

Casenote

“I Didn’t Volunteer for This @&#%!”: The Application of Georgia’s Psychologist-Patient Privilege to Court-Ordered Mental Health Treatment

By holding in *State v. Herendeen*¹ that a patient could invoke the mental health privilege² (“privilege”) when the patient either received mental health treatment (“treatment”) or such treatment was contemplated during the course of the psychotherapeutic relationship, the Georgia Supreme Court eliminated any remaining vestige of a “voluntariness” requirement for patients seeking to invoke the privilege.³ In doing so, the court overruled Georgia case law that had required a patient to demonstrate, in addition to a showing that treatment was received or contemplated, that the patient voluntarily sought the treatment.⁴ The court’s decision clarified the criteria needed to invoke

1. 279 Ga. 323, 613 S.E.2d 647 (2005).

2. *Kennestone Hospital v. Hopson*, 273 Ga. 145, 147-48, 538 S.E.2d 742, 744 (2000).

3. *Herendeen*, 279 Ga. at 326-27, 613 S.E.2d at 650 (citing *Massey v. State*, 226 Ga. 703, 704-05, 177 S.E.2d 79, 81 (1970)).

4. *Id.* at 326-27, 613 S.E.2d at 650, *overruling* *In the Interest of M.N.H.*, 237 Ga. App. 471, 517 S.E.2d 344 (1999); *In the Interest of L.H.*, 236 Ga. App. 132, 511 S.E.2d 253 (1999); *In the Interest of R.M.*, 194 Ga. App. 888, 392 S.E.2d 13 (1990); *Johnson v. State*, 255 Ga. App. 544, 566 S.E.2d 353 (2002).

the privilege in Georgia, allowing for a consistent application of the privilege; however, the decision also raises questions regarding the definition of “treatment . . . given or contemplated”⁵ and the conflict between the interests promoted by the privilege and the probative value of the information protected by the privilege.

I. FACTUAL BACKGROUND

A.P. and M.P. were the minor children of William and Regina Payne. In December 2000, William was indicted for aggravated child molestation, child molestation, and cruelty to children. Regina was also indicted for cruelty to children based on her alleged failure to stop William from molesting A.P. The State named M.P. as a possible witness to William’s and Regina’s criminal actions.⁶

In October 2000, the Douglass County Juvenile Court removed A.P. and M.P. from their parents’ custody and gave temporary legal custody of M.P. to his maternal grandparents and legal custody of A.P. to the Department of Family and Child Services (DFACS). DFACS placed A.P. in a foster home and devised a case plan for A.P., the goal of which was to reunify A.P. with her mother, Regina.⁷ Part of that case plan required that the DFACS caseworker and A.P.’s foster parents arrange for A.P. to receive individual counseling and therapy sessions. The case plan was filed with the juvenile court, which, in a January 29, 2002 order, noted that A.P. and Regina were undergoing joint therapy sessions with Dr. Dennis Herendeen, a licensed psychologist. In an August 6, 2002 order, the juvenile court stated that Dr. Herendeen could not recommend the reunification of A.P. and Regina until he could obtain information on Regina’s progress from her personal counselor and meet with Regina.⁸

In May 2003, Dr. Herendeen, Dr. Sam Haskell, a psychologist practicing with Dr. Herendeen, and The Psychology Center, a professional corporation, received a subpoena from the State requesting that they appear before the Douglass County grand jury and bring “all records and transcripts” on A.P. and M.P.⁹ The State was seeking information pertaining to William’s and Regina’s criminal actions.¹⁰ Citing the

5. *Massey v. State*, 226 Ga. 703, 704, 177 S.E.2d 79, 81 (1970).

6. *Herendeen v. State*, 279 Ga. 323, 323, 613 S.E.2d 647, 648 (2005).

