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| \_\_\_\_\_\_JUDICIAL DISTRICT  DISTRICT COURT, COUNTY OF \_\_\_\_\_\_  STATE OF COLORADO    THE PEOPLE OF THE STATE OF COLORADO,  Plaintiff,  v.  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,  Defendant. | **🡹COURT USE ONLY🡹** |
|  | Case Number: |
| **GUARDIAN *AD LITEM’S* BRIEF IN SUPPORT OF THE**  **PRESERVATION OF THE PSYCHOTHERAPEUTIC PRIVILEGE**  **AND**  **REQUEST FOR THE COURT TO APPOINT THE GUARDIAN *AD LITEM* TO REPRESENT THE CHILDREN ON ISSUES REGARDING THE PSYCHOTHERAPEAUTIC PRIVILEGE IN THE CRIMINAL PROCEEDING** | |

1. **BRIEF BACKGROUND OF ISSUE**
2. **PRESERVATION OF THE PSYCHOTHERAPEUTIC PRIVILEGE FOR THE MINOR CHILDREN.**
3. **Appointment of Guardian *ad litem* as privilege-holder**

In *L.A.N. v. L.M.B*, 292 P.3d 942 (Colo. 2013), the Colorado Supreme Court held that the Guardian *ad litem* is the appropriate party to hold the privilege in dependency and neglect cases when the child is too young to hold their own privilege and the parents’ interest in the proceeding could contravene the child’s interest in maintaining confidentiality. *Id. at 948.*

The Court specifically held that “the parent cannot hold the privilege when the parent’s interests as a party in a proceeding involving the child might give the parent incentive to strategically assert or waive the child’s privilege in a way that could contravene the child’s interest in maintaining the confidentiality of the patient-therapist relationship.” *Id. at 948.*

1. **L.A.N. Order Entered in \_\_\_JV\_\_\_\_**

On \_\_\_\_\_, the \_\_\_Judicial District Court entered its order determining that the Guardian *ad litem* would be the privilege holder of the psychotherapist relationship in case number \_\_\_JV\_\_\_\_for the minor children \_\_\_\_\_\_\_\_\_\_\_. (See Attached). The order was entered upon the agreement of all parties. (See Attached Unopposed Motion).

Case \_\_\_\_JV\_\_\_ continues to be an open case, the Guardian *ad litem’s Order of Appointment* is still in effect, and the Court’s *Order of Determination of Privilege and Limited Waiver Under L.A.N. and 13-90-107(1)(g)* continues to be an active order. The Guardian *ad litem* respectfully requests that this Court take judicial notice of case \_\_\_JV\_\_\_\_.

1. **Waiver of the Privilege**

Absent direct waiver of the privilege by the privilege holder, privileged information cannot be accessed unless the privilege holder inadvertently waives the privilege. The party seeking to overcome a privilege must prove that the privilege was waived. Waiver occurs when “the privilege holder, by words or conduct, has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question.” *Clark v. District Court*, 668 P.2d 3 (Colo. 1981).  *See also*, *People v. Sisneros*, 55 P.3d 797, 801 (Colo. 2002).

Defendant has not claimed that the Guardian *ad litem* inadvertently waived the privilege. Defendant simply issued a subpoena on the children’s therapist (on or about July 12, 2016) directing the therapist to produce all therapeutic records.

1. ***In Camera* Review of Documents.**

A Court should not view or review privileged documents *in camera.* *People v. Sisneros,* 55 P.3d 797 (Colo. 2002). Absent a waiver, an *in camera* review of documents by the Court is not permissible. *People v. Wittrein*, 221 P. 3d 1076 (Colo. 2009). An *in camera* inspection by the Court may be appropriate when there is a disputed claim of waiver or a claim is asserted that an exception to the privilege should apply. *Pennsylvania v. Ritchie,* 480 U.S. 39, 60-61 (1987); *People v. Madera*, 112 P.3d 688, 691 (Colo. 2005) (attorney-client privilege); *People v Trujillo*, 144 P.3d 539 (Colo. 2006); *Spykstra* at 670; *Alcon v. Spicer*, 113 P.3d 735, 740-742 (Colo. 2005). In those cases, the Court is limited to reviewing a privilege log to determine if there was a waiver to the claim of privilege or if there is an exception to the privilege. *Alcon v. Spicer*, 113 P.3d 735, 740-742 (Colo. 2005).

In this case, the Defendant has neither claimed that the privilege was inadvertently waived or that there should be an exception to the psychotherapeutic privilege.

