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Opinion following order vacating prior opinion

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of M.K. and K.K.	H042619 (Santa Clara County Super. Ct. No. 6-14-FL-013698)
M.K., Appellant, v. K.K., Respondent.	

In the course of its determination of child custody and visitation issues, the family court ordered appellant M.K. not to disseminate confidential information related to the psychotherapeutic treatment of her former husband, respondent K.K. The court ruled that the information was protected by the psychotherapist-patient privilege and had not been waived by K.K.'s disclosure to her during their marriage. M.K. contends that this ruling constituted an abuse of discretion and amounted to a gag order which violated her free speech rights. We find no error and affirm the order.[1]

Background

The parties had been married for just over 10 years when M.K. filed for dissolution on December 4, 2014. Their three children were then eight, six, and almost

[1] We refer to the parties throughout this opinion by their initials to protect their personal privacy interests. (California Rules of Court, rule 8.90(b)(10).)

three years old. M.K. requested joint legal custody and sole physical custody, with visitation to K.K. of a "minimum two visits per week, or as the parties may agree." K.K. responded with a request for joint legal and physical custody.

On January 6, 2015, K.K. filed a "Request for Order" setting forth a proposed shared custody schedule. In the attached declaration, K.K. stated that since the filing of the petition M.K. had been "severely limiting" the children's access to him. M.K. responded with a request for sole physical custody and joint legal custody "with mother to make final decisions." The court declined to order a specific schedule or other relief. Instead, it ordered the parties to meet and confer on the subject of custody and visitation before the next hearing, which was set for February 5, 2015.

K.K.'s attorney attempted to comply with the order by proposing a visitation schedule. M.K., however, responded with another request for sole physical custody and joint legal custody, again with her retaining the right "to make final decisions." On January 14, the court issued a temporary visitation schedule allowing K.K. unsupervised visitation on specific days and times.

M.K. then filed a Request for Order allowing K.K. only supervised visitation. M.K. asserted that K.K. had "serious mental health problems." K.K. denied this claim, asserting that he was "a capable father who has always been involved with caring for the children," and that he had "no mental health problems that interfere with [his] ability to continue to do so." He also stated that M.K. had refused to cooperate in the meet-and-confer process regarding visitation as the court had ordered.

On January 27, 2015 M.K. submitted another ex parte request for an order, this time allowing K.K. "no visitation without mental health investigation." The request was rejected by the court's document examiner, but she submitted a similar request on February 3, 2015. In her accompanying declaration she suggested granting K.K. "limited supervised visitation." M.K. described for the court K.K.'s history of what she called his "unresolved mental health issues," including what she represented to be diagnoses from

psychiatrists he had consulted and the medications they had prescribed. She also alleged "emotional, physical, and financial abuse."

K.K. filed a response to the January 27 request, disputing M.K.'s allegations and requesting a protective order. He stated that the children were "happy and well cared for" when they were with him. He objected to M.K.'s new claims of abuse, which were devoid of specific facts or context. As to the allegations regarding his mental health, K.K. stated, "I deny [M.K.]'s negative accusations about my mental health and request the court to strike and disregard her statements which violate my privilege and privacy rights with any of my therapists. [M.K.] is seeking to restrict my relationship with our children, and limit my visits with them, by claiming that I have 'unresolved mental health issues'. She describes confidential communications with my therapists concerning my purported diagnosis and treatment. First, I object to her disclosure of all such communications and ask the court to strike and disregard them because they are privileged and private communications with my therapists. As the holder of these privileges and privacy rights, I did not and do not consent to their disclosure and [M.K.] was never authorized to disclose them. I have always considered my therapy to be private and confidential. Almost a year ago, on a few occasions, I permitted [M.K.] to speak with my therapist. I permitted this only to enable my therapist to better understand my situation, so he could best help me, and because I thought [M.K.], as my wife and trusted partner, had my best interests at heart and would talk with my therapists to help me be helped by them. I never intended any of these communications, or anything about my therapy, to be disclosed to anyone else, without my prior consent. Second, [M.K.] is a lay person, not a doctor, psychologist, or other expert on mental or physical health. Her attempted expert opinions concerning my (or my family's) mental or physical health, or certain medications should also be stricken and disregarded."

