NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

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| SHAWN K. RICKETTS,<br><br>Petitioner,<br><br>v.<br><br>TIMOTHY G. RICKETTS,<br><br>Respondent. | ) | Case No. 2D19-3854 |

Opinion filed June 19, 2020.

Petition for Writ of Certiorari to the Circuit Court for Polk County; Sharon M. Franklin, Judge.

Ceci C. Berman and Joseph T. Eagleton of Brannock & Humphries, Tampa; Sarah E. Kay of Sessums Black Caballero Ficarrotta, Tampa; and Sarah E. Kay of Kay Family Law PLLC, Tampa (substituted as counsel of record), for Petitioner.

Jean Marie Henne of Jean M. Henne, P.A., Winter Haven, for Respondent.

BLACK, Judge.

Shawn K. Ricketts, the Wife, seeks certiorari review of the trial court's order granting in part and denying in part her motion for protective order addressing discovery of medical records. We grant the petition.

In February 2019, the Wife filed a petition for dissolution of marriage. One month later, Timothy G. Ricketts, the Husband, filed a counterpetition for dissolution of marriage. Neither party alleged that the other was unfit to have time-sharing with the parties' two children.

In June 2019, the Husband noticed the Wife that he intended to serve subpoenas duces tecum without deposition to eleven nonparties, all of which were alleged to have provided some type of medical, psychological, or psychiatric treatment to the Wife. The subpoenas directed that each nonparty was to produce "[a]ny and all records of any kind or nature regarding medical and/or psychological and/or psychiatric treatment or counselling of Sharon [sic] K. Ricketts during the past five (5) years." The requested records were to include "notes, prescriptions, treatment records, consultation reports, lab reports, blood work reports, office notes by staff of the facility and any electronic records maintained during the course of treatment."

In August 2019, the Husband noticed the Wife for deposition duces tecum, to occur on September 10, 2019, and directed that she produce "all records of any kind or nature regarding medical and/or psychological and/or psychiatric treatment or counselling [she] ha[d] undergone during the past five (5) years," to include "notes, prescriptions, treatment records, consultation reports, lab reports, blood work reports, office notes by staff of the facility and any electronic records maintained during the course of treatment." The deposition notice also directed the production of "any and all

bank statements for accounts which [the Wife was] an authorized signer between May, 2018 and the date of deposition including copies of any checks issued on said accounts" and "statements for all lines of credit utilized by [the Wife] for the time period of May, 2018 to date."

The Wife filed an objection to the notice of production from nonparties and a motion for protective order, alleging that the Husband sought to engage in discovery which included the deposition of the Wife and the production of documents "largely center[ing] on [the Wife's] psychological records." The Wife alleged that the deposition and the subpoenas sought to obtain "irrelevant, confidential, and privileged documents and information for a five-year timespan" and that Florida law clearly recognizes both physician-patient and psychotherapist-patient privileges.[1] She further alleged that the subpoenas were not reasonably calculated to lead to the discovery of admissible evidence and otherwise did not tend to prove or disprove any material fact where the Wife's physical or mental health was not in controversy. The Wife relied upon cases concluding that a claim for time-sharing or custody does not place the parent's health at issue.

A hearing was held on the Wife's motion for protective order, and the order on review was rendered September 6, 2019. The order grants in part and denies in part the Wife's motion. The order requires the Wife to produce to her attorney "the Wife's medical records for twelve (12) months immediately preceding the date of filing of the Petition" and directs the Wife's attorney to review the records, produce to the Husband

[1]The Wife did not object to or seek a protective order with regard to the requested nonmedical financial records and documents. Therefore, those documents were not at issue below and are not at issue here.

"any documents Wife's counsel deems not privileged," and produce "a privilege log for documents withheld from production as privileged." The order further directs that "[a]ny questions as to the privileged nature of a document in the privilege log" would be resolved via "an in camera inspection of the document" by the trial court.

The transcript from the hearing reflects that the Wife argued each of the points she had raised in her motion; she particularly focused on the case law establishing that in order for the Wife's medical records to be discoverable her health must be in controversy, and therefore relevant to the proceedings, and the Wife must have been the party to place her health in controversy. The Husband argued that the Wife's mental health was at issue because her attorney had propounded interrogatories to the Husband inquiring (1) as to whether the mental condition of a spouse was at issue in the case and, if so, requiring identification of the spouse and all of the spouse's health care providers and (2) whether the other parent's time-sharing should be impacted, supervised, or limited as a result of a mental health condition and what conditions should apply to time-sharing. The Husband also argued that the Wife's attorney had not reviewed the requested records to determine whether they were all privileged or if, for instance, the Wife had discussed any of her treatment with a third party present, such that the conversation was not privileged.

Certiorari is appropriate to review orders compelling discovery of privileged matters. Quinney v. Quinney, 890 So. 2d 407, 408 (Fla. 5th DCA 2004); accord Pauker v. Olson, 834 So. 2d 198, 200 (Fla. 2d DCA 2002). The irremediable harm prong of the certiorari standard is met when an order erroneously directs the

disclosure of medical records. Brooks v. Brooks, 239 So. 3d 758, 760 (Fla. 1st DCA 2018) (quoting Zarzaur v. Zarzaur, 213 So. 3d 1115, 1117 (Fla. 1st DCA 2017)).

