



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

February 15, 2018

SENT VIA EMAIL ONLY: charles.j.hill@state.or.us

Charles J. Hill
Executive Director
Oregon Board of Licensed Professional Counselors & Therapists
3218 Pringle Rd. SE, Suite 120
Salem, OR 97302

RE: Opinion Request OP-2018-1

Dear Mr. Hill:

You have requested our opinion on the right of a noncustodial parent to inspect a child's records from a licensed professional counselor or a marriage and family therapist.

QUESTION

Does a noncustodial parent have the same right as a custodial parent to inspect and receive a child's records from a licensed professional counselor or marriage and family therapist?

SHORT ANSWER

Yes, unless the court's order of sole custody expressly limits the noncustodial parent's right. ORS 107.154(3) provides that an order of sole custody to one parent will not deprive the other parent of the authority to inspect and receive the child's psychological records to the same extent as the custodial parent has that authority, unless the court orders otherwise. While this provision does not define "psychological," the statutory text and context indicate that this term includes the services that professional counselors and therapists provide in treating mental, emotional, and behavioral disorders.

DISCUSSION

A person engaged in the practice of professional counseling or marriage and family therapy generally may not purport to be a licensed practitioner unless licensed by the Oregon Board of Licensed Professional Counselors and Therapists. ORS 675.825(1)(b)-(c). Professional counseling means "the assessment, diagnosis or treatment of mental, emotional or behavioral disorders involving the application of mental health counseling or other

psychotherapeutic principles and methods.” ORS 675.705(7)(a). And marriage and family therapy is similarly defined as “the assessment, diagnosis or treatment of mental, emotional or behavioral disorders involving the application of family systems or other psychotherapeutic principles and methods.” ORS 675.705(6)(a).

These licensed practitioners are generally prohibited from disclosing communications made by their clients, except, as relevant here, “[w]hen the client or those persons legally responsible for the affairs of the client give consent to disclosure.” ORS 675.765(1). While this exception generally allows parents to access their child’s counseling or therapy records, we assume without deciding that a court order of sole custody to one parent means that the noncustodial parent is no longer legally responsible for the child’s affairs for purposes of ORS 675.765(1), and thus no longer has the right to access the child’s records.^{1/}

However, a court order of sole custody to one parent does not deprive the noncustodial parent of the authority “to inspect and receive the child’s medical, dental, and psychological records, to the same extent as the custodial parent may . . . inspect and receive such records.”^{2/} ORS 107.154(3). That is, a noncustodial parent by default is not deprived of any right to access a child’s professional counseling or therapy records if they are considered psychological records under ORS 107.154(3). However, “psychological” is not defined by statute.

Therefore, we must determine whether “psychological,” as used in ORS 107.154(3), refers to the type of services provided by licensed professional counselors and therapists, that is, “the assessment, diagnosis or treatment of mental, emotional or behavioral disorders” by applying mental health counseling, family systems, or other psychotherapeutic principles and methods. *See* ORS 675.705(6)(a), (7)(a) (defining professional counseling and marriage and family therapy).

We discern the legislature’s intent by looking to the text, context, and legislative history of ORS 107.154(3).^{3/} *E.g.*, *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009). “[W]ords of common usage typically should be given their plain, natural, and ordinary meaning.” *E.g.*, *PGE v. Bureau of Labor & Industries*, 317 Or 606, 611, 859 P2d 1143 (1993).

1. Text

“Psychological” has several definitions that might be relevant to its use in ORS 107.154(3): “relating to, characteristic of, directed toward, influencing, arising in, or acting through the mind esp. in its affective or cognitive functions”; “relating to, concerned with, deriving from, or used in psychology”; and “dealing with mental phenomena esp. as interpreted or elucidated by the application of principles of psychology.” *Webster’s Third New Int’l Dictionary* 1833 (2002). “Psychology” has several definitions that involve knowledge about mental processes and behavior. *Id.* “Affective” refers to emotions, *id.* at 35, while “cognitive” refers to intellectual functions such as thinking and reasoning, *id.* at 440.

Therefore, as relevant here, we conclude that “psychological” refers to knowledge about mental processes, behavior, emotions, and thinking and reasoning. And the statutory definitions of professional counseling and marriage and family therapy refer to the assessment, diagnosis, and treatment of *mental, emotional, and behavioral* disorders. ORS 675.705(6)(a), 7(a). In addition, the statutory definition of professional counseling includes the “[a]pplication of intervention methods based on *cognitive, affective, behavioral, systemic or human development principles.*” ORS 675.705(7)(b)(A) (emphasis added). Several of the terms appearing in that definition also appear either in the definition of “psychological” or of “psychology.”

