E. Allen Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. Personality & Social Psychol. 952 (1990); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 Calif. L. Rev. 541 (1978).

opportunity to assert a privilege in those records, denies the child both voice and validation in that it forces disclosure of private and intimate details shared with her therapist and it deprives her of the chance to have her voice heard by the court before the records are disclosed. This can only have a negative effect on her relationship with her therapist and a negative effect on her perceptions of the fairness of the legal process. Indeed, the overwhelming consensus of the empirical research confirms the importance of the confidentiality guarantee safeguarded by the legal privilege both on patient willingness to share information with therapists and on the patient's confidence in the legal system.[12]

B. Therapeutic Jurisprudence Scholarship Suggests That Depriving Appellant of the Right to Assert Privilege Diminishes Effectiveness of Therapy

Similarly, a growing body of therapeutic jurisprudence scholarship suggests that a breach of the privilege can have a significantly negative impact on the patient's

[12] *See* Appelbaum et al., *Confidentiality: An Empirical Test of the Utilitarian Perspective,* 12 Bull. Am. Acad. Psychiat. & Law 109, 115 (1984)(reviewing studies showing empirical support for effect of privilege and for fact that people are "overwhelmingly confident that their therapists would protect their privacy"); Taube & Elwork, *Researching the Effects of Confidentiality on Patients' Self-Disclosures,* 21 Prof. Psychol.: Res. & Prac. 72 (1990)(privilege shown to be important where law is understood and relevant to particular patients); McGuire, Toal, & Blau, *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship,* 16 Prof. Psychol.: Res. & Prac. 375 (1985)(patients significantly valued confidentiality); VandeCreek, Miars, *Client Anticipations and Preferences for Confidentiality of Records,* 34 J. Counseling Psych. 62 (1987); Miller & Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy,* 17 Prof. Psychol.: Res. & Prac. 15 (1986)(same); Cheng, et al., *Confidentiality in Health Care,* 269 J. Am. Med. Ass'n 1404 (1993)(confidentiality important to adolescents seeking counseling).

willingness to participate in therapy and in treatment.[13] Therapeutic jurisprudence is a field of interdisciplinary research with a law reform agenda that focuses attention on the consequences of law for the psychological functioning and emotional well being of the people affected.[14] Therapeutic jurisprudence sees the law and the way in which it is applied by various legal actors, including lawyers, judges, and guardians ad litem, as having inevitable consequences for psychological well being that should be studied with the tools of the behavioral sciences. It suggests that these consequences should be taken into account in reforming law, when consistent with other important normative values, in the direction of making it less anti-therapeutic and more therapeutic. It is a mental health approach to law in the way it is applied, suggesting the need for legislatures and courts to be sensitive to the law's impact on psychological health and to perform their roles with an awareness of basic principles of psychology.[15]

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[13]*See generally* Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View,* 50 U. Miami L. Rev. 249 (1996)(rejection of the privilege may seriously diminish the effectiveness of therapy for individuals who are in or decide to undertake therapy; many patients, out of concern for potential disclosure, will predictably inhibit their own disclosure to the therapist if privilege does not attach).

[14]*See, e.g.,* Bruce J. Winick, Therapeutic Jurisprudence Applied: Essays on Mental Health Law (1997); Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence (David B. Wexler and Bruce J. Winick, eds., 1996).

[15]In recent years, Florida has joined other states in applying the principles of therapeutic jurisprudence to proceedings in juvenile and family court. *See, e.g., M.W. v. Davis and DCF,* 756 So.2d 90 (Fla. 2000)(recognizing that children obtain psychological benefit from procedural protections and representation by counsel prior to being placed in psychiatric treatment facilities); *Amendment to Rules of Juvenile Procedure, Fla.R.Juv.P.8.350,* 804 So.2d 1206 (Fla.

The literature on the therapeutic impact of a forced breach of the privilege strongly suggests that the breach can have significant anti-therapeutic consequences for the patient.[16] If a patient does not perceive that the court will adequately protect the confidentiality of her communications, the trust vital to the psychotherapeutic relationship is likely to be significantly impaired or destroyed.

As observed by Chief Judge Henry Edgerton decades ago, in a seminal pronouncement on the therapeutic value of preserving psychotherapist-patient confidentiality in court proceedings:

2001)(same); *Amendment to Florida Rule of Juvenile Procedure, Fla.R.Juv.P. 8.100(a),* 796 So.2d 470 (Fla. 2001)(recognizing the deleterious therapeutic consequences for juveniles of video conference arraignments); *In re Report of the Family Court Steering Committee,* 794 So.2d 518 (Fla. 2001)(recognizing "therapeutic justice" as a "guiding principle" in unified family court). *See also* Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach,* 5 Psychol. Pub. Pol'y & L. 951 (1999)(proposing application of therapeutic jurisprudence research to child welfare proceedings).

