**IN THE COURT OF APPEALS OF IOWA**

No. 1-410 / 11-0577
Filed July 13, 2011

**IN THE INTEREST OF R.G.,**
**Minor Child,**

**G.L.G., Father,**
Appellant.

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Appeal from the Iowa District Court for Linn County, Susan Flaherty, Associate Juvenile Judge.

A father appeals an order adjudicating his daughter a child in need of assistance. **REVERSED AND REMANDED.**

Ellen R. Ramsey-Kacena, Cedar Rapids, for appellant father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and William C. Croghan, Assistant County Attorney, for appellee State.

Sherry L. Schulte of Crawford, Sullivan, Read & Roemerman, Cedar Rapids, for appellee mother.

Julie G. Trachta, Cedar Rapids, attorney and guardian ad litem for minor child.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**VAITHESWARAN, J.**

A father appeals an order, following disposition, adjudicating his daughter a child in need of assistance. He contends: (1) the State failed to prove by clear and convincing evidence that the child was in need of assistance under the statutory provisions cited by the juvenile court, (2) the juvenile court abused its discretion in limiting the witnesses he could call, (3) the juvenile court abused its discretion in failing to allow discovery at State expense, (4) the juvenile court abused its discretion in failing to order the disclosure of a therapist's records to his attorney before the therapist testified, (5) the juvenile court erred in ordering fully-supervised contact with his daughter, and (6) the juvenile court exceeded its authority in directing the Iowa Department of Human Services to assess the safety of another child in his care. After requesting full briefing on the fourth issue, we find that issue dispositive.

## *I. Background Facts and Proceedings*

The child-in-need-of-assistance action is premised on allegations that the father was grooming his six-year-old daughter for sexual abuse. Among the witnesses who testified was the child's therapist. The therapist's records up to mid-April 2010 were turned over to the father's attorney in a pending divorce action. The father's attorney in the child-in-need-of-assistance action obtained access to the records.

The therapist continued to see the child through the adjudicatory hearing, which began on December 1, 2010, and continued on December 8, 2010, and on two additional dates in February 2011. Before the hearings began, the father's divorce attorney attempted to obtain the therapist's records from April 2010

through the time of the hearing. In a letter dated November 30, 2010, the therapist's attorney denied the request on the ground that the father was not viewed as a guardian of the child and it was not deemed in the child's best interests to turn over the records absent a court order compelling disclosure.

The father's attorney in the child-in-need-of-assistance proceeding received the letter on Friday, December 3, 2010. She filed "an application for court order for release of records" on Monday, December 6, 2010.

On December 8, 2010, the second scheduled day of the hearing, the State notified the juvenile court that the therapist was ready to testify. During her direct examination, the therapist referred to a July 2010 session. She also referred to an August 2010 therapy session with the child and summarized the discussion that took place during the session. Additionally, she referred to a September 2010 session and summarized the discussion that took place during that session. The underlying reports pertaining to these sessions were among the documents that were not turned over to the father's attorney.

At the close of the therapist's direct testimony, the father's attorney noted her request for the therapy reports, noted that the therapist had "clearly testified" to sessions for which the reports were not provided, and asserted that in order to appropriately cross-examine the therapist, she needed to review the reports. The attorney explained that the request for the remaining records had initially been made at the final pretrial conference and the father's divorce attorney followed up with the therapist but received the non-production response only after the adjudicatory hearing began. The juvenile court summarily denied the

father's request for the records and ordered his attorney to proceed with cross-examination.

Following additional days of testimony, the juvenile court adjudicated the child in need of assistance and ordered that custody of the child be placed with her mother subject to fully-supervised visitation with the father.

On appeal, the father contends the district court abused its discretion in refusing to order the disclosure of the post-April 2010 therapy records.

## *II. Analysis*

### *A. Timeliness of Father's Request for Documents*

As a preliminary matter, the State argues that the father's attorney did not make a timely request for the therapist's records. The father's attorney sought a court order on the first working day after she received the letter from the therapist's attorney stating the documents would not be produced without a court order. We conclude the request was timely.

