AN OVERVIEW OF HOW FAMILY LAW COURTS IN FLORIDA TREAT ALCOHOLISM AND ADDICTION

By Joseph M. Considine, P.A.

Substance abuse is a leading cause of marital discord and divorce throughout the country. In 2012, an estimated 22.2 million persons aged 12 years or older were classified with substance abuse dependence or abuse based on criteria specified in the *Diagnostic and Statistical Manual of Mental Disorders,* 4th Edition. The good news is that some 4 million persons aged 12 or older received treatment for alcohol or illicit drug use in 2012. The bad news is that 18 million did not.

The Florida Legislature has attempted to deal with this burgeoning issue. The Legislature stated the problem thusly:

Substance abuse is a major health problem that affects multiple service systems and leads to such profoundly disturbing consequences as serious impairment, chronic addiction, criminal behavior, vehicular casualties, spiraling health care costs, AIDS and business losses, and significantly affects the culture, socialization, and learning ability of children within our schools and educational systems. Substance abuse impairment is a disease which affects the whole family and the whole society and requires a system of care that includes prevention, intervention, clinical treatment, and recovery support services that support and strengthen the family unit. (Florida's Marchman Act)

Florida's family law attorneys are many times on the front lines and see the ravages of substance abuse and dependency in divorce and child time sharing cases. It is a leading cause of marital discord and divorce. This article will refer to addiction, alcoholism, substance abuse and dependency as interchangeable terms.

There is not an abundance of case law in Florida dealing with the ever growing societal problem of addiction and alcoholism as it affects judicial determinations in family law cases; yet there is enough for us to see how the courts treat alcoholics and addicts in divorce and custody proceedings. What follows is an overview of some of the important and frequently encountered issues in family law matters as presented where there is substance abuse and dependency.

A Divorcing Spouse's Right To Treatment Or Therapy Records Of The Other.

The law regarding access to a spouse's treatment records is clear. Almost always, records of a spouse's treatment or therapy are confidential, privileged and unavailable to the other spouse in a divorce or child custody/time sharing matter. An individual who has sought treatment or therapy for substance abuse or dependency has a right to expect confidentiality and non-disclosure of treatment records. It is necessary to the rehabilitation of the substance abuse impaired individual that he or she feels comfortable that what is disclosed in therapy or treatment stays there and is not repeated in court.

The Florida Evidence Code, F.S. 90.503(2), provides that a "patient has a privilege to refuse to disclose, and to prevent any other person from disclosing confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, **including alcoholism and other drug addiction**, between the patient and the psychotherapist….."

The Marchman Act provides rights to individuals receiving substance abuse services, with a right to confidentiality of individual records. The records of service providers which pertain to the identity, diagnosis, and prognosis of and service provision to any individual are confidential in accordance with this chapter and with applicable federal confidentiality regulation. Such records may not be disclosed without the written consent of the individual to whom they pertain except that appropriate disclosure may be made without such consent. These records are only obtainable upon a court order showing good cause for disclosure.

Moreover, the provisions of HIPPA (42 U.S.C.A. Section 290dd-2) provide that records of substance abuse programs are confidential and cannot be disclosed without express order of court "after application showing good cause".

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Hence, in a family law case, when one spouse requests the treatment records of the other spouse, the requesting party must not only overcome the evidentiary privilege but the confidentiality provisions of Chapter 397, Florida Statutes, and 42 U.S.C.A. Section 290dd-2. It is a very difficult hurdle to overcome and rarely, if ever, permitted.

Encourage The Client To Seek Treatment

If a party in a divorce case admits that he or she is an alcoholic or addict, or that she has been to treatment or that he is a recovering alcoholic, that admission does not create a waiver of the confidentiality and privilege of mental health records. Again, the public policy in Florida is to encourage people to get help and not to have to worry that what they say in treatment will come back to haunt them in a custody battle or divorce with a current or ex-spouse.

However, as in many things in life, there is an exception. An exception to the privilege is where there has been a *calamitous event* such as an attempted suicide occurring during the pendency of the litigation so that the mental health of a parent is sufficiently at issue to warrant finding no privilege exists. That was the finding of the court in **O'Neill v. O'Neill**, 823 So2d 837 (5 DCA 2002). In that case, the wife was addicted to controlled substances and had been in treatment. She used drugs in the presence of the children and was admitted to a psych ward after threatening to hurt herself and the children. The court

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ruled there was no privilege because of the seriousness of the existing problems with the mother. However, for there to be an exception to the general confidentiality of treatment records rule, the *calamitous event* has to occur during the pendency of the litigation and not earlier.

Protect The Therapeutic Alliance

Many therapists know full well the value of the therapeutic alliance between client and therapist. Sometimes, lawyers or the client will call the client's therapist to testify to the fitness as a parent. The evidentiary privilege is waived when the therapist testifies. Lawyers, clients and therapists need to jointly determine whether to interrupt the therapeutic alliance between the therapist and client by having the therapist testify which then permits inquiry into all matters discussed with the client in therapy. I never use the client's therapist to testify unless there is no other possible way to get evidence of recovery and fitness before the court. The better practice is not having the therapist testify and instead, having the client undergo a psychological evaluation by a forensic psychologist who is then able to testify as to the parent's fitness.

Assure The Client She Will Not Be Harmed In The Case If She Goes To Treatment

The spouse/parent/client must always be encouraged to go to treatment and recover from the addiction even if there is a pending or looming divorce case. If there is an addictive process, the individual's safety and health should come first. **Safety first – always.** The client is to be assured that the act of going to treatment will not be used against them, whereas, if there is a substance abuse issue and no attempt at treatment, the court will take the untreated substance abuse into account when making its decisions. I try to get clients to take a long view and assure them that they will always have unsupervised time and access to their children if they get help and stay clean and sober, but their access will be limited or supervised if they continue to abuse substances. The court always wants to protect the children and see the benefits of treatment to the children and the individual parent. In Wyatt, the court wrote that: "As a matter of policy, we decline to affirm a result which, under the facts of this case, effectively penalizes an otherwise fit, competent parent for the ***commendable action of recognizing an addiction to prescription drugs, seeking assistance with, and successfully completing treatment*** for that problem. Wyatt v. Wyatt, 689 So.2d 1140 (Fla. App. 3 Dist. 1997)

Successful completion of treatment has served as the basis for a modification of time sharing after a period of recovery. A father was able to get a custody decree modified when he presented competent evidence that he had recovered from his addiction to substances. The Father had the testimony of two doctors licensed in mental health counseling and friends, that he had not relapsed in his addiction, and didn't have problems with his supervised time sharing with the children. The Court ruled that the Father had proven a substantial and material change in circumstances and that a change from supervised to unsupervised time sharing was in the best interests of the children.

Joe Considine has practiced law in South Florida since 1983. His practice is limited to family law and addiction related law including the Marchman Act. Joe has handled over 1500 litigation cases in his career, appearing in courts throughout Florida. Joe works extensively with families whose loved ones have substance abuse and mental health problems as an attorney. He lectures throughout Florida on family law matters including the Marchman Act and other substance abuse related issues.
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