

Legal Memo

From: Judge Jason A. Rossell

Date: 1/11/2023

Question Presented: Can Corporation Counsel prevent a social worker from testifying in a criminal court case based on confidentiality concerns?

Issue Presented: Recently, Corp Counsel in criminal cases around the State have sought to prevent the agency social worker from testifying in the case until a hearing before the Juvenile Court.

Disclaimer, this is the legal opinion of the author based on the review of cited statutes and case law. Subsequently issued cases or statutory changes may make this analysis obsolete. Judges should make their own record and decision when dealing with these issues.

Cases and Statutes of note:

State Ex Rel. Herget v. Cir. Ct. of Waukesha Co., 84 Wis. 2d 435 (1977)

In the Interest of KCC (DeLeau), 143 Wis.2d 142 (Ct. App. 1988)

State v. Bellows, 218 Wis. 2d 614 (Ct. App. 1998)

In re Caleb J.F. v. Ramiro M.C., 2004 WI App 26

In the interest of Tyler K (Court of Appeals 2005 2005 WL 159506) *Case has unusual history and was a request for certification to the Supreme Court which was later dismissed. Contains a good discussion on the process.

Wis. Stat. §§ 48.396 and 938.396 (Court Records)

Wis. Stat. §§ 48.78 and 938.78 (Child Welfare Agency Records)

OPINION:

The general principle of confidentiality as it relates to the records of the child welfare agency is found in statutes, but is subject to many exceptions. See Wis. Stat. §§48.78(2)(a) and 938.78(2)(a). These statutes prevent the agency from disclosing the contents of or making available for inspection their records if there is not a court order or exception. Similarly, the records of the court are not available for inspection or disclosure absent a specified exception or by court order. See Wis. Stat. §§ 48.396 and 938.396. However, these statutes protect the confidentiality of the records and do not create a separate privilege to prevent a witness from testifying.

Privilege and confidentiality are concepts that are frequently confused even though they are separate legal concepts. The Supreme Court recently discussed the subtle but important difference in the concepts. In State v. Lynch the terms were defined as:

Privilege is an exception to the general rule that the public has a right to every man's evidence. Confidentiality is an ethic that protects the client from unauthorized disclosure of information.... The presence of confidentiality alone is not enough to support a privilege... Confidentiality, therefore, is a professional duty to refrain from speaking about certain matters, while privilege is a relief from the duty to speak in court proceedings.

State v. Lynch, 2016 WI 66, ¶ 19

The agency and juvenile court records are confidential and may not be disclosed absent a court order or statutory exception. However, these statutes protect the confidentiality of the records and do not create a separate privilege to prevent a witness from testifying.

Recently, Corporation Counsels have been citing State v. Bellows as the basis for preventing the social worker from testifying prior to the Juvenile Court holding a Herget motion hearing. In considering their argument, it is important to review Bellows facts and reasoning. In Bellows, the State sought the admission of the CHIPS petition and minutes of the court file showing the defendant's admission as evidence of guilt in the criminal case. See id. at 626. The trial court admitted the documents over the objection of defense counsel and without inquiring about whether the State had complied with the Herget procedures. Id. The Court of Appeals found that the trial court's failure to investigate compliance with Herget was an erroneous exercise of discretion. See id. at 632. The opinion's focus was on the disclosure of the confidential court file not the testimony of a witness.

A social worker testifying as a fact witness does not have a statutory protection from testifying as to their observations. For example, the social worker may testify about their personal observations such as injuries, or demeanor, or other facts. The inclusion of their observations into a confidential document does not grant to them an evidentiary privilege not to testify. Much like hearsay, a witness can testify as to what they saw or said, but not what others said unless the hearsay exceptions and exemptions are met. Similarly, social workers cannot testify about the records or other information from those records that they are not personally aware of unless the dictates of Herget are met.

However, be aware of Wis. Stat. §971.23(1)(e) which requires the district attorney to disclose any relevant written or recorded statements made by a witness. A social

worker's report will be covered by both confidentiality/Herget procedures and the discovery rules at the same time. In this situation, if the prosecution did not follow the Herget procedures, the report may not be disclosed to the defendant. That would be a discovery violation and the sanction may include not permitting the social worker to testify. However, this is a determination made without the input of the social worker and Corporation Counsel.

Best practice based on the above case law would be for the district attorney to comply with Herget prior to trial seeking to release the records to the criminal court by bringing a motion before the juvenile court. In smaller counties, without a rotational system, this may be the same court as is handling the criminal case. The Herget procedure requires notice to the child/juvenile, opportunity to be heard, right to be represented, and an analysis of whether the petitioner's need for the information outweighs society's/child's/juvenile's interest in protecting its confidentiality. Additionally, be aware that the juvenile court's determination to release the documents is for purposes of discovery. The criminal court must then determine if the records are admissible as an evidentiary ruling. See In re Caleb J.F. 269 Wis.2d 709, 721.

The scope and nature of the social worker's testimony is an important consideration, especially, if they are solely a fact witness and their observational statements are contained in other discovery, such as police reports. When faced with this argument from Corporation Counsel, I would hold a hearing to prevent a situation where the social worker is being told by their counsel not to answer questions and then it blows up in front of the jury.

Hope this analysis is helpful when you face these questions and challenges.