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NO. 43,647

IN THE MATTER OF  
THE MARRIAGE OF

ALLISON GELBE-PINKUS  
AND  
MARK PINKUS

AND IN THE INTEREST OF  
TODD PINKUS, THOMAS PINKUS  
AND LUCY PINKUS, CHILDREN

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IN THE DISTRICT COURT OF

510<sup>th</sup> JUDICIAL DISTRICT

DENTON COUNTY, TEXAS

**PETITIONER'S RESPONSE TO  
RESPONDENT'S MOTION TO COMPEL DISCOVERY AND  
RESPONDENT'S MOTION FOR SANCTIONS**

Petitioner, ALLISON GELBE-PINKUS ('WIFE'), files her *Response to Respondent's Motion to Compel Discovery and Motion for Sanctions*, asking that the Court deny Respondent's motion, quash the requested discovery, protect the privileged nature of Petitioner's mental health records, and confirm Petitioner's reasonable belief that her life coaching records would remain confidential as privileged.

**I.**

**RELEVANT FACTUAL AND PROCEDURAL HISTORY**

1. *Illegally obtained records:* Mark Pinkus invaded Allison Gelbe-Pinkus' privacy and illegally downloaded her confidential and privileged Intensive Outpatient Program (IOP) medical records after her treatment in March 2017. In January 2019 he violated the federal Stored Communications Act and Electronic Communications Privacy Act (1986) and Texas laws against eavesdropping by intercepting her recorded therapy/coaching sessions that had been

conducted via Skype despite Allison's reasonable expectation that these sessions qualified as mental health treatment and would remain privileged.

2. *Repeated violations and litigation abuse:* Respondent published these privileged and confidential records to his attorney on January 21, 2019 and his attorney divulged this privileged and confidential information to the court reporter and other persons during Petitioner's deposition on January 24, 2019. Despite Petitioner's efforts to protect her privileged medical records via the Motion for Protection filed on February 3, 2019, Respondent continued to invade Petitioner's privacy and abuse the litigation process. The day after the Court determined that the records should be reviewed in camera, Respondent and his attorney disrespected the court's rulings by revealing privileged mental health and medical information to the court-appointed custody evaluator. On February 13, 2019, Respondent published the privileged mental health and medical records – which contain her date of birth, home address, driver's license number, social security number, and credit card billing information, by filing them with the Court without designating them as confidential or containing sensitive information, and without redacting them, in violation of TRCP 21c(b), (c) and (d)(1).

3. *Efforts at intimidation:* in addition to these violations, Respondent is abusing the litigation process and the Texas Lawyers Creed by filing for sanctions against the abused victim.

## **II.**

### **ARGUMENT AND APPLICABLE LAW**

#### **A. FEDERAL PRIVACY LAW**

*1. Health Insurance Portability and Accountability Act of 1996 (hereinafter HIPAA), in pertinent parts codified as 32 USCA Sec. 1320d through 1320d-8 and supporting regulation:* Title 45 CFR Parts 160 and in Part 164 Subparts A and E, created federal "Privacy Rules."

2. HIPAA requires that health information which is personally or individually identifiable [45 CFR 160.003] must be protected by covered entities. Disclosure is allowed if required by law [45CFR 164.512]; whenever a court orders the disclosure [45CFR 164.512(e)(1)(i)]; or in response to a “subpoena, discovery request, or other lawful process” *if appropriate notice is given or if reasonable efforts to obtain a protective order are available* [45CFR 164.512(e)(1)(ii)(A) and (B)]. The court order should limit the disclosure to “only the protected health information expressly authorized by such order.” [45CFR 164.512(e)(1)(i)] The rules discussing notice and protective orders provide explicit requirements for the protective order, including a prohibition on re-disclosure and a return or destruction of all records, including copies, at the end of the litigation [45CFR 164.512(e)(1)(v)(A) and (B)].

3. Congress allows states to otherwise regulate medical privacy, privilege and redaction. HIPAA pre-empts state laws which are less stringent than HIPAA but allows state laws to be more stringent than the Privacy Rules found within 45 CFR 160 and 164 [45CFR 160.203].