K.K. also noted that in her descriptions of events M.K. had made inaccurate assertions and had omitted dates and circumstances. He had sought therapy nearly a year

earlier, for a period of a few months, to help with "several life-changing events all at once," related to his career and to the rift between his family and M.K.. He had resumed therapy in November 2014 and was finding it helpful. His "personal issues," he maintained, "do not affect my ability to be a responsible parent to our children. I should not be punished, or have supervised visits, because I am in therapy." K.K. again advised the court that M.K. was not "cooperatively coparenting the children," by not responding to his requests to confirm visits, failing to keep him informed about significant experiences by the children, and making unwarranted demands inconsistent with the judge's prior orders.

In his January 28 opposition to M.K.'s ex parte request, K.K. asserted the psychotherapist-patient privilege under Evidence Code section 1014[2] as well as his right to privacy. He pointed out that M.K.'s knowledge of or presence during communications involving his therapists was in furtherance of his treatment, and the disclosure of those communications was therefore improper.

M.K.'s February 3 request was denied. The court did, however, grant her a domestic violence temporary restraining order, requiring K.K. to stay 300 yards away from M.K. except for brief and peaceful contact for purposes of visitation with the children. At the ensuing February 5 hearing, the court ordered M.K., until further order, not to "disseminate, either directly or indirectly, any information . . . or statements or documents furnished in the course of therapy between the respondent and any licensed therapist that he has seen at any time." The only exception was her own legal counsel.[3]

On February 20, 2015, the court filed an order effective February 5, restricting M.K. from disclosing to any person except her own attorney "(a) any statements of

[2] All further statutory references are to the Evidence Code except as otherwise indicated.

[3] M.K. at that point was representing herself, having "lost" her latest attorney. She was granted a continuance to find a new attorney.

physicians or mental health professionals who have a patient-physician or patient-psychotherapist relationship with Respondent or (b) records pertaining to medical or psychological treatment of Respondent by such physicians or mental health professionals, pending hearing on whether or not such statements or records are protected confidential information or privileged from disclosure as asserted by Respondent." At the next hearing on February 24, the court clarified that M.K. would not be permitted to disseminate K.K.'s mental health information in any public forum, but could (without waiver of K.K.'s objections) disclose it to her own counsel as well as custody evaluators and other consultants where it was relevant to custody and visitation. The court stayed its order, however, to allow K.K.'s counsel to assert written objections to the modified order.

The parties submitted their briefs on the disclosure issue between March 12 and 24, 2015. K.K. argued that the privilege under section 1014 constituted an "absolute bar" to disclosure absent waiver or tender by the holder of the privilege. Here, K.K. maintained, M.K. acquired knowledge regarding his therapy, including diagnosis, treatment, and other information, in the spring of 2014, while they were still married. He had agreed to contact between M.K. and his psychiatrist only "so that [M.K.] could help K.K. as he progressed in therapy." He had never given permission for any of this privileged information to be divulged; he had trusted her to keep all such information confidential, and he was "devastated" to learn that she had divulged it in her court filings. In K.K.'s view, no authority or policy supported the creation of an exception for certain categories of people—even counsel or custody evaluators.

In her opposition M.K. argued that K.K. had waived the psychotherapist-patient privilege by allowing her to participate in meetings with K.K.'s psychiatrists, and by allowing them to share with her their diagnoses of him. She further asserted that the best interests of the children necessitated disclosure of K.K.'s mental health records.

On April 23, 2015, the court issued a new protective order, the one at issue in this appeal. In addition to prohibiting M.K. from disclosing information about K.K.'s

medical or mental health treatment in a public forum, the order stated that the psychotherapist-patient privilege allowed K.K. to prevent M.K. from disclosing communications between her and K.K.'s therapists, as well as *any* information she received that was intended to further the purpose for which the therapist was consulted. K.K. had not waived the privilege, the court found; and even if he did, M.K. would have to show a "compelling need" for disclosure and convince the court that the information was material and that no less intrusive means were available to obtain the needed information. The court acknowledged that K.K.'s mental health was relevant to custody determinations, but a less intrusive means of obtaining information on this question was to require him to undergo a mental health examination. M.K. also would be permitted to disclose her own observations of K.K.'s behavior and its impact on the children.

M.K. objected to this order and requested a modification to allow her to disclose confidential information to her attorneys, experts, consultants, her own therapist, and "other professionals when the children's wellbeing [*sic*] is at issue." After receiving extensive additional argument from the parties on this point, the court found no factual or legal basis for M.K.'s "unnecessary" request, and it imposed sanctions on her of $5,000 toward K.K.'s attorney fees. M.K. filed her notice of appeal from the April 23 order on June 19, 2015.