[16]Studies show that when clients are told that their therapist might be required to disclose their communications in court, their willingness to discuss sensitive topic declines markedly. *See* Daniel W. Shuman, et al., *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada,* 9 Int'l J. of L. and Psychiat. 393, 407, 410, 416, 420 (Table I)(1986); Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege,* 60 N.C. L. Rev. 893, 919020, 926, 929 Appendix Table I (1982); Comment, *Functional Overlap Between Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine,* 71 Yale L. J. 1226, 1255 (1962)(71% of people questioned by the author would be less likely to make full disclosure to a psychotherapist if the therapist had a legal obligation to disclose confidential information if asked to do so by a lawyer or judge). *See also* Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff,* 31 Stan. L. Rev., 165, 183 (1978)(majority of therapists surveyed by author "thought that patients will withhold information important to treatment if they believe the therapist may breach confidentiality"); *Allred v. State,* 554 P.2d 411, 417 (Alaska 1976)("Without foreknowledge that confidentiality will attach, the patient will be extremely reluctant to reveal to his therapist the details of his past life and his introspective thoughts and feelings.").

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition….It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.

Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955)(*quoting* Guttmacher and Weihofen, Psychiatry and the Law, 272 (1972)).

Thus, if she is deprived of the opportunity to assert the psychotherapist-patient privilege, and the guardian is allowed the right to access her records without a prior court hearing, Appellant's psychological health may be significantly impaired, and the forced disclosure of her "dreams…fantasies… sins, and …shame" may have profoundly anti-therapeutic effects for her, producing a distrust of her therapist that makes the therapeutic process impossible.[17]

[17]*See* Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View,* 50 U. Miami L. Rev. at 257 ("For most people, public revelation of private therapy disclosures would be extremely unpleasant and embarrassing. Moreover, it could produce significant negative consequences that might be harmful to them in such important areas of their lives as the family and the workplace. As a result, behavioral psychology would predict that people who are aware of this possibility may be seriously deterred from engaging in therapy.").

IV. Society Has A Strong Interest in Fostering Mental Health Treatment and in Protecting Client Privacy, Particularly for Adolescents in Dependency Proceedings

Beyond the therapeutic benefits of according due process protections to a child in a dependency proceeding that enable the child to "believe [] that he or she is being listened to and that his or her opinion is respected and counts," *M.W. v. Davis and DCF,* 756 So.2d 90, 92 (Fla. 2000), the psychotherapist-patient relationship in general is "one that society considers worthy of being fostered." *In re Doe,* 711 F.2d 1187, 1193 (2d Cir. 1983). As the U.S. Supreme Court observed in *Jaffee v. Redmond,* 518 U.S. at 11, 116 S.Ct. at 1929, "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."

A. Society Benefits From the Psychotherapist-Patient Privilege

In keeping with this recognition of the "transcendent importance" of promoting quality treatment for individuals suffering the effects of mental or emotional problems, the Florida legislature has recognized the benefits to society of fostering the psychotherapist-patient privilege:

> The Legislature finds that as society becomes increasingly complex, emotional survival is equal in importance to physical survival. Therefore, in order to preserve the health, safety, and welfare of the public, the Legislature must provide privileged communication for

> members of the public or those acting on their behalf to encourage needed or desired psychological services to be sought out.

Section 490.002, Fla. Stat. (2001). There is also widespread recognition in the social science and medical literature of the overwhelming mental, behavioral and emotional problems experienced by children in the U.S., particularly children growing up in the foster care system, and the need to develop comprehensive systems of care to address those problems.[18]

B. Benefits of the Privilege for Foster Children With Mental Health and Emotional Disorders

Because children in foster care, particularly adolescents, experience higher rates of psychological disorders than their peers raised in their own homes, society should actively promote their participation in all forms of therapy, and in doing so it should allow such children the opportunity to assert the privilege in their private

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[18]The need to treat diagnosed and undiagnosed mental health disorders in children is obviously a critically important societal interest. An estimated one in five children in the United States has a mental, emotional or behavioral disorder, and many suffer from disorders that substantially diminish their ability to function. Bazelon Center for Mental Health Law, *Making Sense of Medicaid for Children with Serious Emotional Disturbance* 2 (1999)(citing National Academy of Sciences, Institute of Medicine, *Research on Children and Adolescents with Mental, Behavioral, and Developmental Disorders* 1998)). Four million children nationally suffer from "a major mental illness that results in significant impairments at home, at school, and with peers." U.S. Dept. of Health and Human Services, *Mental Health: A Report of the Surgeon General* 124 (1999); David Satcher, *Opening Remarks: Healthy People 2010 Launch* (Jan. 25, 2000) at http: www.surgeongeneral.gov/library/speeches/healthy1.htm. The mental health needs of children in foster care are particularly acute. *See, e.g.,* R. Chernoff, et al., *Assessing the Health Status of Children Entering Foster Care,* 93 Pediatrics 594 (1994)(in foster care, 22% of children ages 3 to 6, 63% of children ages 7 to 12, and 77% of teenagers were found to be in need of mental health referral); A. McIntyre & T.Y. Keeler, *Psychological Disorders Among Foster Children,* 15 J. Clin. Child. Psychol. 297 (1986)(in foster care, 48.7% of children ages 4 to 18 showed evidence of psychological disorders; this population was at from two to more than 32 times higher risk for psychological disorders than children raised in their own homes.).