7. *Id.* at 323-24, 613 S.E.2d at 648. The case plan was devised with the assistance of the Georgia Department of Human Resources. *Id.*

8. *Id.*

9. *Id.* at 323, 613 S.E.2d at 648.

10. *Herendeen v. State*, 268 Ga. App. 113, 115, 601 S.E.2d 372, 374 (2004), *aff’d* 279 Ga. 323, 613 S.E.2d 647 (2005).

privilege, the doctors and The Psychology Center moved to quash the subpoena.¹¹ The trial court conducted a hearing on the motion to quash.¹²

Because the privilege could be waived if it were found to apply, both A.P. and M.P. were represented at the hearing; A.P. through her grandmother's attorney and M.P. through his mother and custodian, Regina.¹³ The court did not reach the waiver issue, however, because the court "[b]eliev[ed] the privilege could only be invoked when the patient voluntarily sought treatment."¹⁴ The court found that A.P.'s and M.P.'s treatment "was done pursuant to court order with express contemplation of recommendations to the court based upon that therapy."¹⁵ The court reasoned that the privilege could not be invoked because A.P. and M.P. did not voluntarily seek treatment. The trial court then ordered Dr. Herendeen, Dr. Haskell, and The Psychology Center to produce A.P.'s records for *in camera* inspection so the court could redact those portions of the records that the subpoena did not request.¹⁶

The court of appeals granted the doctors' and The Psychology Center's application for interlocutory review on the issue of the privilege's application.¹⁷ After determining that the existence of the psychologist-patient relationship, the prerequisite for invoking the privilege, did not turn on whether the patient voluntarily sought treatment, but on whether treatment was given or contemplated, the court of appeals reversed the trial court's decision.¹⁸ The court reasoned that A.P. and M.P. received treatment and, as a consequence, both A.P. and M.P. could invoke the privilege. The trial court erred in holding that the privilege required the patient have voluntarily sought treatment, but because portions of the records were not privileged, the court of appeals affirmed

11. *Herendeen*, 279 Ga. at 324, 613 S.E.2d at 648. In their motion, the doctors noted that the subpoena did not contain the patients' consent to release their records. *Id.*

12. *Id.*

13. *Id.* at 324, 327-28, 613 S.E.2d at 648-49, 651. At the hearing, the trial court expressed concern over Regina asserting the privilege on behalf of M.P. and considered whether a guardian ad litem should be appointed for M.P. since M.P. was listed as a possible witness against Regina in the criminal action. *Id.* at 327, 613 S.E.2d at 651.

14. *Id.* at 324, 613 S.E.2d at 648-49.

15. *Id.*

16. *Id.*, 613 S.E.2d at 649.

17. *Herendeen*, 268 Ga. App. at 113, 601 S.E.2d at 373.

18. *Herendeen*, 279 Ga. at 324, 613 S.E.2d at 649 (citing *Massey v. State*, 226 Ga. 703, 704-05, 177 S.E.2d 79, 81 (1970)).

the trial court's order for an *in camera* inspection to review A.P.'s and M.P.'s records.¹⁹

The Douglass County District Attorney appealed to the Georgia Supreme Court.²⁰ On appeal, the Georgia Supreme Court considered whether the privilege could be invoked on A.P.'s and M.P.'s behalf when A.P. and M.P. did not voluntarily seek treatment, but received treatment during the course of their psychotherapeutic relationships.²¹ The court affirmed the court of appeals decision, unanimously holding that whether treatment had been voluntarily sought was not determinative; instead, the only necessary query in deciding if the privilege could be invoked was whether treatment was given or contemplated.²² Accordingly, because A.P. and M.P. received treatment, the privilege could be invoked on their behalf.²³

II. LEGAL BACKGROUND

A. Georgia's Patient-Psychologist Privilege

Enacted by the Georgia General Assembly in 1951, Official Code of Georgia Annotated ("O.C.G.A.") section 43-39-16²⁴ recognizes that certain communications between psychologists and patients are confidential.²⁵ The statute provides that "[t]he confidential relations and communications between a licensed psychologist and client are placed upon the same basis as those provided by law between attorney and client; and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."²⁶ The privilege is absolute and the patient is the only individual who can waive the privilege.²⁷ In 1995 the General Assembly added communications between psychologists and patients to the list of communications excluded from evidence on grounds of public policy and expanded the

19. *Id.*

20. *Id.*

21. *Id.* at 323, 613 S.E.2d at 648.