Discussion

On appeal, M.K. contends that the superior court abused its discretion by preventing her from testifying about and disclosing to others what she had learned from K.K. about his diagnosis and treatment. According to her, K.K. waived the psychotherapist-patient privilege when he "voluntarily discussed his therapy outside the confines of the therapist's office."

Section 1014 allows a patient to "refuse to disclose, and to prevent another from disclosing, a confidential communication between [the] patient and psychotherapist." The term "confidential communication" in this context means "information, including

information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship." (§ 1012.) Our Supreme Court has instructed that "because of the potential encroachment upon constitutionally protected rights of privacy by the compelled disclosure of confidential communications between the patient and his psychotherapist [citation], trial courts should carefully control compelled disclosures in this area. Thus, the psychotherapist-patient privilege is to be liberally construed in favor of the patient." (*Roberts v. Superior Court* (1973) 9 Cal.3d 330, 337 (*Roberts*).)

Nevertheless, waiver of the privilege may occur "if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege." (§ 912, subd. (a).) The privilege may also be waived in effect if the patient himself or herself has tendered the issue of the patient's mental or emotional condition in the litigation. (§ 1016.) This statutory exception, however, "allows only a limited inquiry into the confidences of the psychotherapist-patient relationship, compelling disclosure of only those matters directly relevant to the nature of the specific 'emotional or mental' condition which the patient has voluntarily disclosed and tendered in his pleadings or in answer to discovery inquiries. Furthermore, even when confidential information falls within this exception, trial courts, because of the intimate and potentially embarrassing nature of such communications, may utilize the

protective measures at their disposal to avoid unwarranted intrusions into the confidences of the relationship."[4] (*Lifschutz, supra*, 2 Cal.3d at p. 431.) Finally, any waiver "must be narrowly construed and limited to matters 'as to which, based upon [the patient's] disclosures, it can reasonably be said [the patient] no longer retains a privacy interest.' [Citation.]" (*San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1092 (*San Diego Trolley*).)

"Past cases establish that a person seeking to invoke the psychotherapist-patient privilege has the initial burden of establishing the basic facts to show that the privilege is presumptively applicable—in general, that the person consulted constitutes a 'psychotherapist' and that the communication in question constitutes a ' "confidential communication between patient and psychotherapist," ' within the meaning of the privilege. (Evid.Code, §§ 1010, 1012.) Once the patient has met that burden, the burden shifts to the party who contends that the privilege is inapplicable because one or more of the statutory exceptions appl[y]." (*People v. Gonzales* (2013) 56 Cal.4th 353, 372.)

The parties agree that the superior court's application of section 1014 is reviewed for abuse of discretion. (See *In re S.A.* (2010) 182 Cal.App.4th 1128, 1135; see also *Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1018 [applying privilege to criminal defendant's Veterans Administration Hospital psychotherapy records].) The same standard is applied more generally to custody and visitation orders, for which we determine "whether the trial court could have reasonably concluded that the order in

[4] The Supreme Court emphasized this point: " ' "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand." ' " (*In re Lifschutz* (1970) 2 Cal.3d 415, 431 (*Lifschutz*).)

question advanced the 'best interest' of the child." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; *Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1124 (*Mark T.*).) "A trial court abuses its discretion if there is no reasonable basis on which the court could conclude that its decision advanced the best interests of the child. [Citations.] A discretionary order that is based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, and is subject to reversal even though there may be substantial evidence to support that order." (*Mark T.*, *supra,* at pp. 1124-1125; *Martinez v. Vaziri* (2016) 246 Cal.App.4th 373, 386.) "The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action . . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.)