communications with therapists. Children who are the subject of dependency proceedings

> have faced terrible situations and may have been subjected to abusive and/or neglectful behaviors by the very people who are supposed to love and protect them….many children are involved in court processes precisely because they shared secret information with persons they thought they could trust: doctors, social workers, therapists, and social workers….Children who have been abused or neglected often arrive at the legal proceeding in an incredibly disempowered state. They have been violated and hurt by the people who are supposed to love and protect them. They have had their private lives and stories publicized and repeated by those who promised to keep it secret.

Randi Mandelbaum, *Rules of Confidentiality When Representing Children: The Need For A "Bright Line" Test,* 64 Fordham L. Rev. 2053, 2057-58 (1996). In fact, in a seminal survey of children leaving the foster care system, these "graduates" of foster care repeatedly asked for opportunities to be consulted and heard by decision makers involved in crucial decisions about their lives:

> The remarks and suggestions made by foster care graduates contained a recurrent theme—the importance of consultation with the young people themselves. They felt like pawns—subject to the many powers of others. They felt disregarded, that it did not matter what they wanted or had to say, because too often they were never asked. Whether it was a decision about a foster home, about changes in placement, about visiting arrangements with kin, or about their goals in life, they felt they should have been heard…Such a practice can be beneficial in the long run since it is almost axiomatic that those who participate in making decisions are more concerned about making things work out.

Trudy Festinger, No One Ever Asked Us…A Postscript to Foster Care, at 296 (1983). Respect for confidentiality rights is particularly crucial for such children. It allows them to exert some measure of control over their world, and the ability to develop a degree of trust in those around them.

C. Florida Bar Commission Recommendations on Importance of Confidentiality for Children in Foster Care

The Florida Bar Commission on the Legal Needs of Children has recently affirmed the importance of respecting the confidentiality interests of foster children in the Final Report that it submitted this past June to the Bar Board of Governors:

> Many children involved with service agencies have suffered repeated violations of their sense of personal privacy. They have been abused by parents or relatives, or transferred from one foster care placement to another, or treated like commodities on an assembly line by harried or overworked agency staff. Respect for confidentiality rights is particularly crucial for such children. It allows them to exert some measure of control over their world, and to develop a degree of trust in those around them.[19] Similarly, children in the foster care system have a vital interest in being able to view records generated by agencies, in order to establish a measure of control over personal information about them that is routinely generated and shared by these social service agencies and to have an opportunity to correct prejudicial, misleading or erroneous personal information contained in those records.[20]

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[19]In accordance with this principle, the Florida legislature has set forth as a goal for dependent children the right "[t]o enjoy individual dignity, liberty and privacy, pursuit of happiness, and the protection of their civil and legal rights as persons in the custody of the state." §39.4085(2), Fla. Stat. (2001)(citation in original).

[20]The Executive Summary and Final Report and Recommendations of the Confidentiality Subcommittee of the Bar Commission are available on the Bar website: www.flabar.org. *See also* Sandy E. Karlan, *The Florida Bar Commission on the Legal Needs of Children,* 31 Stetson L. Rev. 193, 198-99 (2002)(noting that one of the areas of consideration by the Bar Commission

While the Bar Commission did not specifically address the question presented in this appeal, it strongly recommended that courts, agencies and the legislature promote means of protecting the privacy interests of children, particularly older, mature children in the dependency and foster care systems, with respect to their records in order to treat and nurture their emotional and physical health care needs:

> Children with the capacity to consent or withhold consent to the release of confidential information concerning health care treatment (e.g., records concerning mental health treatment, treatment for sexually transmissible diseases or HIV) should be consulted prior to an agency releasing such records and should be asked to give informed consent to the release of such information.
>
> The Florida legislature should comprehensively review state laws and policies concerning the right of children to provide consent to the release of confidential health care information or to withhold consent to release of such information, without their parents' or the state's prior authorization. In its review of these laws, the legislature should give consideration to whether the policies promote family integrity, the rights of parents to be involved and active in the lives of their children, the right of the state to protect children from harm, balanced against the privacy and confidentiality interests of children to obtain treatment without conflicting parental or state interests.