22. *Id.* at 326, 613 S.E.2d at 650.

23. *Id.* at 328, 613 S.E.2d at 651.

24. O.C.G.A. § 43-39-16 (2005).

25. *Id.*

26. *Id.*

27. Trammel v. Bradberry, 256 Ga. App. 412, 423, 568 S.E.2d 715, 725 (2002) (citing Wiles v. Wiles, 264 Ga. 594, 595-96, 448 S.E.2d 681, 683 (1994)); Kimble v. Kimble, 240 Ga. 100, 101, 239 S.E.2d 676, 676 (1977); Wilson v. Bonner, 166 Ga. App. 9, 16-17(5), 303 S.E.2d 134, 142 (1983)).

privilege's scope to cover other professions.²⁸ Because of this expansion, Georgia courts commonly refer to the privilege as the "mental health privilege."²⁹

The privilege protects both individual and public interests. First, the privilege protects the individual patient's interest by "encourag[ing] the patient to talk freely without fear of disclosure and embarrassment, thus enabling the [psychotherapist] to render effective treatment of the patient's emotional or mental disorders."³⁰ Second, the privilege protects the public interest by promoting overall mental health.³¹ While the privilege protects important private and public interests, the absence of any statutory language identifying when the privilege may be invoked forces Georgia courts to resolve the issue of when a patient may invoke the privilege.

Georgia courts agreed that a patient must show treatment or the contemplation thereof in order to invoke the privilege; however, Georgia courts split on whether a patient had to demonstrate an additional requirement of voluntariness.³² Consequently, two different rules developed in Georgia. First, Georgia courts have held that the privilege applied regardless of whether treatment was voluntary, provided that treatment was either given or contemplated.³³ The Georgia Supreme

28. *Kennestone Hospital v. Hopson*, 273 Ga. 145, 147-48, 583 S.E.2d 742, 744 (2000). The statute the court referenced was O.C.G.A. § 24-9-21(7) (1995). This statute provides, in pertinent part, that:

[t]here are certain admissions and communications excluded on grounds of public policy. Among these are . . . (5) Communications between psychiatrist and patient; (6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16; (7) Communications between patient and a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor during the psychotherapeutic relationship; and (8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privilege by paragraph (5), (6), or (7) of this Code section.

O.C.G.A. § 24-9-21(7) (1995).

29. *State v. Herendeen*, 279 Ga. 323, 325, 613 S.E.2d 647, 649 (citing *Kennestone Hospital*, 273 Ga. at 148, 538 S.E.2d at 744).

30. *Kennestone Hospital*, 273 Ga. at 148, 538 S.E.2d at 744 (citing *Wiles v. Wiles*, 264 Ga. 594, 595, 448 S.E.2d 681, 682 (1994)).

31. *Id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 10-11 (1996)).

32. *Massey v. State*, 226 Ga. 705, 117 S.E.2d 79 (1970); *But cf In the Interest of M.N.H.* 237 Ga. App. 471, 517 S.E.2d 344 (1999).

33. *See Massey*, 226 Ga. 703, 177 S.E.2d 79; *Manning v. State*, 231 Ga. App. 584, 499 S.E.2d 650 (1998); and *Lucas v. State*, 274 Ga. 640, 555 S.E.2d 440 (2001).

