

99PR1359 & 00PR153 (2/11/00)

PROBATE COURT CITY AND COUNTY OF DENVER STATE OF COLORADO

Case No. 99PR1359, 00PR153

IN THE MATTER OF

The Estate of DAVID FRED FERNANDEZ, SR., a/k/a FRED FERNANDEZ or DAVID FRED FERNANDEZ
Protected Person/Incapacitated Person.

ORDER

THIS MATTER comes before the Court upon David Fernandez's (hereinafter "Respondent") motion to prevent the testimony or reports of Conner F. McBryde, M.D. (hereinafter "McBride") and M. Katherine Kaye, Psy.D (hereinafter "Kaye") to be admitted as evidence at Respondent's Conservatorship/Guardianship hearing. McBryde and Kaye plan to give opinions regarding Respondent's capacity based upon their examinations of him. Respondent asserts that the evidence McBride and Kaye wish to present is privileged pursuant to C.R.S. § 13-90-107 and therefore must be suppressed. Josefita P. Hesson (hereinafter "Petitioner") claims that Respondent waived his privilege.

C.R.S. § 13-90-107 prevents doctors and psychologists from disclosing a patient's information obtained in the course of providing treatment Johnson v. Trujillo, 977 P.2d 152, 154 (Colo. 1999). The purpose of the privilege is to enhance effective diagnosis and treatment by encouraging the patient to disclose all relevant information without fear of embarrassment or humiliation. People v. Dill, 904 P.2d 1367, 1371 (Colo. App. 1995); People v. Dist. Ct., County of Adams, 797 P.2d 1259, 1263 (Colo. 1990) (citing Clark v. District Court, 668 P.2d 3, 8 (Colo. 1983). Because of these policy considerations, statutory privileges are strictly construed. People v. Dist. Ct., County of Adams, 797 P.2d 1259, 1262 (Colo. 1990).

These privileges, however, are not absolute. Kelley v. Holmes, 470 P.2d 590, 592 (Colo. App. 1970). Patients may waive their privilege. Johnson v. Trujillo, 977 P.2d 152, 155 (Colo. 1999); Adams, 797 P.2d at 1263; People v. Deadmond, 683 P.2 763 (Colo. 1984); Stauffer v. Karabin, 492 P.2d 862, 864 (Colo. App. 1971). Waiver is established by a showing that the privilege holder has expressly or impliedly "forsaken his claim of confidentiality with respect to the information in question." Bond v. District Ct, 682 P.2d 33, 38 (Colo. 1984). The party seeking to overcome the privilege bears the burden of establishing such a waiver. Trujillo, 977 P.2d at 155; Dill, 904 P.2d at 1370.

For purposes of this Order the Court relies on McBryde's August 13, 1999 letter (hereinafter "letter") wherein he states, "I have included a copy of the geropsychology report dated 4/15/99 for your review, with Mr. Fernandez's permission." No evidence has been offered to cast doubt on McBryde's version of this interaction with Respondent. McBryde's evaluation was prepared and sent to the Court "to address concerns" raised by Respondent's family "regarding his ability to provide care for himself and his wife." (letter) The evaluation was performed with Respondent's participation and was provided to the Court with his consent.

The Court FINDS that Petitioner has met her burden of establishing that Respondent waived his right to assert the physician/patient and the psychologist/patient privilege by granting consent to the doctor to report to the Court and to include the second report. Respondent provided information to Dr. McBryde and expressly told McBryde that the report could be submitted to the Denver Probate Court. Respondent also agreed that McBryde's report would include Kaye's report. The Court FINDS that Respondent's actions expressly waived the material contained within the submitted reports.

Respondent asserts that a heightened requirement for an express waiver should be imposed on the statute when there is a possibility that the patient's capacity is diminished. He claims that he should have been required to sign an express waiver and have the consequences of his actions fully explained to him. Respondent has not cited any case law to support his contention. In fact, available case law states the opposite.

A patient may waive his privilege by his words and actions. Clark, 668 P.2d at 8. A written waiver is not required. For example, in *People v. Deadmond*, the Colorado Supreme Court held that a patient's abusive language, loud demeanor, and offensive behavior made to his doctor in an emergency room could be readily observed and heard by anyone present, and therefore, constituted an implied waiver of the privilege. 683 P.2d 763 (Colo. 1984). The fact that the patient's capacity was diminished due to his intoxication was insignificant. *Id.*

The Court therefore ORDERS that McBryde and Kaye may testify as witnesses at the hearing scheduled for February 23, 2000 provided their testimony is limited to matters discussed in their submitted reports.

February 11, 2000

C. Jean Stewart
Judge, Probate Court