## **B. STATE PRIVACY LAWS**

1. Tex. Health & Safety Code, Chapter 181, is the Texas medical records privacy equivalent of HIPAA, and Respondent violated it.

(2) "Covered entity" means any person who:

(A) for **commercial, financial, or professional gain, monetary fees**, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, **using, evaluating**, storing, or **transmitting protected health information**. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site;

(B) **comes into possession** of protected health information;

(C) obtains or stores protected health information under this chapter; or

(D) is an employee, agent, or contractor of a person described by Paragraph (A), (B), or (C) insofar as the employee, agent, or contractor creates, receives, obtains, maintains, uses, or **transmits protected health information**.

(2-a) "**Disclose**" means to release, transfer, provide access to, or otherwise divulge information outside the entity holding the information.

Tex. Health & Safety Code Sec. 181.001(b)(2)-(2-a)

2. Texas law is more stringent than HIPAA in that Chapter 181 clearly applies to attorneys, including Respondent's counsel, as covered entities because Respondent's law firm will be using Petitioner's records for monetary or professional gain as she collects, analyzes, uses and discloses the records. Covered entities must comply with both the federal law (HIPAA) and state law (Chapter 181), each of which establishes privacy requirements.

3. Sensitive information must be redacted or designated:

***Rule 21c. Privacy Protection for Filed Documents.***

(a) Sensitive Data Defined. Sensitive data consists of:

- (1) a driver's license number, passport number, social security number, tax identification number, or similar government-issued personal identification number;
- (2) a bank account number, credit card number, or other financial account number; and
- (3) a birth date, a home address, and the name of any person who was a minor when the underlying suit was filed.

(b) Filing of Documents Containing Sensitive Data Prohibited. Unless the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation, an electronic or paper document, except for wills and documents filed under seal, containing sensitive data may not be filed with a court unless the sensitive data is redacted.

(c) Redaction of Sensitive Data; Retention Requirement. Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted.

**C. STATE PRIVILEGE LAWS**

**1. Petitioner's Medical records are Privileged and Not Discoverable under TRE 509:**

***Rule 509. Physician–Patient Privilege***

(a) Definitions. In this rule:

- (1) A "patient" is a person who consults or is seen by a physician for medical care.
- (2) A "physician" is a person licensed, or **who the patient reasonably believes is licensed**, to practice medicine in any state or nation.
- (3) A communication is "confidential" if not intended to be disclosed to third persons other than those: (A) present to further the patient's interest in the consultation, examination, or interview; (B) reasonably necessary to transmit the communication; or (C) participating in the diagnosis and treatment under the physician's direction, including members of the patient's family.

(c) General Rule in a Civil Case. In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

- (1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and
- (2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.

(d) Who May Claim in a Civil Case. The privilege may be claimed by:  
(1) the patient; ...

(e) Exceptions in a Civil Case. This privilege does not apply: ...  
(2) Consent. If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f). ...  
(4) Party Relies on Patient's Condition. If any party **relies on** the patient's physical, mental, or emotional condition as a part of the party's claim or defense **and** the communication or record is **relevant to that condition**.

## **2. Mental health records are Privileged and Not Discoverable under TRE 510:**

### ***Rule 510. Mental Health Information Privilege in Civil Cases***

(a) Definitions. In this rule:

(1) A "professional" is a person: (A) authorized to practice medicine in any state or nation; (B) **licensed or certified** by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder; (C) involved in the treatment or examination of drug abusers; or (D) **who the patient reasonably believes to be a professional** under this rule.  
(2) A "patient" is a person who: (A) consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any **mental or emotional** condition or disorder, **including** alcoholism and drug addiction; or (B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse. ...  
(4) A communication is "confidential" if **not intended to be disclosed** to third persons other than those: (A) present to further the patient's interest in the diagnosis, examination, evaluation, or treatment; (B) reasonably necessary to transmit the communication; or (C) participating in the diagnosis, examination, evaluation, or treatment under the professional's direction, including members of the patient's family.

(b) General Rule; Disclosure.

