Rel: March 29, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2180279

Ex parte Emily E. Holm, LPC, RPT, NCC

PETITION FOR WRIT OF MANDAMUS

(In re: Margaret Bishop

v.

Aubrey Alison Bishop)

(Baldwin Circuit Court, DR-14-901467)

THOMPSON, Presiding Judge.

On August 22, 2018, Aubrey Alison Bishop ("the father") filed in the Baldwin Circuit Court ("the trial court") a

petition seeking to modify his periods of visitation with the child born of his marriage to Margaret Bishop ("the mother"). The mother answered and counterclaimed, also seeking a modification of the father's visitation, an order requiring the father to attend counseling sessions with the child, and an award of an attorney fee.

On September 6, 2018, the father filed a notice of intent to serve a subpoena on Emily E. Holm, the child's counselor, requesting records and information pertaining to Holm's treatment of the child. On October 8, 2018, the mother filed a motion seeking to quash a subpoena the father had issued to Holm. A copy of the subpoena actually issued to Holm was not provided to this court by the parties, but the arguments of the parties indicate that it was the same, in substance, as the one attached to the father's notice of intent to serve the subpoena on Holm. The father opposed the mother's motion to quash.

On November 2, 2018, the trial court entered an order denying the mother's motion to quash the father's subpoena to Holm. In that order, the trial court determined that, "while there may exist a privilege, the privilege may only be

asserted by either the child or the counselor and not by a third party."

Thereafter, on November 6, 2018, Holm filed a motion to quash the father's subpoena, arguing that the information sought in the subpoena was confidential and privileged. See Rule 503A(c), Ala. R. Evid. ("The person who was the licensed counselor ... at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the client."). The father filed an opposition to Holm's motion to quash.

On November 9, 2018, the trial court entered an order denying Holm's motion to quash the father's subpoena. In its November 9, 2018, order, the trial court specified that its order required production to the father of Holm's records pertaining to the child and that it did not require the submission of those documents to the court or to any third party. Holm filed a timely petition for a writ of mandamus in this court, arguing that the trial court erred in denying her motion to quash the father's subpoena.

In Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003), our supreme court held that petitions for a writ

of mandamus pertaining to discovery matters will be considered only in certain exceptional cases; one of those exceptions is when a privilege is alleged to have been disregarded. Accordingly, because the issue in this petition concerns the production of privileged information and the trial court has ordered the production of that privileged information, we address the merits of the petition. A writ of mandamus is a drastic and extraordinary remedy and should be granted only when a party demonstrates that the trial court has abused its discretion and that the party has a clear legal right to the relief sought. Ex parte Moore, 642 So. 2d 457 (Ala. 1994).

Initially, we note that the trial court in its November 9, 2018, order, and the parties in their briefs, refer to the privilege set forth in § 34-26-2, Ala. Code 1975, for communications between "licensed psychologists, licensed psychiatrists, [and] licensed psychological technicians and their clients" as being applicable in this matter. However, the materials submitted to this court contain no evidence or allegations regarding whether Holm is a licensed psychologist, a licensed psychiatrist, or a licensed psychological technician.

Rather, Holm asserted in her motion to quash the father's subpoena that she is a licensed professional counselor. Section 34-8A-21, Ala. Code 1975, provides:

> "For the purposes of this chapter [i.e., Title 34, Chapter 8A, entitled 'Counselors'], the confidential relations and communications between licensed professional counselor or certified counselor associate and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."

The privilege afforded a licensed professional counselor and his or her client pursuant to § 34-8A-21 is the same as that afforded under § 34-26-2, and, therefore, we treat the parties' arguments and the determinations in the trial court's November 9, 2018, order as if they referred to § 34-8A-21, which is applicable in this matter.