Court recently utilized this one-part rule in *Lucas v. State*.³⁴ Second, Georgia courts developed a two-part rule that required, in addition to a showing of treatment, that the patient have voluntarily sought the treatment.³⁵ Largely limited to cases involving juveniles,³⁶ the two-part rule denied the privilege to patients undergoing court-ordered treatment and implicitly suggested that in certain circumstances the evidence protected by the privilege may provide valuable information that could resolve substantive issues in a case.

B. The One-Part Patient-Psychologist Privilege Rule

Prior to *Herendeen*,³⁷ the majority of Georgia courts employed the one-part rule and held that the privilege applied whenever treatment was given or contemplated.³⁸ The one-part rule only required that the patient demonstrate that the patient received treatment or that treatment was contemplated during the course of the psychotherapeutic relationship. The Georgia Supreme Court utilized the one-part test in its 1970 decision, *Massey v. State*.³⁹ After undergoing a court-ordered sanity examination, the defendant sought to prevent statements made during his sanity examination from being admitted into evidence.⁴⁰ The court reasoned that the statements were properly admitted because “[b]efore the psychiatrist-patient communications privilege . . . may be invoked, the requisite relationship of psychiatrist and patient must have existed, to the extent that treatment was given or contemplated.”⁴¹ The trial court did not order the defendant to undergo mental health treatment; rather, the court ordered the defendant to undergo a sanity evaluation.⁴² Accordingly, because the defendant’s relationship with the court-appointed psychiatrist did not encompass treatment, the defendant could not invoke the privilege.⁴³

34. 274 Ga. at 645, 555 S.E.2d at 446.

35. See *M.N.H.*, 237 Ga. App. 471, 517 S.E.2d 344; *In the Interest of L.H.*, 236 Ga. App. 132, 511 S.E.2d 253 (1999); and *In the Interest of R.M.*, 194 Ga. App. 888, 392 S.E.2d 13 (1999).

36. See *In the Interest of M.N.H.*, 237 Ga. App. 471, 517 S.E.2d 344; *In the Interest of L.H.*, 236 Ga. App. 132, 511 S.E.2d 253; and *In the Interest of R.M.*, 194 Ga. App. 888, 392 S.E.2d 13.

37. 279 Ga. 323, 613 S.E.2d 647.

38. See *Massey v. State*, 226 Ga. 703, 177 S.E.2d 79; *Manning v. State*, 231 Ga. App. 584, 499 S.E.2d 650; and *Lucas v. State*, 274 Ga. 640, 555 S.E.2d 440.

39. 226 Ga. 703, 177 S.E.2d 79 (1970).

40. *Id.* at 704-05, 177 S.E.2d at 81.

41. *Id.* at 704, 177 S.E.2d at 81.

42. *Id.*

43. *Id.* at 704-05, 177 S.E.2d at 81.

In *Manning v. State*,⁴⁴ the Georgia Court of Appeals addressed the one-part rule as applied to the patient-psychologist privilege.⁴⁵ On appeal, Manning argued that a questionnaire she filled out was a privileged communication.⁴⁶ Addressing her argument, the court of appeals stated that “[b]efore a person can invoke the [privilege], she must show that the requisite psychologist-patient or psychiatrist-patient relationship existed to the extent that treatment was given or contemplated.”⁴⁷ The questionnaire was not a privileged communication because Manning failed to provide any evidence indicating that the questionnaire was part of “treatment or the contemplation thereof,” much less that the questionnaire was even given to a medical professional.⁴⁸

In 2001 the Georgia Supreme Court discussed the one-part rule as applied to involuntary treatment.⁴⁹ In *Lucas* the defendant argued that some of the co-defendant’s mental health records were not privileged because the records were made during the course of the co-defendant’s court-ordered treatment.⁵⁰ Rather than apply the two-part rule suggested by the defendant, the Georgia Supreme Court applied the one-part rule, focusing its analysis on whether the co-defendant received treatment and, if so, whether his records were prepared in the course of treatment.⁵¹ Because the co-defendant received treatment, the court reasoned that those records prepared in the course of treatment were privileged.⁵² Ignoring the issue of “voluntariness,” the court stated that the proper test for invoking the privilege was whether the patient received treatment or whether treatment was contemplated during the course of the psychotherapeutic relationship.⁵³

44. 231 Ga. App. 584, 499 S.E.2d 650 (1998).