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was "whether a guardian-ad-litem report that is admissible in the dispositional phase of an abuse case should be admissible, with its inherent hearsay, in a custody case."); American Bar Association Steering Committee on the Unmet Legal Needs of Children, America's Children: Still at Risk (2001), at 78 ("Confidentiality is extremely important; but it is a delicate balance. How do we encourage adolescents to involve parents or other trusted adults in their health care decisions without discouraging or barring their access to medical services? Fear of inappropriate disclosure prevents many adolescents from receiving needed care. Providing minors with access to confidential health care services increases their willingness to seek health professionals' advice regarding the prevention of pregnancy, HIV/AIDS, sexually transmitted diseases, substance abuse and mental health problems.").

The Florida Bar Commission on the Legal Needs of Children, Confidentiality Subcommittee Report (Appendix C) at C.19-20.[21]

Thus, society has a strong interest in fostering the psychotherapist-patient relationship in the case of a dependent child who is in need of therapy and in fostering her interest in keeping her intimate thoughts and feelings private in order to further her therapeutic treatment. The paramount interest in court proceedings is safeguarding the health and well being of the foster child.[22] While the guardian has a responsibility to assure that the child is healthy and has a responsibility to advocate for appropriate health care interventions, the guardian ad litem's need to know the intimate details of her treatment should not take precedence over the child's right of access to confidential health care services.[23]

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[21]The Commission also recommended that "[c]hildren over 14 should be allowed to request that private information not be disclosed when the disclosure involves extraordinarily sensitive issues concerning the child's privacy." *Id.* at C.24.

[22]*See* New York State Permanent Judicial Commission on Justice for Children, *Ensuring the Healthy Development of Children: A Guide for a Judges, Advocates and Child Welfare Professionals* (no date available)(foreword by Commission Chair Judith E. Kaye, Chief Judge of the State of New York)("While we do not suggest, or expect, that court appearances become medical inquiries, we hope that at some point an opportunity might be found to check these fundamental guideposts. By asking [questions about the child's basic health needs] we can create a climate that spotlights the critical connection between foster children's healthy development and their prospects for a permanent home. Hopefully, the inquiry will ensure that needed services are provided. Where questions expose the inadequacy of resources available to meet the needs, we hope that judicial leadership can help spur new initiatives to ensure the healthy development of every foster child.").

[23]An additional concern, from the child's perspective, is that confidentiality does not attach to any guardian-child communications. *See* State of Florida Guardian ad Litem Program, In the Children's Best Interests: A Manual for Pro Bono Attorneys Who Assist Guardians ad

Litem, (1991), Minimal Standards of Operation, Standard 5.6 ("Communications between a child and his guardian ad litem are not privileged in law, and a guardian ad litem shall not assure the confidentiality of such communications.").

By contrast, the child's attorney is statutorily and ethically bound to preserve most confidences of the client. *See, e.g.,* §39.4086, Fla Stat. (2001)(attorney owes child same duties of advocacy, loyalty, confidentiality, and competent representation as is due an adult client); Rule 4-1.6, Fla. R. Prof'l Conduct (duty to preserve client confidences except to prevent client from committing a crime or to prevent a death or substantial bodily harm to another); Standard B-4, American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996)(Commentary)(child's lawyer must preserve child client's confidences, except in situations when child is in grave danger of serious injury or death, in which instance lawyer must ask court to appoint a guardian ad litem to represent the child's best interests and alert court to grave danger of serious injury or death facing child).

Furthermore, as a matter of "best practices," children's lawyers should always respect client confidentiality, and whenever possible, should ask the child client for permission to view and share confidential records. *See* Jean Koh Peters, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions (1997)("A primary duty area for the lawyer is keeping client confidentiality…. The client must be reassured over and over again about the lawyer's strict understanding of her duty of confidentiality. The lawyer should explain her duty in initial discussions and also reinforce the child's understanding in many ways: when asking the child for permission to talk to different people, when asking for signed waivers for release of records, and when discussing with a client what the lawyer plans to tell other parties or the judge. The lawyer must put forth, concretely and specifically, the way in which she understands her confidentiality requirement, and stick by that understanding." *Id.* at 82).

This important distinction between the contrasting confidentiality obligations of attorney and the guardian is particularly apropos in the context of the instant proceeding, in which the guardian ad litem is seeking highly confidential and private information regarding therapy, and there are no statutory or ethical limitations, other than those in §39.201, Fla. Stat., and Standard 5.5, Minimal Standards of Operation (duty not to disclose information relating to appointed case except in reports to the court), on the guardian's sharing of this information beyond the dependency court. For instance, the guardian could be subpoenaed to testify in a dissolution, domestic violence, criminal, or other proceeding about matters that fall within the purview of the Chapter 39 proceeding, but because the guardian can assert no privilege of confidentiality, this highly confidential information about therapy, with its inherent hearsay, could be divulged in the other court proceedings. *See In re Report of the Family Court Steering Committee,* 794 So.2d 518, 522 (Fla. 2001)(recommending as a unified family court "guiding principle" that cases involving inter-related family law issues should be consolidated or coordinated to maximize use of court resources to avoid conflicting decisions and to minimize inconvenience to the families); c*f.* Roy T. Stuckey, *Guardians* Ad Litem *As Surrogate Parents: Implications for Role Definition and Confidentiality,* 64 Fordham L. Rev. 1785 (1996)(proposing statutory recognition of an evidentiary privilege which would permit guardians ad litem to refuse to repeat what their wards have told them, absent compelling circumstances).