(1) In a civil case, a patient **has a privilege to refuse to disclose** and to prevent any other person from disclosing: (A) a confidential communication between the patient and a professional; and (B) a record of the patient's identity, diagnosis, evaluation, or treatment that is created or maintained by a professional.  
(2) In a civil case, any person—other than a patient's representative acting on the patient's behalf—who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes for which it was obtained.

(c) Who May Claim. The privilege may be claimed by:

(1) the patient; ...

(d) Exceptions. This privilege does not apply: ...

(4) Communication Made in Court-Ordered Examination. To a communication the patient made to a professional during a court-ordered examination relating to the patient's mental or emotional condition or disorder if: (A) the patient made the communication after being informed that it would not be privileged; (B) the communication is offered to prove an issue involving the patient's mental or emotional health; and (C) the court imposes appropriate safeguards against unauthorized disclosure.  
(5) Party Relies on Patient's Condition. If any party **relies on** the patient's physical, mental, or emotional condition as a part of the party's claim or defense **and** the communication or record is **relevant** to that condition.

## **3. Petitioner did not waive her mental health records privilege via TRE 511:**

***Rule 511: Waiver by Voluntary Disclosure***

(a) General Rule. A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged;...

**D. STATE LAW as APPLIED TO THIS CASE**

**1. Medical and Mental Health Privilege Applies to “Professionals.”** The parties agree on one statement: Communications between a patient and her physicians and mental health professionals are generally privileged and not discoverable. *See* Tex. R. Evid. 509; 510; *see also* Tex. R. Civ. P. 193.2(a). Petitioner’s Intensive Outpatient Program treatment followed inpatient hospitalization for prescription drug dependence that resulted from a bike injury. Hospitalization and the IOP both dealt with both physical pain management and drug dependence; that treatment, is privileged pursuant to both TRE 509 and TRE 510. Respondent argues that TRE 510 only applies to a “professional” and seeks to mislead the court by focusing solely on the life coach’s qualifications. Respondent ignores the qualifications of the medical doctors and professional therapists whose IOP treatment carried over from the inpatient hospitalization. Those professionals clearly meet the definitions in TRE 509 and TRE 510 as persons who are: (1) authorized to practice medicine in any state or nation; or (2) licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder; (3) involved in the treatment or examination of drug abusers; or (4) who the patient reasonably believes to be a professional under this rule. *See* Tex. R. Evid. 509 (a)(2) and 510(a)(1).

**2. Petitioner intended her communications to be privileged.** Petitioner intended her treatment records (inpatient, IOP and life coach therapy) to be confidential within the meaning of TRE 509(a)(3)(A)-(C) or within the meaning of TRE 510(a)(4)(A)-(C). The fact that

Respondent had to surreptitiously invade her privacy to steal the records is evidence that she did not voluntarily disclose them or waive her privilege.

**3. Petitioner did not consent or waive her privilege.** Petitioner did not, within the meaning of TRE 509(e)(2) or TRE 509(f) or TRE 510(d)(2) consent in writing to their disclosure. Petitioner did not, within the meaning of or TRE 511, waive the privilege or authorize Respondent to obtain the records and publish them to his attorney, the court, the custody evaluator, or the world at large when Respondent filed them as public documents with this Court.

**4. Privileged Records Are NOT Discoverable Under Texas Law.** Although Texas Rules of Civil Procedure allow for broad discovery, they only permit discovery regarding “[a]ny matter *that is not privileged* and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.” Tex. R. Civ. P. 192.3(a).

**5. Case Law Defines “Relies On” and “Relevant”.** Generally, medical records are privileged and not discoverable: “records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed.” *In re Anderson*, 973 S.W.2d 410 (Tex. App. – Eastland, 1998); *West v. Salido*, 563 S.W.2d 240 (Tex. 1978). Mandamus is the proper remedy if the trial court orders the disclosure – even of the identity of patients -- of privileged records, *In Re Anderson*. “If disclosure were required, the privilege would be meaningless to the patient who holds a legitimate interest in it. See *Jampole v. Touchy*...” *Id* at 412.