The privilege set forth for licensed professional counselors and their clients under § 34-8A-21, like the privilege set forth in § 34-26-2, is "placed upon the same basis as those provided by law between attorney and client." Similarly, Rule 503A, Ala. R. Evid., also extends, subject to certain exceptions, a privilege to refuse to disclose

confidential communications between a licensed professional counselor and his or her client.[1]

This court's research has not revealed any caselaw discussing the privilege between a licensed professional counselor and his or her client pursuant to § 34-8A-21. However, in the context of the similar privilege afforded a psychologist and his or her client under § 34-26-2, this court has held that, in a custody-modification action, the psychotherapy records for the child that is the subject of the modification action remain privileged and are not required to be disclosed. Ex parte Johnson, 219 So. 3d 655, 657-58 (Ala. Civ. App. 2016). This court explained:

> "Rule 503(d)(5), Ala. R. Evid., recognizes an exception to the psychotherapist-patient privilege in child-custody cases:
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> > "'There is no privilege under this rule for relevant communications offered in a child custody case in which the mental state of a party is clearly an issue and a proper resolution of the custody question requires disclosure.'
>
> "As Johnson points out, Rule 503(d)(5) [(applicable to the privilege afforded a 'psychotherapist,' see note 1, supra)] expressly provides that the

[1]Rule 503, Ala. R. Evid., sets forth a similar privilege for "psychotherapists," which are defined under that rule, in essence, as psychiatrists or psychologists.

> exception in custody cases applies only when 'the mental state of a party is clearly an issue.' (Emphasis added.) This court's precedent indicates that a child is not considered to be a party to a custody-modification action. Jones v. McCoy, 150 So. 3d 1074, 1081 (Ala. Civ. App. 2013). The Advisory Committee's Notes to Rule 503 also suggest that the exception is intended to apply when the mental state of the person seeking custody, not the mental state of the child who is the subject of the custody dispute, is at issue:
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> > "'It is arguable that any person seeking custody has thereby placed his or her mental or emotional condition at issue. Accordingly, this rule continues Alabama's preexisting, judicially created, exception to the psychotherapist-patient privilege. See Harbin v. Harbin, 495 So. 2d 72 (Ala. Civ. App. 1986) (holding that the psychologist-patient privilege yields when the mental state of a party to a custody case is clearly in controversy); Matter of Von Goyt, 461 So. 2d 821 (Ala. Civ. App. 1984) (psychologist-patient privilege inapplicable to protect medical records of litigant in child custody case).'
>
> "In noting that the rationale for the exception is based on the idea that the person seeking custody has placed his or her own mental state at issue, the Advisory Committee's Notes also tend to refute any suggestion that the child's records should be disclosed because they may be relevant to the mental state of the former wife or the former husband, i.e., the parties to the custody action. ..."

Ex parte Johnson, 219 So. 3d at 657-58 (footnote omitted).

Our supreme court has explained the importance of the privilege between a psychologist and his or her client, and,

by implication, between a licensed professional counselor and his or her client under § 34-8A-21, as follows:

> "'[T]he legislature has adopted a psychotherapist privilege. Section 34-26-2, Ala. Code 1975, states:
>
> > "'"[T]he confidential relations and communications between licensed psychologists and licensed psychiatrists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."
>
> "'....
>
> "'This privilege provides a patient the right to refuse to disclose, and to prevent others from disclosing, confidential communications between the patient and psychotherapist made for the purpose of diagnosis or treatment of the patient's mental condition, and it encompasses notes or records made by the psychotherapist. Ex parte Rudder, 507 So. 2d 411 (Ala. 1987). ...
>
> "'....
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> "'... It follows that the privilege is not easily outweighed by competing interests.
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> > "'"Statutes such as § 34-26-2 are intended to inspire confidence in the patient and encourage him in making a full disclosure to the physician as to his symptoms and condition, by preventing the physician from making public information that would result in humiliation, embarrassment, or disgrace to the patient, and are thus designed to promote the efficacy of the physician's advice or

> treatment. The exclusion of the evidence rests in the public policy and is for the general interest of the community."

> "'Ex parte Rudder, [507 So. 2d 411, 413 (Ala. 1987)]....'"

Ex parte T.O., 898 So. 2d 706, 710–11 (Ala. 2004) (quoting Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503-04 (Ala. 1993)) (emphasis omitted).