V. The Child Has a Constitutionally Protected Right to Privacy in Her Psychotherapist-Patient Communications And There Are Less Burdensome or Intrusive Means for the Guardian to Obtain Confidential Information Regarding Treatment

Finally, the Appellant has a right to privacy in her psychotherapist-patient communications that is protected by the Fourteenth Amendment to the U.S. Constitution and Article I, §23 of the Florida Constitution. Therefore, the guardian must use the least burdensome or least intrusive means to obtain information relating to these private communications.

A. Appellant's Federal Privacy Right

Although there is limited authority on whether a child may exercise a right of privacy under the federal constitution to prevent the state, or a court–appointed guardian, from gaining access to private materials concerning mental health treatment, as a general proposition, "[g]iven the recent judicial trend towards affording children greater protection under the Constitution, a minor's right to make medical decisions for herself should receive full protection, and a minor should enjoy standing in contested medical treatment cases to protect her rights of informed consent, bodily integrity and self-determination, and privacy." Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes,* 64 Fordham L. Rev. 2075, 2093 (1996)(*citing* Hillary Rodham, *Children Under the Law,* 483 Harv. Ed. Rev. 487, 509 (1973)(minors are persons

under the Constitution, and as such, they are "entitled to the protective procedures of the Bill of Rights" whenever their liberties or interests are adversely affected.)).[24]

The child's assertion of the privilege is supported by the federal cases establishing a right to privacy. In *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), the U.S. Supreme Court restated the parameters of the right to privacy as protected by the federal constitution, as developed to that point in time:

> Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified governmental interference are personal decisions "relating to marriage…procreation…contraception… child rearing and education."

Id. at 684-85 (*quoting Roe v. Wade,* 410 U.S. 113, 152-53 (1973))(citations omitted). The Court has also noted that the privacy right, by definition, involves "the most intimate of human activities and relationships." *Id.* at 685.

Although the U.S. Supreme Court has never decided whether a right to privacy inheres in the doctor-patient relationship generally,[25] the protection of

[24]*See, e.g., Bellotti v. Baird,* 443 U.S. 622 (1979)(In view of the recognition that "[a] child, merely on account of [her] minority is not beyond the protection of the Constitution," a pregnant minor seeking an abortion does not need parental consent to obtain an abortion; however, the minor must initiate a judicial bypass proceeding to show that she is mature enough and well enough informed to make her own abortion decision in consultation with her physician, independently of her parents' wishes).

psychotherapeutic communications, which the psychotherapist-patient privilege is designed to serve fits squarely within the principles of the privacy right as pronounced in *Carey.* Unlike most information conveyed to a doctor treating physical ailments, the information communicated to the psychotherapist in the course of therapy concerns virtually without exception "the most intimate of human activities [,] … relationships" and thoughts. *Carey,* 431 U.S. at 685. In the words of one federal district court, "[n]o area could be more deserving of protection than communication between a psychiatrist and his patient. Such communications often involve problems in precisely the areas previously recognized by the [Supreme] Court as within the zone of protected privacy, including family, marriage, parenthood, human sexuality, and physical problems." *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1038 (D. Haw. 1979).

Recognizing the similarities between psychotherapeutic communications and the intimate spheres of decision accorded constitutional solicitude under the right to privacy, several state and federal courts have decided that the psychotherapist-patient privilege is grounded in the constitutional right to privacy. The first court to do so

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[25]*See Planned Parenthood v. Casey,* 505 U.S. 833, 112 S.Ct. 2781, 2824 (1992)(leaving undecided "[w]hatever constitutional status the doctor-patient relation may have as a general matter"); *see also Rust v. Sullivan,* 500 U. S. 173, 202, 111 S.Ct. 1759, 1777 (1991) (regulations depriving Title X clients of information concerning abortion as a method of family planning do not violate a woman's Fifth Amendment right to medical self-determination and to make informed medical decisions free of government-imposed harm); *cf. Jaffee v. Redmond,* 518 U.S. at 11, 116 S.Ct. at 1929 (acknowledging that "[b]y protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests."); *Whalen v. Roe,* 429 U.S. 589 (1977).

was the California Supreme Court in *In re Lifschutz,* 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557 (1970). There the Court said:

> We believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage. In *Griswold v. Connecticut, supra,* 381 U.S. 479, 484, the United States Supreme Court declared that "Various guarantees [of the Bill of Rights] create zones of privacy," and we believe that the confidentiality of the psychotherapeutic sessions falls within one such zone.

