

Stepfather sued for abuse can assert psychotherapy privilege

Testimony regarding 'family session' restricted

A man accused of sexually abusing his stepdaughters could assert the psychotherapist-patient privilege to restrict the testimony of a psychologist regarding a family therapy session the defendant attended in 1993, a federal judge has ruled.

The plaintiffs, Kimberley Medeiros and Wendy Sweeney, alleged that defendant Kevin M. Campbell could not assert the privilege because he was not a patient of the psychologist when he attended the therapy session with the plaintiffs and their mother, Sheila Brayden.

But U.S. District Court Judge Allison D. Burroughs disagreed, entering an order prohibiting Dr. Judith Power from disclosing or testifying about any communications between her and the defendant at the March 5, 1993, session.

"There can be situations in which family members attending a therapy session are mere participants whose communications are not privileged," Burroughs wrote. "Here, however, given Dr. Power's contemporaneous treatment notes, as well as the lack of any statement [by her] regarding confidentiality or privilege, the Court finds that Mr. Campbell was a patient participating in family therapy and that he may invoke the privilege."

The five-page decision is *Medeiros, et al. v. Campbell*, Lawyers Weekly No. 02-257-16. The full text of the ruling can be found at masslawyersweekly.com.

Harsh result?

Boston lawyers Mitchell Garabedian and William H. Gordon represented the plaintiffs. Garabedian said he could not comment due to a court order sealing a relevant document in the case.

Ross A. Kimball of Boston and Atlanta attorneys Jeffrey B. Bogart and George R. Ference represented the defendant. Kimball also declined to comment, citing the sensitive nature of the case.

Annette Gonthier-Kiely, president of the Massachusetts Academy of Trial Attorneys, questioned whether Burroughs' decision was



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— Anthony J. Cichello, Boston

consistent with the purpose of the psychotherapist-patient privilege as codified at G.L.c. 233, §20B to protect "justifiable" expectations of confidentiality.

"The first prerequisite is you have to be a patient," she said. "It was a compelling fact that, at the evidentiary hearing, Dr. Power testified that only the plaintiff, Ms. Medeiros, was her client and that she did not consider Mr. Campbell a patient. Right there I think he should not be afforded the privilege."

Gonthier-Kiely also noted that the judge appeared to give less weight to the doctor's testimony than she did to a notation on the doctor's notes labeling the appointment in question a "family" session.

"It was a family session in the sense that family members attended," Gonthier-Kiely said. "In this setting, when we're talking about a minor who was [an alleged] victim of sexual abuse and the protections that should be afforded [to such victims], the weight should go to protecting that minor."

Gonthier-Kiely cited the public policy embodied in G.L.c. 119, §51A, which imposes a mandatory duty on certain professionals to report suspected child abuse.

"Right there is the implicit understanding that if you convey a crime such as that to a psychotherapist, it's not protected," she said. "That psychotherapist is mandated to report it."

But Boston attorney Paul R. Cirel said Burroughs was "spot on" in concluding that the defendant could assert the privilege. In addition, Cirel said, the Supreme Judicial Court has rejected a balancing of public policy considerations when it comes to the psychotherapist-patient privilege.

"Privileges aren't a balancing test," he said.

"We have very few of them in Massachusetts, and the few we have are pretty absolute."

In 2010, Cirel argued *Board of Registration in Medicine v. Doe*, one of the landmark cases on the psychotherapist-patient privilege. He represented a psychiatrist in blocking a government subpoena of more than 20 patient files.

In concluding that the government subpoena should have been quashed, the SJC held that the state's psychotherapist-patient privilege statute does not permit a weighing of the public interest — in that case, the furtherance of a government investigation into the doctor's treatment practices — against the interests protected by the privilege.

For the same reasons expressed by the SJC in *Doe*, Cirel said, it would have been improper for Burroughs to weigh the public interest in protecting victims of sexual abuse in deciding whether to pierce the psychotherapist privilege asserted by the defendant in *Medeiros*. According to Cirel, the Legislature in statutorily recognizing the psychotherapist-patient privilege has already determined that the weight is in favor of protecting those communications.

"The purpose of the privilege is to encourage a full, fair and honest disclosure of information within the 'cone of silence' of therapy," Cirel said. "Family therapy is precisely that. [Here.] the family was invited in. What good would it be for the patient who was initially being treated, as well as to the other family members, if there was not a thorough disclosure and unburdening of whatever the issues are?"