In this case, the superior court noted that conveying confidential communication "does not necessarily result in waiver of [a] privilege. The privilege may survive even broad disclosure of a communication because the psychotherapeutic relationship may survive such a disclosure. Hence, the fact that [M.K.] has become privy to some privileged communications does not result in loss of the privilege, and [K.K.] may request the Court to prevent [M.K.] from further disclosing the privileged communications." In rejecting M.K.'s assertion of waiver, the court further determined that the disclosures to her by K.K. did not reveal a significant part of a confidential communication. Finally, the court determined that the patient-litigant exception to the privilege was inapplicable because K.K. had not tendered the issue of his mental condition in litigation, but had only "denied the other party's allegations as to his mental condition."[5]

[5] The patient-litigant exception (see § 996) is not addressed by the parties on appeal, having been appropriately disavowed as a theory by M.K. in the superior court. Clearly K.K. did not tender the issue of his psychological condition as an issue merely by

In her reply brief, M.K. unequivocally states that she is *not* seeking to disclose any communications between K.K. and his therapists, or even between the therapists and her. All she wants, she tells us, is admission of "conversations she had with her husband outside the presence of the therapist." The evidence she sought to admit below, however, was not so limited. In her declaration opposing K.K.'s request for a protective order, M.K. offered hearsay statements purportedly made to her by K.K.'s psychiatrist, who expressed opinions and concerns about K.K..[6] Her vigorous argument to the court manifestly included the assertion that the best interests of the children required disclosure of his *mental health records*, not just information K.K. provided directly to her. She sought these records specifically to show "the treating psychiatrist's diagnosis and treatment recommendations," and she maintained that *her presence* at the psychiatrist's office had resulted in waiver of the privilege because it "was **completely optional** and **occurred with Respondent's consent**, as was the doctor's sharing of his written conclusions regarding Respondent's mental health." It was these efforts by M.K. on which the court ruled. We can only assume that she has since abandoned the effort to admit confidential records and communications between her and K.K.'s therapists.

What is left to disclose? M.K. points out the following: that K.K. saw a therapist; that he confided to her in the spring of 2014; that he changed therapists twice after talking

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seeking custody of his children. (See *Koshman v. Superior Court* (1980) 111 Cal.App.3d 294 [patient-litigation exception inapplicable where mother had not tendered her medical condition as an issue in custody litigation]; see also *Manela v. Superior Court* (2009) 177 Cal.App.4th 1139, 1148-1149 (*Manela*) [father did not raise issue of his tic/seizure disorder in seeking custody of couple's son].)

[6] According to M.K., Dr. French "described [K.K.]'s bipolar [*sic*], anxiety, depression, and narcissism to me, and tied them to [K.K.]'s daily behavior." In the course of "multiple meetings, in person, with . . . Dr. French" she learned that "Dr. French was concerned, as well, and acknowledged [K.K.]'s complete lack of empathy and was hoping to work on teaching him this [*sic*] . . . [¶] Dr. French was also deeply concerned about [K.K.]'s very rapidly changing moods . . . as well as a serious concern regarding [K.K.]'s mentions of suicide."

to her; and that he spoke of suicide to her and others. In citing these facts, M.K. refers us to K.K.'s declaration, which is more nuanced than M.K.'s description suggests. In the declaration K.K. stated that he consulted a therapist at M.K.'s urging; he thought she was "looking out for [his] best interests and was concerned for [him]." He confided his sadness to her in the spring of 2014 "hoping for her support," because he "thought she was [his] best friend and confidant and truly wanted to help [him]." He stopped taking the prescribed medication by June 2014, in consultation with his therapist, because he had begun to resolve many of the issues causing him stress. He twice changed therapists "reluctantly," both times only because M.K. "demanded" that he do so.

Aside from the skewed portrayal of K.K.'s disclosures to her, M.K.'s assignment of error is perplexing. First, none of them constitutes a part, much less a significant part,[7] of any communications protected by the psychotherapist-patient privilege; they are only her own observations of K.K.'s behavior expressed to her several months before their separation. Hence, there is nothing to waive. "There is, of course, a vast difference between the disclosure of a general description of the object of her psychotherapeutic treatment, and the disclosure of all or a part of the patient's actual communications during psychotherapy." (*Roberts*, *supra*, 9 Cal. 3d at p. 340.) Disclosure of either the existence or the purpose of the psychotherapist-patient relationship does not constitute a waiver because it does not reveal a significant part of the communication. (*Ibid*.; see also *Lifschutz, supra*, 2 Cal.3d at p.430 [existence of psychotherapist-patient relationship is not a " 'significant part of the communication' " amounting to waiver]; *San Diego Trolley*, *supra*, 87 Cal.App.4th at p. 1094 [no waiver where litigant's disclosure was of both the fact that she was being treated for anxiety and the medications prescribed for her].)

[7] As noted earlier, only disclosure of "a significant part of the communication" protected by an applicable privilege can be deemed a waiver. (§ 912, subd. (a).)

