

[Cite as *In re Kelleher*, 2009-Ohio-2960.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	
	)	
TRISTEN KELLEHER,	)	CASE NOS. 08-JE-31
	)	08-JE-32
FRANKIE KELLEHER,	)	08-JE-33
	)	08-JE-34
ISABELLA KELLEHER,	)	
	)	OPINION
AND	)	
	)	
BLAZE KELLEHER.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas, Juvenile Division of Jefferson County, Ohio Case No. 2008CU00039, 40, 41, 42
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JUDGMENT:	Reversed and Remanded
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APPEARANCES:  
For Plaintiff-Appellant

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For Defendant-Appellee

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JUDGES:

Hon. Gene Donofrio  
Hon. Joseph J. Vukovich  
Hon. Mary DeGenaro

Dated: June 16, 2009

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DONOFRIO, J.

{¶1} Plaintiff-appellant, Scott Kelleher, appeals from Jefferson County Juvenile Court judgments designating defendant-appellee, Amanda Kelleher, as the residential parent of the parties' four minor children. Appellant also appeals from judgments overruling his motions seeking to compel the disclosure of appellee's mental health records to the court for an in-camera inspection.

{¶2} The parties share four children: Tristen (d.o.b. 1/18/01); Frankie (d.o.b. 12/25/01); Isabella (d.o.b. 12/20/02); and Blaze (d.o.b. 2/29/04). The parties dated for approximately eight years. They married in 2007, after the birth of their children. They are currently married but separated. They separated in April 2008.

{¶3} Appellant filed petitions for allocation of parental rights and responsibilities on April 11, 2008. He sought custody of the four children stating that he feared for their safety when they were in appellee's care. In response, appellee filed her own petitions for custody. This matter, although four separate cases, has proceeded jointly. The court granted temporary custody to appellant during the pendency of these proceedings.

{¶4} On June 27, 2008, appellant served a subpoena on the director of medical records at Trinity Medical Center West requesting that she produce all of appellee's medical records. Appellant also filed a motion to compel the director to comply with the subpoena. In this motion, appellant requested that the court order the director to comply with the subpoena. He asserted that he believed the director was in possession of appellee's mental health records and that they were relevant to the pending custody determination. The trial court denied the motion without explanation.

{¶5} The matter proceeded to a joint hearing before a magistrate. At the time, the children were four, five, six, and seven years old. The magistrate heard testimony from numerous witnesses and also interviewed the three oldest children. The magistrate found that it was in the children's best interest that he award custody to appellee. He noted that both parties presented testimony that they were good, capable parents. He found that while appellant's main concern was appellee's

alleged suicide attempts, these attempts occurred three to four years prior and since that time appellant regularly left the children in appellee's care. He also noted that appellee is on medication for depression and is in counseling.

{¶16} Appellant filed objections to the magistrate's decisions. He asserted that the magistrate's decisions were against the weight of the evidence for various reasons. Appellant claimed that the only reason the magistrate found in appellee's favor was because the magistrate favored giving custody to the mother.

{¶17} The trial court overruled appellant's objections. It then granted appellee's petitions for custody and denied appellant's petitions for custody.

{¶18} Appellant filed timely notices of appeal on October 27, 2008. This court consolidated the four appeals.

{¶19} Appellant raises two assignments of error, the first of which states:

{¶110} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT QUASHED THE APPELLANT'S SUBPOENA DIRECTED TO THE DIRECTOR OF RECORDS OF TRINITY MEDICAL CENTER, WEST SEEKING THE DISCOVERY OF APPELLEE'S MEDICAL RECORDS WITHOUT FIRST CONDUCTING AN IN-CAMERA INSPECTION OF THE RECORDS."

{¶111} Appellant filed both a subpoena to discover appellee's mental health records and a motion to compel the director of records at Trinity Medical Center West to comply with the subpoena. He claimed in his motion that appellee's mental and physical health was relevant to the determination of the children's best interests.

{¶112} By denying the motion to compel and failing to conduct an in-camera inspection of the records, appellant contends that the trial court ignored the mandate of R.C. 3109.04(F)(1)(e), which requires the court to consider the parties' physical and mental health when allocating parental rights and responsibilities. Appellant points out it has been his contention that appellee has attempted suicide in the past. Yet appellee has denied this. Appellant claims that appellee's mental health records would help to establish or refute this contention.

{¶13} Appellant further argues that the trial court should have at least had both parties brief their position. He then assumes his brief would have contained the allegations of suicide, appellee's brief would have denied these allegations, and then the court would have had to conduct an in-camera inspection of the records to determine if they were of any evidentiary value.

{¶14} In order to preserve for appeal the trial court's adoption of a magistrate's findings of fact and conclusions of law, a party must file objections to the magistrate's decision and state with particularity all grounds for objection. Civ.R. 53(E)(3)(b)(ii); *In re Knight*, 11th Dist. No. 2002-T-0158, 2003-Ohio-7222, at ¶21. Appellee makes much of the fact that appellant did not make a specific objection in his objections to the magistrate's decision regarding the denial of his motion to compel.