6. Even in the interest of discovery directed at seeking the truth, no privilege should be ignored. *Mutter v. Wood*, 744 S.W.2d 600 (Tex. 1988). Discovery is available for any matter that is not privileged **and** is relevant to the subject matter of the pending action. TRCP 192.3(a). *In re CSX*, 124 SW3d 149 (Tex 2003) holds discovery "requests must be reasonably tailored to include only relevant matters."

7. In a child custody determination, the trial court considers the child's best interests. *See* Tex. Fam. Code Ann. § 153.002 (Vernon 2002). In determining the best interest of a child, a court considers whether a parent can meet the needs of the child. *See generally Mumma v. Aguirre*, 364 S.W.2d 220, 221, 223, 6 Tex. Sup. Ct. J. 220 (Tex. 1963) (considering a claimant's ability to meet the needs of the child). Respondent obviously believed Petitioner could meet the needs of her children after her successful treatment for legally prescribed medication because he decided to father another child with her after that treatment.

8. Generally, medical records are privileged and not discoverable: “records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed.” *In re Anderson*, 973 S.W.2d 410 (Tex. App. – Eastland, 1998); *West v. Salido*, 563 S.W.2d 240 (Tex. 1978). Mandamus is the proper remedy if the trial court orders the disclosure – even of the identity of patients -- of privileged records, *In Re Anderson*. “If disclosure were required, the privilege would be meaningless to the patient who holds a legitimate interest in it. *See Jampole v. Touchy...*” *Id* at 412.

9. Even in the interest of discovery directed at seeking the truth, no privilege should be ignored. *Mutter v. Wood*, 744 S.W.2d 600 (Tex. 1988). Discovery is available for any matter that is not privileged **and** is relevant to the subject matter of the pending action. TRCP 192.3(a). *In re CSX*, 124 SW3d 149 (Tex 2003) holds discovery "requests must be reasonably tailored to include only relevant matters."

10. By citing cases that speak in the present tense, Respondent appears to argue (without any factual basis) that **current** drug dependence authorizes a search of medical records: “Consideration of a child's best interests may include whether a parent **has** a dependence on drugs or alcohol. *See In re Walters*, 39 S.W.3d 280, 289 (Tex. App.--Texarkana 2001, no pet.); *Monaghan v. Crawford*, 763 S.W.2d 955, 957-58 (Tex. App.-San Antonio 1989, no writ).



Possession or access to a child has been restricted when a parent abuses drugs or alcohol and use of the substances may be prohibited **while** the parent has custody. *See In re Walters*, 39 S.W.3d at 286-88.” But there is *no evidence* that Petitioner has abused any drugs or alcohol or other substance after successfully completing treatment.

11. Respondent cites the “Litigation Exception” to Physician-Patient and Mental Health Privileges as if any divorce action triggers the exception. Petitioner did not put her mental health or past drug use in question and Respondent has no evidence of current dependence. The “litigation exception,” applies when “any party relies on the patient's physical, mental, or emotional condition as part of the party's claim or defense and the communication or record is relevant to that condition.” *See In re Morgan*, 507 S.W.3d 400, 404 (Tex. App.—Houston [1st. Dist.] 2016, no pet.)(orig. proceeding); *see also* Tex. R. Evid. 509(e)(4), 510(d)(5).

12. This exception applies when “(1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance.” *In re Morgan*, 507 S.W.3d 400, citing *R.K. v. Ramirez*, 887 S.W.2d 836, 843 (Tex. 1994).

13. Mere possible relevance or broad relevance is not enough to waive the physician-patient privilege. The litigation waiver to the privilege applies only to a party’s records that relate **in a significant way** to a party’s claim or defense. *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994). The information on the condition sought must be central to a claim or defense, not merely an evidentiary or intermediate issue of fact. “The privacy of the physician/patient relationship should not be subject to a casual breach by every litigant in single-minded pursuit of the last scrap of evidence which may marginally contribute to victory in the litigation.” *Ramirez, supra*. Simply because a condition may be “relevant” to a claim or defense does not mean the party relies upon the condition as a part of the claim or defense. Relevance being defined so broadly

would mean that virtually any defendant could plead some defense so broadly as to make any condition of a patient arguably relevant to the claim, and the privilege would cease to exist. *R.K.*, *supra* at 842. The medical condition contained in the medical records must be of legal consequence to a party's claim in order to be discoverable. *Ramirez*, *supra* @ 842-3. In applying the litigation exception "relevance alone cannot be tested because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances." *In re Christus Health Southeast Texas*, 167 S.W.3d 596 (Tex. App. – Beaumont 2005), dealing with overly broad requests to produce logs of telephone calls and social media postings.