Secondly, after describing these communications, M.K. acknowledges that K.K.'s declaration "demonstrated [that] the crisis had past [*sic*]" and "[his] current need for therapy had abated"; by November 2014, she notes, "he was seeing a therapist only for dissolution[-]related issues." The facts she seeks to disclose, even if they were within the privilege, only undermine her adamant position that his mental instability requires supervised visitation to protect the children.

At best M.K. points to an argument made in her "Sur-reply re: Privilege," in which she suggested that *even if* her communications with K.K.'s therapists were protected by the privilege, his own discussions outside the therapist's office "were not privileged and constituted a waiver of the privilege." Relying on authority pertaining to the *physician-patient* privilege, M.K. points out that the purpose of a privilege is key in determining the scope of its application. (See, e.g., *Jones v. Superior Court* (1981) 119 Cal.App.3d 534, 547 [scope of the physician-patient waiver "should be determined primarily by reference to the purpose of the privilege," i.e., to preclude humiliation of the patient]; *Manela*, *supra*, 177 Cal.App.4th at p. 1148 [same].) Here, she argues, "there was a low likelihood [K.K.] would be humiliated." But her reliance on the physician-patient privilege is weakened by the legislative and judicial recognition that the protections offered by the psychotherapist-patient privilege apply more broadly than those accorded patients by the physician-patient privilege. (See Legislative Committee Com. to § 1014 [this privilege "provides much broader protection than the physician-patient privilege"]; see also *In re Lifschutz*, *supra*, 2 Cal.3d at p. 439 [recognizing greater degree of confidentiality legally provided for psychotherapy than for other medical treatment].)

The waiver provisions of section 912 themselves vitiate M.K.'s argument that K.K.'s waiver consists in disclosures he made to her regarding his mental health treatment. Subdivision (d) of that statute states, in pertinent part: "A disclosure in confidence of a communication that is protected by a privilege provided by . . .

[section] 1014 (psychotherapist-patient privilege) . . . when disclosure is reasonably necessary for the accomplishment of the purpose for which the . . . psychotherapist . . . was consulted, is not a waiver of the privilege." Here, as noted earlier, K.K. indicated in his declaration that he allowed M.K. to share and receive confidential information about him with his psychiatrists "only so that my psychiatrist would better understand me and my situation from the information [M.K.] provided, and so that [M.K.] could help me as I progressed in therapy . . . To the extent that [M.K.] gained knowledge about my diagnosis, treatment, prognosis, or any other information, whether oral or written, about my therapy, this occurred only for the purpose of furthering my therapy." He had "never consented to [M.K.]'s disclosure of any information or documents about [his] therapy in any form," and he "trusted her to keep all such information confidential." Thus, whether M.K. acquired the information about K.K.'s diagnosis and treatment from the treating therapists or from K.K. himself, no waiver occurred merely by such sharing of the information with her.

M.K. then injects relevance into the analysis, contending that waiver should apply here because K.K.'s voluntary disclosures "were relevant and material." This point, which the superior court itself acknowledged, is of no help to M.K.. Certainly evidence of K.K.'s mental health was relevant to the court's custody and visitation determination; but it was not an issue that ipso facto overcomes the privilege. The Law Revision Commission comment to section 910 makes the Legislature's priority clear: "A privilege is granted because it is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding." (§ 910.) This point is reinforced in the comments to section 1014 itself: "Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected."

In her reply brief, M.K. denies that she relied on the concept of relevance in her opening brief. Accordingly, we will give the point no further attention.

M.K. exhibits further confusion over the privilege analysis by suggesting that the court "rejected the waiver claim because it must be . . . supported by a 'compelling need.' " Her argument misses the mark. As the superior court recognized, the requirement of a compelling need is invoked when waiver *is* found: In such a case, "any disclosure of confidential or private information must be supported by a showing of compelling need and accomplished in a manner which protects, insofar as is practical, the patient's privacy." (*San Diego Trolley*, *supra*, 87 Cal.App.4th at p. 1093.) Consistently with this admonition, the court's discussion of a compelling need was an *alternative* rationale; in other words, *even if* K.K.'s disclosures constituted a limited waiver, M.K. would still have to demonstrate that there was a "compelling need" for the information to overcome K.K.'s constitutional right of privacy. (Cal. Const., art. I, § 1; see *People v. Stritzinger* (1983) 34 Cal.3d 505, 511 (*Stritzinger*) [recognizing roots of psychotherapist-patient privilege in constitutional right of privacy] see also *Kirchmeyer v. Phillips* (2016) 245 Cal.App.4th 1394, 1403 [same]; *Griswold v. Connecticut* (1965) 381 U.S. 479, 484 [recognizing "zones of privacy" in the Bill of Rights]). Such a compelling need would be shown by evidence that the information is "material to the disposition of the litigant's rights" and that the information cannot be obtained by "less intrusive means." (*San Diego Trolley*, *supra*, at p. 1095.)