### *B. Preservation of Error*

The State next contends the father's attorney did not preserve error on the issue she now presents. Again, we disagree with the State. The father's attorney filed a request for the documents with the court, specifically asserting she needed the documents to "adequately cross-examine" the therapist. She again raised the issue with the court before she began her cross-examination. We conclude error was preserved.

### *C. Failure to Subpoena Records*

At the hearing, the juvenile court questioned the need for a court order rather than a subpoena. The father's attorney responded that the letter from the

therapist's attorney spoke of the need for an order as a prerequisite to production.

It appears that requirement was grounded in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). Under HIPAA, a covered entity is permitted to disclose protected health information to "the individual." 45 C.F.R. § 164.502(a)(1)(i) (2010). If "a parent, guardian, or other person acting in loco parentis has authority to act on behalf of an individual who is an unemancipated minor in making decisions related to health care," the covered entity must generally treat this "personal representative" as the individual for purposes of section 164.502(a)(1)(i), and may therefore disclose protected health information to that representative. *Id.* § 164.502(g)(3)(i). However, the covered entity may elect not to treat that person as a personal representative if the entity has a reasonable belief that (1) either "[t]he individual has been or may be subjected to domestic violence, abuse, or neglect by such person" or "[t]reating such person as the personal representative could endanger the individual" and (2) "[t]he covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative." *Id.* § 164.502(g)(5).

Covered entities are allowed to disclose protected health information "in the course of any judicial or administrative proceeding" in response to a court or administrative tribunal order or in response to "a subpoena, discovery request, or other lawful process" provided that certain requirements are met. *Id.* § 164.512(e). While this provision would have allowed the father's attorney to proceed with a subpoena, the provision also contemplated the issuance of an

order. *Id.* § 164.512(e)(1)(i). Given the specificity of the letter in requiring an order, as well as the press of time, we are not persuaded that the father waived his right to obtain the records by waiting to obtain an order rather than subpoenaing them.

### *D. State's* Cashen *Protocol and Best Interests Arguments*

The State appears to argue that the juvenile court's summary denial of the request for the records was consistent with the Iowa Supreme's Court's holding in the criminal case of *State v. Cashen*, 789 N.W.2d 400, 408–10 (Iowa 2010).[1] Assuming without deciding that this protocol is applicable in the child-in-need-of-assistance setting, the juvenile court did not apply it.

Nor did the juvenile court invoke or apply a best-interests analysis, another argument the State now raises in support of the decision. *See Harder v. Anderson, Arnold, Dickey, Jensen, Gullickson & Sanger, L.L.P.*, 764 N.W.2d 534, 538 (Iowa 2009) (applying best-interests analysis to determine whether a divorced parent could obtain her children's mental health records for use in her own therapy pursuant to Iowa Code section 598.41(1)(e) (2005)). While we have de novo review, and could independently engage in such an analysis, we decline to do so for the reason that follows.

### *E. Testimony About Confidential Records*

Following the court's summary denial of the father's request for production, the therapist explicitly and in detail testified to therapy sessions for which documents were not produced. We conclude the father was entitled to the

[1] In response to *Cashen*, the legislature recently amended Iowa Code section 622.10, regarding the disclosure of privileged communications by professionals in testimonial settings. *See* S.F. 291, 84th G.A., Reg. Sess. § 2 (Iowa 2011).

underlying records for those sessions to cross-examine the therapist adequately. *See* Iowa Code § 232.96(5) (2009) ("[T]he privilege attaching to confidential communications between a health practitioner or mental health professional and patient . . . shall [not] be ground for excluding evidence at an adjudicatory hearing."). As those records were not produced and the juvenile court relied on the therapist's testimony about the sessions in adjudicating the child as a child in need of assistance, we reverse the child-in-need-of-assistance adjudication and remand for further proceedings consistent with this opinion.

**REVERSED AND REMANDED.**