Id. at 432.

The opinion of the *Lifschutz* court was essentially followed by the Ninth Circuit in *Caesar v. Mountanos,* 542 F.2d 1064 (9th Cir. 1976), which also found that the privilege was grounded in the right to privacy. *Id.* at 1067 n. 9. However, a preferable position was articulated by Judge Hufstedler, writing in concurrence and dissent in *Caesar.* Judge Hufstedler criticized *Lifschutz* for "incorrectly assess[ing] the weight of the patient's right of privacy as against competing litigation." *Id.* at 1071. Despite finding that the "confidential communications between a psychotherapeutic patient and his doctor have the indicia to place those communications squarely within the constitutional right of privacy," *id.,* Judge Hufstedler nonetheless found that a limited intrusion on the constitutional right was warranted. Judge Hufstedler proposed a limited exception to the privilege allowing a party to discover *the fact of treatment, the cost of treatment and the ultimate*

diagnosis, but no more, unless the party could establish a compelling need to obtain the substance of the therapeutic communications. *Id.* at 1075.[26]

Recent U.S. Supreme Court precedent suggests that Judge Hufstedler's resolution of the issue strikes the appropriate balance. In *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S.Ct. 2791 (1992), the Court held constitutional a state statute requiring doctors to give certain information to women considering abortion, and mandating a 24-hour waiting period between the provision of that information and the exercise of the woman's capacity to give informed consent for the procedure. The Court held that the statutory provisions did not constitute an unconstitutional "undue burden" on a woman's right to an abortion before fetal viability, because the provisions did not place a "substantial obstacle" in the path of a woman seeking such an abortion. *Id.* at 2821. In reaching this holding, the Court gave particular emphasis to the fact that the Pennsylvania statute there in issue required the giving of truthful, nonmisleading information about the abortion procedure and its alternatives, a resolution which did not unduly invade the abortion patient's privacy. *Id.* at 2823.

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[26]This test would appear to at least superficially resemble the more simplistic test formulated by the California appeals court in *In re Kristine W.,* 94 Cal.App.4th at 528 (holding that details of the child's psychotherapy were protected by the privilege and limiting the "*circumscribed information*" that the therapist was expected to provide to "matters that reasonably assist the court in evaluating whether further orders are necessary for [the child's] benefit …[while] preserv[ing] the confidentiality of the details of her treatment." (emphasis added)).

If this analysis is used to determine the scope of the right to privacy in the dependency court psychotherapist-patient context, it is clear that testimony cannot be compelled (by the guardian or any other party to the proceeding) concerning the substance of confidential communications made during such therapy. As set out in the preceding four arguments, expected and actual confidentiality is crucial to successful psychotherapeutic treatment. Were that confidentiality eliminated, it would not only place a "substantial burden" in the path of a dependent child, or an adult, seeking psychotherapy, but in many cases it would make it impossible for a person even to consider confiding secret troubles that psychotherapy can uniquely address. A requirement that a patient (or her therapist) reveal confidences shared in therapy would thus place an "undue burden" on the patient's right to seek and receive psychotherapy treatment, and would thus place an "undue burden" on the patient's right to privacy surrounding the psychotherapist-patient relationship.[27]

Furthermore, the *Casey* court noted the importance that the information which the state required women to have was "truthful, nonmisleading" information, and found a significant state interest in providing such information to women seeking

[27]Judge Hufstedler's resolution of the issue delineates the proper parameters of the relevant privacy concerns. The limited, objective information she proposes to require in her opinion in *Caesar* is "truthful [and] nonmisleading," and probably would not place a "substantial obstacle" in the path of those who need and seek psychotherapeutic treatment. The information—perhaps most notably, the diagnosis—would nevertheless aid the legal system in determining whether there existed a compelling need for further disclosures. In keeping with the gravity of the constitutional privacy right attending the psychotherapeutic relationship, however, seldom would such a showing be possible.

abortions. *Id.* at 2823. Here, of course, the state (i.e., the court-appointed guardian) seeks through the legal process (i.e., its order of appointment) to force the patient (or her doctor) to reveal, rather than to receive information. But the guardian's interest in the revelation of that information is not similarly weighty, because the information it seeks is not generally likely to be "truthful, nonmisleading" information. Instead, such "information" is heavily weighted toward exaggeration, distortion and fantasy—products of a mind that is almost by definition not coping well with one or more aspects of reality. This information is not "truthful" in the judicial sense, and therefore it is not "nonmisleading."[28] The guardian thus has little or no legitimate interest in forcing its revelation under circumstances that call out to keep the materials private.