Furthermore, the statutory definitions of professional counseling and marriage and family therapy both refer to the application of psychotherapeutic principles and to counseling services and principles. ORS 675.705(6)(a), (6)(b)(A), (7)(a). “Counseling” is defined as “a practice or professional service designed to guide an individual to a better understanding of his problems and potentialities by utilizing modern *psychological* principles and methods esp. in collecting case history data, using various techniques of the personal interview, and testing interests and aptitudes.” *Webster’s* at 518 (emphasis added). And “psychotherapy” is defined as “treatment of mental or emotional disorder or maladjustment by *psychological* means.” *Webster’s* 1834 (emphasis added); *see also* Theodore & Renee Millon, *Abnormal Behavior & Personality* (1974) (defining “psychotherapy” in the glossary as a “general term for treatment by psychological procedures”); H.J. Eysenck et al., *Encyclopedia of Psychology* 886, 889 (1979) (explaining that psychotherapy “refers to any of a variety of psychological means used to modify mental, emotional, and behavior disorders” and that “[p]sychotherapy is an applied area of psychology”). That is, the definitions of both these terms indicate a close relation to psychological principles or procedures. It is reasonable to conclude that practicing in psychotherapy and counseling involves providing services of a psychological nature.

A review of the contemporary literature at the time ORS 107.154 was enacted in 1987 confirms this close link between psychology, counseling, and therapy. For example, one text explained that “[t]he work of the practicing psychologist in the most diverse fields of applied psychology can be classified into . . . psychodiagnostics[,] counseling[,] . . . and psychotherapy.” Eysenck et al., *Encyclopedia of Psychology* at 854.

A contemporary newspaper article explained that while “[t]he three major groups offering psychotherapy are psychiatrists, psychologists and social workers[,] . . . [t]he social workers, in turn, are being challenged by a new category of therapist specializing in the treatment of troubled family and marital relationships.” Daniel Goleman, *Social Workers Vault into a Leading Role in Psychotherapy*, N.Y. Times, Apr 30, 1985.⁴¹ The article also referred to these new practitioners as “counselors.” *Id.* The article further explained that “[p]art of the confusion between the [various professions providing psychotherapy] stems from the fact that, once they have been trained, what they actually do as therapists can be identical.” *Id.*

And finally, the federal government job classification of “psychologists” included not only clinical psychologists and counseling psychologists, but counselors, and explained that this classification “[i]ncludes formulating and applying psychological principles and laws in predicting and controlling behavior in society.” Office of Federal Statistical Policy & Standards, U.S. Dep’t of Commerce, *Standard Occupational Classification Manual* 66 (1977)

Therefore, a review of the usage of “psychological” and related terms indicates that the treatment of mental, emotional, or behavioral disorders, as well as the use of psychotherapeutic and counseling principles would have been considered psychological in nature at the time ORS 107.154(3) was enacted. In addition, it would have been understood that psychologists, psychiatrists, social workers, counselors, and therapists were providing services of a similar nature.

2. Context

We turn next to the statutory context, which includes the relevant session laws and related statutes. *E.g.*, *Stevens v. Czerniak*, 336 Or 392, 401, 84 P3d 140 (2004). Statements of statutory policy are also included in analyzing context. *E.g.*, *Havi Group LP v. Fyock*, 204 Or App 558, 564, 131 P3d 793 (2006). The session law that enacted ORS 107.154 did not contain any other reference to the term “psychological,” *see* Or Laws 1987, ch 795, § 3; nor did ORS chapter 107 at the time contain any reference to “psychological.” And the statutory scheme for the licensing of professional counselors and therapists did not yet exist. *See* Or Laws 1989, ch 721 (enacting that statutory scheme two years later).

However, the same session law did contain a policy statement indicating that one goal was “to encourage parents to share in the rights and responsibilities of raising their children after the parents have separated or dissolved their marriage.” Or Laws 1987, ch 795, § 2 (codified at ORS 107.149). This suggests we should construe ORS 107.154(3) in a way that furthers the rights of noncustodial parents, which leads to a broader reading of “psychological.”

While professional counselors and therapists did not yet have a statutory licensing scheme in 1987, psychologists did have such a scheme. Therefore, those statutes as they existed in 1987 may serve as useful context to the extent they can be considered related statutes. As we discuss below, that context cuts both ways.