{¶15} But appellant was not required to make such an objection here. The process of filing objections to a magistrate's decision in order to have them heard by the trial court and, subsequently preserved for review on appeal, applies to *magistrate's* decisions. Civ.R. 53(E)(3). It was the trial court and not the magistrate that denied appellant's motion to compel compliance with his subpoena. Appellant would not have filed an objection to the trial court's judgment. Moreover, appellant would not have filed an appeal from the denial of his motion to compel. Generally, discovery orders are interlocutory and, therefore, are neither final nor appealable, especially those that deny discovery. *Miklovic v. Shira*, 5th Dist. No. 04-CA-27, 2005-Ohio-3252, ¶26. Thus, the trial court's denial of appellant's motion to compel compliance with his subpoena was not a final, appealable order. As such, appellant's recourse was to wait until the court reached a final judgment in this case and then raise the issue on appeal as he has done. Thus, the issue raised in this assignment of error is properly before us.

{¶16} A trial court has broad discretion in discovery matters and we will not reverse a court's discovery decision absent an abuse of discretion. *Patterson v. Zdanski*, 7th Dist. No. 03-BE-1, 2003-Ohio-5464, at ¶10. Abuse of discretion

connotes more than an error of law or judgment; it implies that the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶17} The physician-patient privilege protects communications, including medical records, from discovery. R.C. 2317.02(B)(1). However, the privilege does not apply when the patient files a civil action that directly places the patient's physical or mental condition at issue. R.C. 2317.02(B)(1)(a)(iii); *Neftzer v. Neftzer* (2000), 140 Ohio App.3d 618, 623. When a parent files an action seeking custody of her children, she places her mental and physical condition at issue for the trial court to consider. *Id.* R.C. 3109.04(F)(1)(e) specifically lists the parties' mental and physical health as a factor for the trial court to consider. As such, the filing of a counterclaim seeking custody of the parties' children, constitutes a waiver of the physician-patient privilege. *Gill v. Gill*, 8th Dist. 81463, 2003-Ohio-180, at ¶21.

{¶18} In this case, appellee waived her physician-patient privilege by filing cross-petitions for custody of the children and thereby placing her mental health at issue. Appellee's medical records could be highly relevant on this issue.

{¶19} Generally, where a dispute exists over whether certain medical records are causally or historically related to the issues in the case, a trial court should conduct an in-camera inspection of the records in order to make its determination. *Patterson*, 7th Dist. No. 03-BE-1, at ¶17; *Neftzer*, 140 Ohio App.3d at 622. See also *Trangle v. Rojas*, 150 Ohio App.3d 549, 2002-Ohio-6510, at ¶35 (It is incumbent for the trial court to conduct an in-camera review of allegedly privileged materials that may be discoverable and the failure to do so is an abuse of discretion).

{¶20} "This inspection serves two important purposes:

{¶21} "First, it allows the trial court to make an informed decision as to the evidentiary nature of the material in question rather than depending on the representations of counsel. Secondly, the in-camera inspection allows the trial court to discern that aspect of the evidence, which has evidentiary value from that which does not, as well as to allow the trial court to restrict the availability of that evidence,

which has limited evidentiary value.” *Patterson*, at ¶17-18, quoting *State v. Geis* (1981), 2 Ohio App.3d 258, 260.

{¶22} In this case, the trial court simply denied appellant’s motion to compel without reason. This action was an abuse of discretion. The records appellant sought to discover could likely be relevant to the issues in this case. At the custody hearing, appellee’s mental health was a subject of much testimony. The evidence established that appellee suffers from depression and anxiety and takes medication to control these conditions. Furthermore, appellant testified that appellee attempted suicide on four occasions, which resulted in four hospitalizations, during the time they were together. Appellee plainly denied these allegations.

{¶23} At a minimum, the trial court should have ordered appellee’s medical records released to it for an in-camera inspection. It seems likely, based on the fact that the court was to consider appellee’s mental and physical health as factors in this case, that appellee’s medical records would contain pertinent evidence for the court to consider. And if for some reason the records did not contain such evidence, the court could have then denied their discovery.

{¶24} Accordingly, appellant’s first assignment of error has merit.

{¶25} Given our resolution of appellant’s first assignment of error, his second assignment of error is moot. It states:

{¶26} “THE DECISION OF THE TRIAL COURT TO DESIGNATE APPELLEE AS RESIDENTIAL PARENT OF THE PARTIES['] FOUR MINOR CHILDREN WAS AN ABUSE OF DISCRETION.”

{¶27} For the reasons stated above, the trial court’s judgment is hereby reversed and the matter is remanded. On remand, the trial court is to compel the director of medical records at Trinity West to produce appellee’s medical records for its inspection. The court is then to conduct an in-camera inspection of appellee’s medical records to determine if they are relevant to the issues in this case, namely appellee’s mental health. If the records are relevant to the issues in this case, a new

hearing on custody shall be held.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.