Boston health care lawyer Anthony J. Cichello said many lawyers might see *Medeiros* as a harsh result given the troubling allegations in the case. But the judge was on legally firm ground, he said.

Massachusetts courts have a long history of protecting the psychotherapy privilege, particularly in cases in which the therapist does not provide a clear, upfront explanation to the participant that what they say during the course of the session is not privileged, Cichello said. In that light, Cichello said he could understand why Burroughs did not find Dr. Power's testimony determinative on the issue of whether the defendant qualified as her patient during the 1993 session.

"I am sure that the therapist thought of the daughter with whom she had multiple therapy sessions as 'the client,'" he said. "But [Dr. Power] clearly treated or talked about the situation as a family therapy session, which carries with it implications which she may or may not have thought through."

Cichello said he sees Burroughs' decision as essentially recognizing what amounts to be a "default" rule protecting the privilege in the family therapy setting.

"In the absence of a clear statement of 'what you tell me is not going to be privileged,' the judge felt it was reasonable for this man to assume that his communications were going to be confidential," Cichello said.

Sexual abuse allegations

The defendant, who now resides in Georgia, became the plaintiffs' stepfather when he married Brayden in 1980. At the time, Medeiros was 11 and Sweeney was 8. The plaintiffs alleged the defendant began sexually abusing them when he became their mother's live-in boyfriend before the marriage and that the abuse occurred between 1979 and 1984 while the family lived in Massachusetts.

Medeiros received psychological treatment from Dr. Power in early 1993. The defendant was a participant in one of Medeiros' nine sessions with Dr. Power. Specifically, on March 5,

Medeiros, et al. v. Campbell

THE ISSUE	Is a personal injury defendant accused of sexually abusing his stepdaughters entitled to assert the psychotherapist-patient privilege to restrict the testimony of a psychologist regarding a family therapy session the defendant attended in 1993?
DECISION	Yes (U.S. District Court)
LAWYERS	Mitchell Garabedian and William H. Gordon, of Law Offices of Mitchell Garabedian, Boston (plaintiffs) Ross A. Kimball of Sloane & Walsh, Boston; Jeffrey B. Bogart and George R. Ference, of Atlanta (defense)

1993, the defendant attended a session that, in addition to Medeiros, was attended by Sweeney and Brayden.

The plaintiffs, who are residents of Massachusetts, sued the defendant in federal court in 2015, asserting claims for assault, battery, and both intentional and negligent infliction of emotional distress.

During the course of discovery, the defendant moved for a protective order. Asserting the psychotherapist-patient privilege, the defendant sought to preclude Dr. Power from testifying about or disclosing any document relating to communications between the defendant and Dr. Power during the March 1993 session.

In opposing the motion, the plaintiffs contended that the only "patient" at that session was Medeiros and, therefore, the defendant was not entitled to claim the protection of Massachusetts' psychotherapist-patient privilege statute.

Privilege enforced

Under G.L.c. 233 §20B, "a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition."

The privilege applies to "patients engaged with a psychotherapist in marital therapy, family therapy, or consultation in contemplation of

such therapy." The statute defines patient as "a person who, during the course of diagnosis or treatment, communicates with a psychotherapist."

As a threshold issue, Burroughs found it "likely" that the March 5, 1993, therapy session was not preceded by any statement limiting confidentiality or privilege. The finding was based both on the fact that none of the participants could recall such a disclaimer and because Dr. Power testified at an evi-

dentiary hearing that it was not her practice to speak about privilege at a session.

Turning to the larger issue, Burroughs was unpersuaded by the plaintiffs' evidence that the defendant was not a patient within the meaning of §20B. Medeiros indicated in an affidavit that she believed the March 5 session was for her benefit alone and not for the treatment of any of the other participants.

Moreover, Dr. Power testified that she did not intend to treat Campbell at the March 5 session and that the family was invited so the doctor could get a better understanding of the family for the purpose of treating Medeiros.

But Burroughs found compelling evidence that Dr. Power titled her treatment notes for the March 5 appointment "Family Session." In addition, the psychologist referred to that session as a "family therapy session" in the treatment notes for her next appointment with Medeiros.

"The purpose of the psychotherapist-patient privilege is to protect the 'justifiable expectations of confidentiality' of people seeking psychotherapeutic help, and based on the foregoing, Mr. Campbell could have justifiably expected that the statements he made to Dr. Power at the March 5, 1993 session were privileged," the judge wrote.

— PAT MURPHY

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