The “practice of psychology” was defined to include “any psychological service . . . involving the application of . . . the methods and procedures of interviewing, *counseling*, *psychotherapy*, and hypnosis.” ORS 675.010(4) (1987) (emphasis added). This practice also included the “diagnosis, prevention, treatment and amelioration of psychological problems and emotional and mental disorders.” *Id.* Counseling and psychotherapy are two services provided by licensed professional counselors and therapists, as are the diagnosis and treatment of mental, emotional, and behavioral disorders. ORS 675.705(6)(a), (6)(b), (7)(a). The similarity between the types of services currently provided by professional counselors and therapists and those provided by licensed psychologists suggests that the legislature would have considered counseling and family and marriage therapy to be psychological in nature.

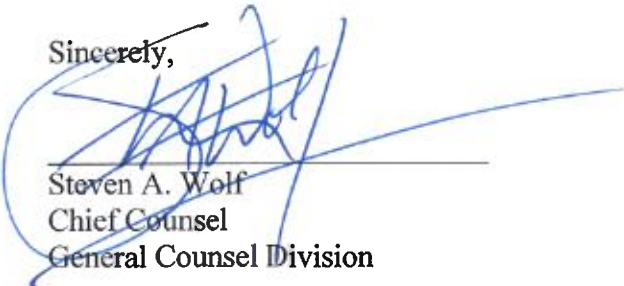
However, portions of this statutory scheme suggest a narrower reading of “psychological.” Without being a licensed psychologist, a person could not “purport to be a psychologist.” ORS 675.020(1) (1987). That phrase was broadly defined as using any title or any description of services that incorporated such terms as “psychological” or “psychotherapy.” ORS 675.020(2) (1987). While other licensed practitioners in the healing arts were exempt from this prohibition (except that they could not use the terms “psychologist” or “psychometrist”), ORS 675.090(4) (1987), professional counselors and therapists could not yet be licensed. This context can be read as an indication that the legislature intended psychological records to refer only to records of licensed psychologists (and the other licensed practitioners in the healing arts).

We conclude that the statutory scheme of licensed psychologists provides little useful context in interpreting “psychological” as used in ORS 107.154(3). First, those statutes can be used to support either a broad or narrow reading of this term. Second, the session law enacting ORS 107.154(3) did not refer to this licensing scheme, or use the same wording; for example, ORS 107.154 does not refer to the “practice of psychology” or to licensed psychologists. This is significant as a related statute dealing with the kind of mental services certain minors could consent to without parental involvement limited this authority to services from licensed psychologists and other types of licensed or registered practitioners. ORS 109.675(1) (1987). That is, the legislature could have used practitioner-specific wording in ORS 107.154(3), but did not. And third, we find the explicit policy statement contained in ORS 107.149 to be of more significance.

CONCLUSION

After reviewing both the text and context, we conclude that the services provided by licensed professional counselors and therapists are psychological in nature for purposes of ORS 107.154(3). The ordinary usage of “psychological” indicates that this term encompasses the assessment, diagnosis, and treatment of mental, emotional, and behavioral disorders through the application of counseling and psychotherapy. And the explicit policy statement that parents should be encouraged to share in the rights and responsibilities of raising their children after a separation or marital dissolution guides us to a broader reading of “psychological” that will allow noncustodial parents the same right of access to counseling and therapy records as possessed by the custodial parent. However, we note that ORS 107.154(3) provides a default rule that can be modified by the court in any particular case. A cautious practitioner would seek a copy of the court’s custody order to make sure the noncustodial parent’s right of access to records has not been expressly limited.

Sincerely,



Steven A. Wolf
Chief Counsel
General Counsel Division

^{1/} “Custody” in the context of the parent-child relationship is defined as “[t]he care, control, and maintenance of a child.” *Black’s Law Dictionary* (10th ed 2014).

^{2/} This provision applies “unless otherwise ordered by the court.” ORS 107.154.

Context indicates that ORS 107.154(3) applies in matters of marital annulment, dissolution, or separation; this opinion does not address parental rights related to juvenile dependency proceedings.

^{3/} The legislative history does not contain any guidance on what type of records were intended to be encompassed by the term “medical, dental, and psychological.”

^{4/} The article is available at <http://www.nytimes.com/1985/04/30/science/social-workers-vault-into-a-leading-role-in-psychotherapy.html>.