45. *Id.* at 584, 499 S.E.2d at 650-51.

46. *Id.* at 584-85, 499 S.E.2d at 651. The questionnaire consisted of a Clayton County-Flint River Center Family Information Perspective. In filling out the questionnaire, Manning made several inculpatory statements relating to her propensity for rage, anger, and temper control problems. *Id.* at 584, 499 S.E.2d at 650-51.

47. *Id.* at 584, 499 S.E.2d at 651 (citing *Strickland v. State*, 260 Ga. 28, 30, 389 S.E.2d 230, 233 (1990)).

48. *Id.*

49. *Lucas*, 274 Ga. 640, 555 S.E.2d 440.

50. *Id.* at 645, 555 S.E.2d at 446.

51. *Id.*

52. *Id.*

53. *Id.*

C. *The Two-Part Patient-Psychologist Rule*

While some Georgia courts held that the privilege could be invoked when treatment was either given or contemplated, other Georgia courts developed another rule holding that the privilege would not apply unless a two-part test was satisfied; first, that treatment was given or contemplated; and second, that the patient voluntarily sought treatment.⁵⁴ Interestingly, the two-part rule was often applied in those cases concerning a minor's welfare.⁵⁵ The stricter standard employed by the Georgia Court of Appeals suggested that the court, at least in those cases, reasoned that the probative value of the information contained in certain psychotherapeutic communications could potentially outweigh those interests protected by the privilege.

For example, in *In the Interest of R.M.*,⁵⁶ the court of appeals utilized the two-part test and held that the privilege did not apply to a father's court-ordered psychiatric evaluation.⁵⁷ At a hearing for termination of the father's parental rights, DFACS sought to produce portions of the psychologist's report on R.M.'s father, but the juvenile court refused to admit the records, noting that the privilege protected the records.⁵⁸ The Georgia Court of Appeals reversed the court and stated that "the [juvenile] court's ruling was erroneous because the psychologist-patient privilege . . . arises only when the patient *voluntarily* seeks *treatment* from the psychologist"⁵⁹ Contrary to the one-part rule, the court identified two elements necessary for invoking the privilege: voluntariness and treatment.⁶⁰ Because the father could not satisfy either element, he could not invoke the privilege to protect his records.⁶¹

In a 1999 decision, the Georgia Court of Appeals applied the two-part rule when a patient failed to attend court-ordered treatment.⁶² In *In the Interest of M.N.H.*,⁶³ the biological mother failed to participate in

54. See *In the Interest of M.N.H.*, 237 Ga. App. 471, 517 S.E.2d 344; *In the Interest of L.H.*, 236 Ga. App. 132, 511 S.E.2d 253; and *In the Interest of R.M.*, 194 Ga. App. 888, 392 S.E.2d 13.

55. See *In the Interest of M.N.H.*, 237 Ga. App. 471, 517 S.E.2d 344; *In the Interest of L.H.*, 236 Ga. App. 132, 511 S.E.2d 253; and *In the Interest of R.M.*, 194 Ga. App. 888, 392 S.E.2d 13.

56. 194 Ga. App. 888, 392 S.E.2d 13.

57. *Id.* at 889, 392 S.E.2d at 14.

58. *Id.*

59. *Id.* (emphasis in original).

60. *Id.*

61. *Id.*

62. *In the Interest of M.N.H.*, 237 Ga. App. 471, 517 S.E.2d 344 (1999).