In its November 9, 2018, order denying Holm's motion to quash, the trial court cited § 30-3-154, Ala. Code 1975, which provides:

> "Unless otherwise prohibited by court order or statute, all records and information pertaining to the child, including, but not limited to, medical, physiological, dental, scholastic, athletic, extracurricular, and law enforcement, shall be equally available to both parents, in all types of custody arrangements."

(Emphasis added.) The trial court concluded that because § 30-3-154 was enacted in 1996, well after the 1979 enactment of § 34-8A-21,[2] the legislature, with knowledge of § 34-8A-21, intended § 30-3-154 as an exception to § 34-8A-21.

In her brief in support of the petition for a writ of mandamus, Holm contends that the trial court erred in its

[2]The trial court actually cited the 1963 enactment of § 34-26-2, Ala. Code 1975. See discussion, supra.

application of the rules of statutory construction. This court has explained:

> "The construction of a statute is a legal question, and we review the trial court's interpretation of a statute with no presumption of correctness. Ex parte Sonat, Inc., 752 So. 2d 1211, 1216 (Ala. 1999) (citing Sizemore v. Franco Distrib. Co., 594 So. 2d 143, 147 (Ala. Civ. App. 1991) (rejecting a presumption of correctness in tax-refund action brought as original proceeding in circuit court)). The cardinal rule in statutory construction is to determine and give effect to the intent of the legislature as manifested in the language of the statute. State v. Amerada Hess Corp., 788 So. 2d 179 (Ala. Civ. App. 2000) (citing McClain v. Birmingham Coca-Cola Bottling Co., 578 So. 2d 1299 (Ala. 1991)). 'Absent a clearly expressed legislative intent to the contrary, the language of the statute is conclusive. Words must be given their natural, ordinary, commonly understood meaning, and where plain language is used, the court is bound to interpret the language to mean exactly what it says.' Ex parte State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996) (citing IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344 (Ala. 1992))."

State v. Pettaway, 794 So. 2d 1153, 1155 (Ala. Civ. App. 2001).

We agree with the trial court that it is presumed that in enacting new legislation, such as § 30-3-154, the legislature knows of existing laws, such as the privilege afforded under § 34-8A-21. Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d 293, 297 (Ala. 1998). Also,

> "[t]he presumption is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by unmistakable implication, and that it does not intend to overthrow fundamental principles, infringe rights, or depart from a general system of law without expressing its intention with irresistible clearness."

Duncan v. Rudulph, 245 Ala. 175, 176-77, 16 So. 2d 313, 314 (1944).

Section 30-3-154 allows parents access to a child's records and information "[u]nless otherwise prohibited by ... statute." Thus, in enacting § 30-3-154, the legislature recognized that there existed statutes that might restrict a parent's rights to certain information or records pertaining to his or her child.[3] Section § 34-8A-21 is such a statute, because it provides a confidential privilege between a licensed professional counselor and his or her client, even if the client is a child. Applying the two statutes to the facts of this matter, it is clear that § 30-3-154 allows a parent to obtain information about the child that is not otherwise prohibited by a statute such as § 34-8A-21. If the

[3]The only issue before this court is the issue of privileged communications between Holm and the child. None of the parties have raised or discussed any possible implications of the disclosure restrictions under the federal Health Insurance Portability and Accountability Act of 1996.

legislature had intended a different result in enacting § 30-3-154, i.e., by making all privileged records of the child available to a parent, it would have so specified by omitting the clear language "[u]nless otherwise prohibited by ... statute." See Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d at 297.

The trial court erred in determining that the parents' rights under § 30-3-154 negated the privilege afforded under § 34-8A-21 for the communications between the child and his licensed professional counselor, Holm. The communications between Holm and the child are confidential and privileged, § 34-8A-21, and Holm has asserted that privilege.[4] Accordingly, we hold that the trial court erred in denying Holm's motion to quash the father's subpoena.

PETITION GRANTED; WRIT ISSUED.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.

[4]Given the posture of this case, the parties have not argued the issue of waiver of the privilege, and, therefore, we do not reach that issue.