14. Texas courts have repeatedly addressed this balancing test. Even if medical records could be useful for impeachment [say, to rebut the statement that Petitioner loves her children and wants to care for them] or if the information contained therein could be used to test the credibility of a witnesses, those uses, standing alone, do not make the information discoverable under the patient-litigant exception to the physician-patient privilege. *See In Re Leatherwood*, 1998 WL 800341 (Tex. App.–San Antonio 1998, no pet.) (not designated for publication) in which the court held that permitting discovery of medical records to attack a witness's credibility would have a chilling effect on an injured party's decision to seek relief which is not the intended result of the patient litigation exception:

The ultimate issue in this case is whether Patel sexually assaulted R.A.D. Issues of witness credibility are evidentiary or intermediate issues, even if the witness is an outcry witness. If we took the position of Patel and Comfort Inn to its logical extreme, mental health records would be discoverable in every case for every witness whose credibility is at issue. Our reading of the requirements set forth in *R.K. v. Ramirez* does not support this position. Permitting discovery of medical records to attack a witness's credibility would have a chilling effect on an injured party's decision to seek relief, which is not the intended result of the patient-litigant exception. *Leatherwood's* credibility and any effect her alleged condition would have on R.A.D. are tangential to the claim that R.A.D. was assaulted and suffered damages as a result. Therefore, *Leatherwood's* medical records are not discoverable under the patient-litigant exception to the patient-physician privilege.

*In re Leatherwood*, No. 04-98-00814-CV, 1998 WL 800341, \*2 (Tex. App.—San Antonio Nov. 18, 1998, orig. proc.).

15. Courts have protected mental health records from disclosure in two employment law disputes where the plaintiff sought mental anguish damages, noting the “tremendous potential for abuse that exist when a defendant has unfettered access to a plaintiff’s medical records.” *Burrell v. Crown Central Petroleum, Inc.*, 177 F.R.D. 376, 380, 383-84 (E.D. Tex. 1997) and *In re Whipple* 373 S.W.3d 119 (Tex. App. - San Antonio 2012). Defensive claims that a plaintiff’s damages and injuries were caused by pre-existing conditions may not involve the resolution of ultimate issues of fact that have legal significance standing alone. *In re Nance*, 143 S.W.3d 506 (Tex. App. – Austin 2004). Therefore, records which are not related – in a significant way -- to the underlying suit are not relevant, remain privileged, and should not be disclosed.

16. Past temporary post-partum depression or past dependence on legal medication is not enough to put Petitioner’s current mental condition in issue. Neither side has put Petitioner’s mental health in issue enough to waive the privilege. Petitioner sought treatment for depression. In case law analyzing the privilege in personal injury cases in which mental anguish damages were sought, prior depression did not trigger the litigation exception. A routine mental anguish claim “will not, standing alone, make a plaintiff’s mental or emotional condition a part of the plaintiff’s claim.” Thus, “[a] routine allegation of mental anguish or emotional distress does not place the party’s mental condition in controversy. The party must assert mental injury that exceeds the common emotional reaction to an injury or loss.” *In re Williams*, No. 10-08-00364-CV, 2009 WL 540961,\*5 (Tex. App.—Waco Mar. 4, 2009, orig. proc.) (granting mandamus to correct trial court’s order for production of mental health records).