63. 237 Ga. App. 471, 517 S.E.2d 344 (1999).

court-ordered psychological treatment as part of her court-ordered drug rehabilitation program.⁶⁴ On appeal, the mother contended the juvenile court erred by allowing her psychologist to testify.⁶⁵ Citing the court's holding in *R.M.*,⁶⁶ the court of appeals opined that "the psychologist-patient privilege . . . arises only when the patient *voluntarily* seeks treatment from the psychologist, whereas here [appellant] saw [the psychologist] only at the instigation of DFACS and received no treatment."⁶⁷ The mother could not invoke the privilege because she did not voluntarily seek treatment and because she did not receive treatment.⁶⁸ By requiring that the patient demonstrate that the treatment was voluntarily sought, the court's application of the two-part rule to court-ordered treatment created an inconsistency with the privilege's application in Georgia, specifically the decision resulted in two separate rules for determining whether a patient undergoing involuntary treatment may invoke the privilege in Georgia.

III. COURTS RATIONALE

In *State v. Herendeen*,⁶⁹ the Georgia Supreme Court considered the issue of whether the privilege applied to the records of a patient who received court-ordered treatment.⁷⁰ After determining that A.P. and M.P. received treatment, the court concluded that the privilege could be invoked on A.P.'s and M.P.'s behalf and that Drs. Herendeen and Haskell were subsequently barred from disclosing any privileged communications.⁷¹ The court's opinion clarified the criteria for invoking the privilege in Georgia and provided patients undergoing involuntary treatment the same protections as those patients undergoing voluntary treatment.

The court's initial sensitivity to the privilege's beneficial impact on mental health arguably foreshadowed the court's decision to disapprove of the two-part test developed in the court of appeals. The court first noted that Georgia, like the other forty-nine states, the District of Columbia, and all the federal courts, recognizes a form of the psycho-

64. *Id.* at 472, 517 S.E.2d at 346.

65. *Id.* at 475, 517 S.E.2d at 348.

66. 194 Ga. App. 888, 392 S.E.2d 13.

67. 237 Ga. App. at 475, 517 S.E.2d at 348 (citing *In the Interest R.M.*, 194 Ga. App. 888, 889(1), 392 S.E.2d 13, 14 (1990)).

68. *Id.*

69. 279 Ga. 323, 613 S.E.2d 647 (2005).

70. *Id.* at 323, 613 S.E.2d at 648.

71. *Id.* at 328, 613 S.E.2d at 650-51.

therapist privilege.⁷² The court stated that “[p]rotecting confidential mental health communications from disclosure serves an important private interest and a public interest[,]”⁷³ and then identified the two important interests protected by the privilege, namely enabling the patient to talk freely with his psychotherapist⁷⁴ and facilitating the public’s overall mental health.⁷⁵ To fulfill these interests, the privilege may be invoked whenever “the requisite relationship of [mental health provider] and patient . . . existed, to the extent that treatment was given or contemplated.”⁷⁶

The court then noted that while voluntarily seeking treatment does evidence the existence of that relationship, voluntariness is not essential to establishing the requisite psychotherapeutic relationship needed to invoke the privilege.⁷⁷ The court identified three examples where courts utilizing the two-part rule held that the privilege did not apply: (1) when the court appointed a mental health provider to evaluate a person’s mental state; (2) when a court orders a plaintiff to undergo a psychiatric examination pursuant to O.C.G.A. section 9-11-35,⁷⁸ and (3) when the court orders a plaintiff under O.C.G.A. section 15-11-100⁷⁹ to undergo a mental health evaluation during the course of a parental rights termination hearing.⁸⁰ In each of these examples, “there was no privilege because there was no treatment, not because the interaction was involuntary.”⁸¹ The requisite psychotherapeutic relationship does not require that the patient have voluntarily sought treatment; rather, the relationship requires only that treatment be given or contemplated.⁸²

The court then declared that “we disapprove language in *M.N.H.*, *L.H.*, and *Johnson v. State*, which states the privilege exists only when the patient voluntarily seeks treatment, and thereby supports the idea that court ordered (i.e., involuntary) interaction with a mental health provider can never be privileged.”⁸³ By expressly overruling those cases

72. *Id.* at 325, 613 S.E.2d at 649 (citing *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996)).