Balanced against the weighty—indeed, indispensable—privacy concerns surrounding the psychotherapist-patient privilege in this case, the guardian's demand for the details of the Appellant's confidential communications to her therapist must fail under the federal privacy right guaranteed by the Fourteenth Amendment.

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[28]*See* D. Spence, *The Special Nature of Psychoanalytic Facts,* 75 Int'l. J. of Psychoanal. 915, 915-916 (1994) (in a therapy session, "it does not matter from an epistemological point of view whether a patient's statement is literally true or false."); Comment, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved,* 34 Emory L. J. 777, 802 (1985) ("Certainly a court has no interest in allowing an individual's case to be prejudiced by narrations of his fantasies.").

B. Appellant's State Privacy Right

The Appellant's privacy rights under the Florida Constitution are even weightier. Unlike the federal Constitution, the Florida Constitution contains an explicit provision discussing the right to privacy for all residents of Florida. Article I, Section 23, of the Florida Constitution provides: "Right to privacy -- Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." The right to privacy protected by the Florida Constitution is broader and deeper than that provided by the federal Constitution[29]:

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, free-standing constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than of the Federal Constitution.

Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla 1985). The Florida Constitution "embraces more privacy interests, and extends more

[29] *See generally* Gerald B. Cope, *To Be Let Alone: Florida's Proposed Right of Privacy,* 6 Fla. St. U. L.Rev. 671 (1978)(detailing history of privacy amendment).

protection to the individual in those interests, than does the federal Constitution." *In re T.W.,* 551 So.2d 1186, 1192 (Fla. 1989).

In Florida, under Article I § 23 of the Constitution, the right to privacy extends to every natural person irrespective of age. *Id*. "Minors are natural persons in the eyes of the law and constitutional rights do not mature and come into being magically only when one attains the state defined age of majority." *Id.* In the case of *In re T.W.*, the Supreme Court of Florida established that minors have a right to privacy under the Florida Constitution. *Id.* [30]

The Florida Supreme Court has recognized "the overarching principle that article I, section 23 of the Florida Constitution guarantees that 'a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health.'" *Matter of Dubreuil,* 628 So.2d 819, 822 (Fla. 1994). Although *Dubreuil* involved an adult, the Florida Supreme Court has long recognized that the constitutional protections afforded this kind of personal choice extend to minors, as well. A child has the right to decide

[30]On this point at least, the guardian should be in agreement with the child. As the State Guardian ad Litem Program indicated in its 1991 analysis of *T.W.: "T.W.* strongly suggests that privacy may be a special area in which the rights of minors are virtually the same as those enjoyed by adults. Indeed, the *T.W.* Court expressly declined to develop a relaxed standard for reviewing privacy claims involving minors. On this question, the opinion eschewed the federal courts' tendency to sometimes allow the state to intrude upon the privacy rights of minors even though a similar intrusion would not be tolerated for adults. *Id.* at 1194-95. Thus, at least under Florida law, the privacy rights of minors may be coequal, or nearly coequal, to the privacy rights of adults." State of Florida Guardian ad Litem Program, In the Children's Best Interests: A Manual for Pro Bono Attorneys Who Assist Guardians ad Litem, (1991), Chapter 7 ("Privacy Rights of Children") at 7-8.

on medical procedures relating to pregnancy, without the necessity for a judicial bypass procedure required by the federal Constitution.[31] *In re T.W.,* 551 So.2d at 1192. A mature child may not be prosecuted for having sex with another mature minor. *B.B. v. State,* 659 So.2d 256 (Fla. 1995). A child has the right to participate in proceedings relating to his own adoption. *Peregood v. James,* 663 So.2d 665 (Fla. 5th DCA 1995). A child may consent to the adoption of her own child. *In re Brock,* 25 So.2d 659 (Fla. 1946).

If a minor can consent to sexual activity and to intrusive medical procedures, including abortion, and can give up her baby for adoption, then certainly a minor is entitled to have her voice heard, independent from the state (i.e., her court-appointed guardian), in order to protect the privacy of her psychotherapist-patient communications from being breached by the guardian or the state.

It cannot be disputed that in Florida the psychotherapist-patient privilege implicates constitutionally protected privacy rights. Florida statutes provide for a psychotherapist-patient privilege. §90.503, Fla. Stat. (2001). The statute provides that "communication between a psychotherapist and a patient is confidential if it is not intended to be disclosed to third persons." §90.503(1)(c), Fla. Stat. (2001). Additionally, the statute provides that a "patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential

[31] *See Bellotti v. Baird,* 443 U.S. 622 (1979), *supra* at n. 24 (requiring judicial bypass).

communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including … between the patient and the psychotherapist. §90.503(2), Fla. Stat. (2001).