17. Even cases in which an injury plaintiff had previously suffered prior rape and assault, the claims for mental anguish damages have not waived triggered the litigation exception to the mental health privilege. Mental health records did not lose their privilege and were not discoverable even when mental anguish damages (for trouble sleeping, being uneasy around

men, especially those who looked like the rapist, for being anxious when touched) were sought after a rape, in *In re Doe*, 22 S.W.3d 601 (Tex. App.—Austin 2000) (orig. proc.). Even the specific testimony of the plaintiff regarding her mental anguish did not transform her claim from being a garden variety mental anguish claim (where the privileged is not waived) to a central part of the claim for mental injury sufficient to waive the privilege. The Third Court continued in *Doe*: “To hold otherwise would suggest that every time a plaintiff raises a claim for past and future mental anguish damages her mental condition would be in issue and thereby all mental health records would be discoverable. This proposition is contrary to the express holding of the Texas Supreme Court in [*Coates v. Whittington*].”

18. A plaintiff’s mental anguish claim which included testimony of psychiatric treatment, past depression, and stress such as troubled sleep, nightmares, anxiety attacks, emotional breakdowns, difficulty breathing, and heart palpitations were not sufficient to make the plaintiff’s mental condition part of a claim or defense in *In re Chambers*, No. 03-02-00180-CV, 2002 WL 1378132, \*1-5 (Tex. App.—Austin 2002, orig. proc.).

19. Allegations of routine “mental anguish or emotional distress will not, standing alone, make a plaintiff’s mental or emotional condition a part of the plaintiff’s claim. The allegations in [Plaintiff’s] petition that he suffered ‘emotional shock’ is not a sufficient basis to make his mental or emotional condition an issue on which the jury will be required to make a factual determination. Therefore, [Plaintiff’s] communications ... are protected by the physician-patient privilege.” *In re Toyota Motor Corp.*, 191 S.W.3d 498, 502 (Tex. App. – Waco 2006, orig. proceeding).

20. Respondent endeavors to put Petitioner’s medical condition and mental health records in issue via the back door. There is no basis for alleging current mental health or current drug dependence, so Respondent falsely creates relevance by invading Petitioner’s privacy, stealing her records, finding past issues, and using the stolen records to manufacture a claim of relevance.

21. Respondent suggests that “when requested, the trial court must perform an in-camera inspection and ensure that production is no broader than necessary.” But Respondent stole the records and published them instead of relying on the court to exercise its gate-keeping function.

22. Respondent recognizes that the test is not simply whether the condition is relevant "because any litigant could plead some claim or defense to which a patient's condition could arguably be relevant and the privilege would cease to exist." *Id.*, citing *In re Union Pac. R.R. Co.*, 459 S.W.3d 127, 130 (Tex. App.—El Paso 2015, orig. proceeding.). Nor is the test satisfied "if the patient's condition is merely an evidentiary or intermediate issue of fact, rather than an 'ultimate' issue for a claim or defense, or if the condition is merely tangential to a claim rather than 'central' to it." *Ramirez*, 887 S.W.2d at 842. Instead, the condition must be so central as to require the jury, as part of its determination of the claim or defense, to "make a factual determination concerning the condition itself." *Id.* at 843. The jury will not be asked if Petitioner has a current drug dependence, as there is no evidence of current dependence. The prior records are therefore tangential, not central, to the child custody issue.

23. Similarly, the assertion to the life coach that children drained Petitioner of energy is not the kind of statement that waives the privilege. Most new parents are exhausted by the demands of newborns. A single comment acknowledging that common sentiment does not rise to the heightened threshold at which the mental health condition is put in issue and the privilege is waived:

“The plaintiff must assert a mental injury that exceeds the common emotional reaction to an injury or loss.” *Coates v. Whittington*, 758 S.W.2d 749, 753 (Tex. 1988) (orig. proceeding). “The fact that a plaintiff has had past mental problems is distinct from the mental anguish associated with a personal injury or loss; a tortfeasor takes a plaintiff as he finds her.” *In re Pennington*, No. 02-08-00233-CV, 2008 WL 2780660 at 4 (Tex. App. – Fort Worth July 16, 2008, orig. proceeding) (mem. op.); *In re Nance*, 143 S.W.3d 506, 512 (Tex. App. – Austin 2004, orig. proceeding); *In re Doe*, 22 S.W.3d 601, 606 (Tex.App. – Austin 2000, orig. proceeding). *In re Whipple*, 373 S.W.3d 119 at 123-124 (Tex.App.—San Antonio 2012, no pet.)