73. *Id.* (citing *Jaffee*, 518 U.S. at 10-11).

74. *Id.* at 326, 613 S.E.2d at 650 (citing *Jaffee*, 518 U.S. at 10).

75. *Id.* at 325-26, 613 S.E.2d at 650 (citing *Jaffee*, 518 U.S. at 11).

76. *Id.* at 326, 613 S.E.2d at 650 (citing *Massey v. State*, 226 Ga. 703, 704, 177 S.E.2d 79, 81 (1970)).

77. *Id.*

78. O.C.G.A. § 9-11-35 (2004) (Supp. 2004).

79. O.C.G.A. § 15-11-100 (2005).

80. *Herendeen*, 279 Ga. at 326, 613 S.E.2d at 650.

81. *Id.* at 327, 613 S.E.2d at 650.

82. *Id.*

83. *Id.* at 326-27, 613 S.E.2d at 650.

utilizing the two-part rule, the court affirmatively established “treatment or the contemplation thereof” as the only prerequisite needed to invoke the privilege and eliminated any remaining case law holding otherwise.⁸⁴

Having eliminated any remaining confusion regarding which rule Georgia follows, the court turned to A.P.’s and M.P.’s situation and immediately recognized that A.P. received treatment from Dr. Herendeen and that M.P. received treatment from his psychotherapist.⁸⁵ Consequently, because A.P. and M.P. received treatment, the psychotherapeutic communications requested in the subpoena were privileged communications, and absent A.P.’s and M.P.’s consent, the records were not discoverable.⁸⁶ Because M.P. was listed as a possible witness against Regina in the criminal action, the court expressed concern on the issue of Regina’s asserting the privilege on M.P.’s behalf.⁸⁷ Thus, the court remanded the case to the trial court with instructions for the court to determine whether M.P. needed a guardian ad litem to decide whether to invoke the privilege on M.P.’s behalf.⁸⁸

IV. IMPLICATIONS

Hopefully, the most immediate effect of the Georgia Supreme Court’s decision in *Herendeen*⁸⁹ is a consistent application of the privilege to patients receiving involuntary treatment in Georgia. The decision also furthers the interests protected by the privilege, namely facilitating an individual’s psychotherapeutic treatment and promoting the overall public health. By allowing the privilege to be invoked regardless of whether the treatment was voluntarily sought, the decision affords individuals undergoing court-ordered treatment the same assurances of confidentiality provided to those individuals who voluntarily sought treatment. Such assurances, in turn, encourage a healthy, productive psychotherapeutic environment for the individual patient, along with promoting the public’s overall mental health.

The removal of the “voluntary” requirement eases the burden on patients seeking to invoke the privilege, but the removal also means that the privilege’s entire application hinges on the meaning of “treatment or the contemplation thereof,” a term courts have yet to conclusively define.

84. *Id.*

85. *Id.* at 327, 613 S.E.2d at 650-51.

86. *Id.*

87. *Id.* at 327-28, 613 S.E.2d at 651. An attorney representing A.P.’s grandmother objected to the release of her mental health records. *Id.* at 327, 613 S.E.2d at 651.

88. *Id.* at 328, 613 S.E.2d at 651.

89. 279 Ga. 323, 613 S.E.2d 647 (2005).

While courts make the distinction between privileged communications and nonprivileged communications when reviewing documents *in camera*, such distinctions are based on the individual court's subjective opinion and, as such, could vary in their individual interpretations of treatment or the contemplation thereof. The lack of an objective definition for "treatment or the contemplation thereof[.]" coupled with the varying opinions about what constitutes "treatment or the contemplation thereof" could lead to an inconsistent application of the privilege.