1. **Balancing of Interests**

The Colorado Rules of Criminal Procedure, Rule 17, provides for a balancing test for the Court to use when resolving competing interests regarding requests for protected information. However, Privileges defined by C.R.S. §13-90-107 are not subject to the balancing test of C.R.C.P. Rule 17.

*Clark v. District Court,* 668 P.2s 3 (Colo. 1983).

A defendant’s claim to a Constitutional right to confront an adverse witness does not supersede an individual’s rights under the 13-90-107. *People v. District Court*, 719 P.2d 722 (Colo. 1986); *People v. Tauer*, 847 P.2d 259 (Colo. App. 1993); *People v. Turner*, 109 P.3d 639 (Colo. 2005).

1. **People v. Marsh: A Parent in Conflict Does not have the Right to Waive a Child’s Privilege.**

Based on correspondence between Defense counsel and the District Attorney, it would appear that Defense counsel asserts that a Guardian *ad litem* who holds a child’s psychotherapeutic privilege in the dependency and neglect proceeding, is not the privilege holder in a criminal proceeding and, therefore, the privilege can be waived by a parent, the Defendant Father in this case. Defense counsel attached to the subpoena duces tecum, a waiver signed by the Defendant Father.

The Colorado Court of Appeals has held that a conflicted parent should not be allowed to determine if a child’s psychiatrist-patient privilege should be asserted or waived. *People v. Marsh*, \_\_ P.3d \_\_, 2011 WL 6425492, 10 (Colo. App. 2011). In *People v. Marsh,* the Court cited the proposition that criminal cases in which the parents’ interest conflict with the therapeutic interests of a child, a person or a guardian *ad litem* should be appointed to hold the privilege. *Citing In re Adoption of Diane,* 400 Mass. 196, 508 N.E. 2d 837, 840 (1987).

In *People v. Sisneros*, the Colorado Supreme stated that “the purpose of the psychologist-patient privilege is to enhance the effective diagnosis and treatment of illness by protecting the patient from the embarrassment and humiliation that might be caused by the psychologist’s disclosure of information divulge by a client during the course of treatment. The Colorado Supreme Court held that the policy reasons for protection of the psychotherapeutic relationship is more critical than the physician-patient privilege. 55 P.3d 797, 800 (Colo. 2002).

Defendant Father’s desire to seek the therapeutic records of his minor children is in pursuit of his own interests in defense. His interests are directly in conflict with his children’s interest which is to be able to engage in therapeutic services without either parent using that process for his or her own benefit.

1. **APPOINTMENT OF THE GUARDIAN *AD LITEM* TO REPRESENT THE CHILDREN WITH RESPECT TO THE PSCYHOTHERAPEUTIC PRIVILEGE.**

Under Colorado Statute 24-4.1-304(1), “[J]udges are encouraged to designate one or more persons to provide [various] services on behalf of a child who is involved in criminal proceedings as a victim or a witness . . . .” Colorado Judicial Directive 04-06(V)(C) provides that a Guardian *ad litem* may request the Court to expand the scope of his or her judicial appointment when such is necessary for the protection of the best interests of the children.

The Rocky Mountain Victim Law Center was appointed to represent the minor children in this case for the purpose of assist with the following services provided under 24-4.1-304(1):

(a) To explain, in language understood by the child, all legal proceedings in which the child will be involved;

(b) To act, as a friend of the court, to advise the judge, whenever appropriate, of the child's ability to understand and cooperate in any court proceeding;  
  
(c) To assist the child and the child's family in coping with the emotional impact of the crime and any subsequent criminal proceeding in which the child is involved;  
  
(d) To advise the district attorney concerning the ability of a child witness to cooperate with the prosecution and concerning the potential effects of the proceeding on the child.

However, The Rocky Mountain Victim Law Center is not the therapeutic privilege holder and is unable to represent the minor children with respect to the psychotherapeutic privilege.

The Guardian *ad litem* requests that the Court appoint the Guardian *ad litem* as a lawful representative, as defined by C.R.S. 24-4.1-302(3) and CJD 04-06(V)(C), to represent the best interests of the minor children on the limited issue of the psychotherapeutic privilege, as issues may arise during the course of the criminal proceeding.

Attachments:

1. *Order Of Determination of Privilege and Limited Waiver Under L.A.N. and 13-90107(1)(g)*
2. *Unopposed Motion for Determination of Privilege and Limited Waiver Under L.A.N. and 13-90107(1)(g)*
3. *Order Appointing Guardian ad Litem*