> Florida law is clear that a person's medical records enjoy a confidential status. First, the right to privacy contained in Article I, section 23 of the Florida Constitution has been extended to preclude dissemination of one's medical records. See State v. Johnson, 814 So. 2d 390, 393 (Fla. 2002). Second, confidential medical records are protected from disclosure as provided in Florida statutory law. See § 456.057(7)(a), Fla. Stat. (2013) (providing that, with few exceptions, medical records may not be furnished to any person other than the patient or the patient's legal representative or other treating health care providers, except upon written authorization of the patient). Third, section 90.503(2)[, Florida Statutes (2013),] provides that under the psychotherapist-patient privilege, a patient has a privilege to refuse to disclose confidential information or records made for the purpose of diagnosis or treatment of mental conditions, including any diagnoses made by the psychotherapist.

S.P. ex rel. R.P. v. Vecchio, 162 So. 3d 75, 79 (Fla. 4th DCA 2014).

"[A]bsent evidence of an applicable statutory exception or waiver, a trial court departs from the essential requirements of law when it enters an order compelling disclosure of communications or records in violation of the psychotherapist-patient privilege." Id. at 80. Section 90.503, Florida Statutes (2019), provides an exception "[f]or communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense." § 90.503(4)(c). "The records of [the Wife's] treating physician, the medical facility, and the pharmacy fall within the ambit of the statutory privilege." See Brooks, 239 So. 3d at 761. "Any invasion of the privilege must be limited to what is demonstrably necessary on the facts of each case." Zarzour, 213 So.

3d at 1118. And the privilege may not be deemed involuntarily waived except under "extreme circumstances." Id. at 1119.

The Wife has not relied upon any condition as an element of her claims or as a defense. The fact that the Husband answered an interrogatory and asserted that the Wife's mental health is of concern does not satisfy the statutory requirement. Cf. Hicks v. State, 276 So. 3d 127, 128 (Fla. 1st DCA 2019) ("[T]hese limited litigation activities, without more, fail to clearly establish a waiver of the children's psychotherapist-patient privilege . . . ."). Moreover, and although the Wife does not raise this point, there was no evidence presented at the hearing; the only basis suggested by the Husband was the Husband's attorney's argument regarding the Wife's interrogatories. This is insufficient. See Smith v. Smith, 64 So. 3d 169, 171 (Fla. 4th DCA 2011).

The law with regard to a party's medical records in dissolution proceedings is clear. Requesting custody, time-sharing, or parental responsibility does not place a party's mental health at issue. See, e.g., Koch v. Koch, 961 So. 2d 1134, 1134 (Fla. 4th DCA 2007). Neither parent has alleged that the other is unfit to have time-sharing with their children. See Quinney, 890 So. 2d at 409; cf. Schouw v. Schouw, 593 So. 2d 1200, 1201 (Fla. 2d DCA 1992) (concluding that even where both parties questioned the other's psychological fitness to parent, "mere allegations" are insufficient to overcome the privilege). "Further, 'mere allegations of mental or emotional instability are insufficient to place the custodial parent's mental health at issue so as to overcome the privilege.' " Leonard v. Leonard, 673 So. 2d 97, 99 (Fla. 1st DCA 1996) (quoting Oswald v. Diamond, 576 So. 2d 909, 910 (Fla. 1st DCA 1991)). And while the

occurrence of a "calamitous event" would likely place a party's mental health at issue, there is no such event in this case. See Koch, 961 So. 2d at 1134 (quoting Attorney Ad Litem for D.K. v. Parents of D.K., 780 So. 2d 301, 308 (Fla. 4th DCA 2001)); Leonard, 673 So. 2d at 99.

Finally, before a court can order production of privileged records, even through in camera inspection, it must first determine that the party asserting the privilege has waived it. See Brooks, 239 So. 3d at 761; cf. Scully v. Shands Teaching Hosp. & Clinics, Inc., 128 So. 3d 986, 988 (Fla. 1st DCA 2014) (holding that in camera review of the requested documents was appropriate where the petitioner had placed her medical and psychiatric condition at issue). Thus, even though the trial court in this case ordered in camera inspection of any documents in the Wife's privilege log, that was error where the court did not apply the law requiring a finding that the privilege had been waived. See Brooks, 239 So. 3d at 761; cf. Koch, 961 So. 2d at 1135.

We also note that the Wife's motion for protective order encompassed both the nonparty subpoenas and the Wife's deposition subpoena. The order, however, directs the Wife to produce documents but otherwise grants her motion. Based on the language of the order, we necessarily conclude that the trial court granted the motion as to each of the eleven nonparty subpoenas; there is no direction that the nonparty subpoenas should issue or that production should occur. Yet the trial court ordered the Wife to produce essentially the same records, limited only to a one-year period, without explanation for the divergent ruling.[2]

[2]Although the Husband contends that he requested only nonprivileged documents, each of the documents identified would fall under the statutory privilege.

The Wife's prior health, physical and mental, are not relevant to her current ability to parent the children; "[w]hat is relevant to the trial court's determination regarding child custody is the parties' present ability and condition." Schouw, 593 So. 2d at 1201. Here, as in Schouw, there was no showing by the party attempting to obtain the records—the Husband—that the prior records of the other parent would contribute to the court's determination of present ability. See id.; see also Brooks, 239 So. 3d at 761.

The court departed from the essential requirements of the law in denying in part the Wife's motion for protective order. The records sought to be produced from the nonparties as well as from the Wife fall under the statutory privilege of section 90.503. The court failed to apply the correct law in ordering the Wife to produce her medical records. The petition for writ of certiorari is granted.

Petition granted; order quashed.

LaROSE and SLEET, JJ., Concur.

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See, e.g., Brooks, 239 So. 3d at 761 (quashing order as it required disclosure of prescriptions records).