M.K. further argues that there were "competing compelling interests" here, i.e., the "wellbeing [*sic*] of the couple's minor children," which the court failed to balance against K.K.'s interest in confidentiality. She cites no authority requiring such weighing of an established, *nonwaived* privilege against competing interests, but instead invokes a general *privacy* interest. M.K. suggests that we must address these "competing compelling state interests" even if K.K.'s privilege was not waived, because "the psychotherapist-patient privilege itself is a *component* of the constitutional right to

privacy . . . and [is] therefore subject to the same balancing test between the patient's interest in confidentiality and competing compelling state interests."

The authority M.K. cites to support this illogical explanation is inapposite. The discussion she quotes from *Stritzinger, supra,* 34 Cal.3d at p. 511 was directed at the statutory exception for the therapist's child abuse reporting obligation in a criminal context. The Supreme Court in that case held that confidential communications between the defendant and his therapist should not have been disclosed, thereby violating not only the privilege but also the defendant's constitutional right to confrontation. The other cases M.K. parenthetically cites are likewise inapplicable to the circumstances presented here.

More comparable is *Simek v. Superior Court* (1981) 117 Cal.App.3d 169 (*Simek*), cited by K.K. and by the superior court. There the mother of the couple's two children sought disclosure of the father's psychotherapy records in order to show that he was unsuitable for visitation with the children. Although the focus of the appellate court was on the inapplicability of the patient-litigant exception, it did note that there were means other than by violating the privilege for the family court to obtain information on the father's mental health and thereby evaluate the safety of the children: It could admit evidence bearing directly on the father's behavior or it could order a mental examination pursuant to former Code of Civil Procedure section 2032, subdivision (a). (*Simek, supra,* at p. 177.)

Here, as in *Simek*, the court fully recognized the importance of protecting the interests of the parties' children in determining the appropriate extent and scope of custody and visitation. It affirmed that whether K.K. suffered from mental or emotional impairment was a material issue in this determination, as evidence on that question would bear upon the degree to which K.K. was capable of maintaining the safety and welfare of the minors while making decisions regarding them and while spending time with them. The court then ruled that a less intrusive means of obtaining information on this issue

might be to require K.K. to undergo a mental health examination. Indeed, it did not foreclose such an examination of each parent and of the children to be conducted as part of a custody evaluation if the parties could not resolve this dispute in mediation. Thus, even if the weighing advocated by M.K. is required for a nonwaived privilege, the court did recognize the needs of the parties' children in applying the privilege. We see no abuse of discretion in its thoughtful balancing of the interests involved.

M.K. next argues that the court's "gag order" violated her right to free speech by imposing a prior restraint on her ability to speak even to her own attorney. The prior discussion equally applies to this contention. To the extent M.K. still seeks to disclose communications coming within the psychotherapist-patient privilege, M.K.'s free speech rights must give way to this important restriction. As noted by the court below, there are other ways of expressing her concern that the children will be adversely affected by the limitation on her disclosures. She can complain all she wants to her attorney about the dangers she personally sees in K.K.'s parenting ability; likewise, she can voice her concerns to a custody evaluator, the children's therapists, and the judge. The court fully afforded her this latitude by emphasizing that "the psychotherapist-patient privilege does not preclude [M.K.'s] disclosure of her observations of behavior of [K.K.] and its impact on her and the children. This is evidence other than privileged communications, and if credible, is sufficient to show good cause for an order of psychiatric examination, in the event a custody evaluation is hereafter ordered by the court."

In summary, we have found no abuse of discretion and no infringement of M.K.'s free speech rights in the court's restriction on her disclosure of information protected by the psychotherapist-patient privilege. No waiver of that privilege occurred, nor impairment of M.K.'s ability to express her concerns about the suitability of K.K. for legal and physical custody or unsupervised visitation.

Disposition

The order is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.