The statute grants the psychotherapist-patient privilege irrespective of age. A "patient" is defined as "a *person* who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition…." §90.503(1)(b), Fla. Stat. (2001)(emphasis added). Under the general statutory definitions, "[t]he word 'person' includes individuals and *children*…." §1.01(3), Fla. Stat. (2001)(emphasis added). *See generally Attorney ad Litem for D.K. v. Parents of D.K.,* 780 So.2d at 306 (*citing Wray v. Dept. of Professional Regulation,* 410 So. 2d 960 (Fla. 1st DCA 1982) & *Arias v. Urban,* 595 So.2d 230 (Fla. 3d DCA 1992)).

Finally, as argued in §§ I & III above, in order to conduct effective psychotherapy, there must be an atmosphere of confidence and trust in which "a patient of a psychologist is expected to bare her soul and reveal matters of a private nature in order to receive help, but will not do so if the psychologist can be compelled to reveal these innermost thoughts and confidences …". *Palm Beach County School Board v. Morrison*, 621 So.2d 464 (Fla. 4th DCA 1993).

In evaluating statutes that affect the privacy rights of minors, the Florida Supreme Court has noted that, in addition to those interests considered in the case

of an adult, the court must consider "the state's interest in protecting minors." *In re T.W.,* 551 So.2d at 1995. In order to outweigh the minor's privacy rights, the interest must be "compelling." *Id.*

But even where a compelling state interest is found, the state must choose the least intrusive or restrictive means of furthering that interest. *Id.* "Any inquiry under this prong must consider procedural safeguards relative to the intrusion." *Id.* at 1195-96. Thus, the Florida Supreme Court held in *T.W.* that the statute requiring parental consent or a waiver hearing for a minor seeking an abortion was unconstitutional because, among other reasons, the state was intruding on the minor's privacy rights without appointed counsel and a hearing on the record that comported with due process. *Id.* *T.W.* makes clear that the state cannot brush aside a child's due process, however "compelling" the state's interests may be.[32]

As discussed in §I above, §61.403, Fla. Stat. (2001), provides the *only* legislatively authorized mechanism for a court appointed guardian ad litem to obtain confidential medical, mental health or other records pertaining to a child. That statute incorporates a specific procedural safeguard that protects the child's

[32]It is true that the Florida Supreme Court has acknowledged that children are different from adults and may be treated differently by the courts. *See, e.g., Brennan v. State,* 754 So. 2d 1 (Fla. 1999)(unconstitutionality of death penalty where defendant was 16 years of age at time of the crime). When the Court has done so, it has recognized that children may present the courts with different kinds of problems, and may need more or different kinds of protection, but not less. *See Amendment to Florida Rule of Juvenile Procedure, Fla.R.Juv.P. 8.100(a),* 796 So.2d 470 (Fla. 2001) (disallowing video detention arraignments for juveniles; "[i]n our view, children deserve more" legal protection than adults).

privacy interest in her mental health records by requiring the guardian to petition the court and give notice to the child and all the parties before it can obtain an order allowing it to inspect and copy any confidential records or documents relating to the minor child. Without question this procedure is the least restrictive or intrusive means of furthering the guardian's compelling interest in acquiring confidential information about the child's mental health treatment.

C. A Modest Compromise

Alternatively, if the guardian ad litem is troubled by the burdens of having to give notice to the child and all of the parties each time it seeks an order from the court allowing it to inspect and copy confidential mental health treatment records or documents relating to the child, it could simply change the wording of its order of appointment to make it less broad and less intrusive on the child's privacy interests. The change in wording would merge the test in Judge Hufstedler's concurrence in *Caesar* with the *Kristine W*. test and combine them with the procedural safeguards of §61.403, Fla. Stat., when the guardian establishes a compelling need for more than just circumscribed information about the child's treatment. The order could be reworded as follows:

> Upon presentation of this Order to any agency, hospital, school, person, or office including … public and private mental health facilities, … and mental health professionals, including … psychologists, psychiatrists, counselors and staff, … the individual designated in this cause and the Circuit Director or program staff shall be entitled to discover *circumscribed information about the*

mental health treatment being provided to a child 12 years or older, i.e., *the fact of treatment, the cost of treatment and the ultimate diagnosis, but no more*, unless the Circuit Director or program staff can establish a *compelling need to obtain the substance of the child's therapeutic communications, in which case an order for this psychotherapist-patient privileged information shall be obtained only after notice to all parties and a hearing thereon.* (Changes in itals.).

VI. Conclusion

Based on the foregoing statutory, policy and constitutional arguments and authorities, the Children & Youth Law Clinic urges this Court to reverse the order of the trial court denying the child's Motion for Injunctive Relief so that the child may assert the psychotherapist-patient privilege under Florida statutory and constitutional law.

Respectfully submitted,

UNIVERSITY OF MIAMI SCHOOL OF LAW CHILDREN & YOUTH LAW CLINIC

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Certificate of Service

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I HEREBY CERTIFY that the instant *amicus curiae* brief has been prepared with 14 point Times New Roman Type.

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