Likewise, the lack of a working definition for "treatment or the contemplation thereof" potentially allows for individuals undergoing court-appointed evaluations to argue that at some point during the evaluation, they received treatment and that portions of that evaluation are therefore privileged. In theory the patient could assert that portions of the evaluation amounted to treatment, thereby manipulating the privilege's broad scope to the patient's advantage. Certainly, the psychotherapist could testify that the patient was not treated; however, does the patient's reasonable expectation not factor into whether treatment was received or, more interestingly, contemplated: What is treatment? How is treatment contemplated? Who contemplates treatment? What ensures that the psychologist does not treat the patient during the course of the evaluation? Again, the lack of a working definition for "treatment or the contemplation thereof" presents issues of consistency in the privilege's application because it potentially allows patients, by arguing that portions of their evaluations were treatment, to frustrate a court's attempt to evaluate the patient's mental health.

Moreover, the court's decision to adopt the one-part test expanded the class of persons eligible to invoke the privilege in Georgia. While the decision to extend the privilege to involuntary treatment promotes the privilege, the court's extension of the privilege to involuntary treatment, absent any exceptions,⁹⁰ creates a conundrum: by eliminating the two-part rule, the court's decision now prevents unconsented disclosure of all psychotherapeutic communications, even when such communications could further the patient's own court-ordered rehabilitation or resolve substantive issues. The court of appeals, despite its use of the one-part rule, expressed concern over this extension in *Herendeen v. State*,⁹¹ stating that

90. This note does not consider the exception to the privilege provided in O.C.G.A. § 19-7-5 (2004). This statute requires certain professionals, including psychotherapists, to report child abuse to state authorities if "reasonable cause to believe that a child has been abused" exists. O.C.G.A. § 19-7-5(h).

91. 268 Ga. App. 113, 601 S.E.2d 372, *aff'd* 279 Ga. 323, 613 S.E.2d 647 (2005).

[w]e are mindful of the possible effect of this holding upon deprivation proceedings and petitions for termination of parental rights. As noted . . . , individuals receiving psychiatric or psychological consultations during such proceedings do not always sign a release waiving the privilege. Custody or retention of parental rights is often conditioned upon consent to treatment and the successful completion of various types of therapy; the therapists report back to the juvenile court in order to assist the court in making its decision [T]he potential effect of [the one-part rule] on the use of psychiatric and psychological records in the juvenile court must be addressed by the Georgia Supreme Court or by the General Assembly.⁹²

The court's statement suggests a scenario wherein a patient may be willing to forgo consenting to disclosure of treatment records and thus forgo custodial and parental rights over the patient's minor in an attempt to keep from the court's purview information that the patient fears is harmful to the patient's case. For example, a minor is abused and molested by her father and sent to court-ordered treatment as part of the minor's therapy. At the father's criminal trial, the minor's guardian refuses to waive the privilege on the minor's behalf. Under the one-part rule, the decisionmaker is prevented from hearing evidence of the minor's psychological state following the abuse and other highly relevant issues. The same factual scenario occurred in *Herendeen v. State*.⁹³

While the one-part rule promotes the interests protected by the privilege, the court's across-the-board application eliminates any exceptions to the rule. Conversely, the two-part rule allowed persons access to psychotherapeutic communications during the course of involuntary treatment, but denied patients undergoing involuntary treatment the same rights as those voluntarily undergoing treatment. Despite the seeming need for a balance between the interests protected by the privilege and the probative value of psychotherapeutic communications, the Georgia Supreme Court unanimously sided on behalf of the interests promoted by the privilege and promulgated a rule that allows a patient to invoke the privilege whenever treatment was received or contemplated, regardless of whether such treatment was voluntary or not.

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92. *Id.* at 115-16, 601 S.E.2d at 374-75.

93. 279 Ga. 323, 613 S.E.2d 647.