24. More than just relevance is required to trigger the litigation exception to the privilege. In *In re Pennington*, No. 02-08-00233-CV, 2008 WL 2780660 at 4 (Tex. App. – Fort Worth July 16, 2008, orig. proceeding) (mem. op.), the plaintiff pleaded for ordinary mental anguish and her physical medicine records revealed prescriptions for anti-depressants before the wreck that injured her: “The fact that a plaintiff has had past mental problems is distinct from the mental anguish associated with a personal injury or loss; a tortfeasor takes a plaintiff as he finds her. [cites omitted] Defensive claims that a plaintiff’s damages and injuries were caused by the pre-existing condition do not involve the resolution of ultimate issues of fact that have legal significance standing alone. [cite omitted] Indeed, these types of defensive assertions are in the nature of inferential rebuttal claims and, thus, are not sufficient to put a plaintiff’s mental condition at issue so as to make medical records about that condition discoverable.” *In re Pennington*.

25. *In re Nance*, 143 S.W.3d 506 (Tex. App. – Austin 2004) repeated the inferential rebuttal analysis when a hospital and doctor were sued after a routine gall bladder surgery resulted in internal bleeding and death. The decedent’s mental health records were sought, objections were lodged, the records were produced in camera, and the court ordered the released to the defendants, who argued that the decedent regularly drank too much and might have pancreatitis, which could have caused post-operative bleeding. And, the defendants continued, her mental health and alcohol use were relevant to the wrongful death beneficiaries’ claims for mental anguish, loss of consortium, and loss of pecuniary services. The court emphasized that those possible defenses did not trigger the litigation exception: “As a matter of law, there is no adequate remedy at law for a decision denying a privilege. *In re Monsanto Co.*, 998 S.W.2d 917, 922 (Tex. App – Waco 1999, orig. proceeding),” *id* at 510, and then discussed what it means to be relevant enough to waive the privilege:

Whether a plaintiff's condition is "part" of a claim is determined from the pleadings, without reference to the evidence that is clearly privileged. To be a "part" of a claim or defense, the condition itself must be a fact that alone carries legal significance under the substantive law. ("Because relevance is defined so broadly, virtually any litigant could plead some claim or defense to which a patient's condition could arguably be relevant and the privilege would cease to exist. We reject this alternative as well."). To illustrate the "part" of concept, the supreme court cited the example of an allegation that a testator is incompetent. Such a mental condition, if found, would be a factual determination to which legal consequences attach: the testator's will would no longer be valid. *Id.* at 842-43. "In other words," the supreme court explained, "information communicated to a doctor ... may be relevant to the merits of an action, but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to the party's claim or defense." [Cite omitted.] "As a general rule," the supreme court explained, "a mental condition will be 'part' of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself." *Id.* It also observed that "[c]ommunications and records should not be subject to discovery if the condition is merely an evidentiary or intermediate issue of fact, rather than an 'ultimate' issue of a claim or defense, or if the condition is merely tangential to a claim rather than 'central' to it. *Id.* at 842.

*In re Nance*, 143 S.W.3d 506, 511-512 (Tex. App. – Austin 2004)

26. The allegation that Ms. Nance was a heavy drinker whose alcohol use made her more susceptible to post-surgical bleeding was not enough to make her condition "part" of the lawsuit's causation defense. And being a heavy drinker, which may have interfered with family relationships and earning capacity, was not enough to make her condition "part" of the lawsuit's damages defense. "[W]hether Ms. Nance was an alcoholic or a heavy drinker is, at most, an intermediate issue of fact regarding the claims for emotional and pecuniary loss by her family, and [for] the defensive theory that a pre-existing condition caused her death." *Id.* at 512. Pleading a "pre-existing condition as an alternative and affirmative defense" does not make it central; instead, "that defensive theory is in the nature of an inferential rebuttal, not an ultimate issue of fact that alone has legal significance. [*R.K. v. Ramirez*] at 843; see also Tex. R. Civ. P. 277. We hold that the records in question, if protected by the physician-patient privilege, are not discoverable under the patient-litigant exception to that privilege."

27. Footnote 7 to *In re Nance* and Tex. R. Civ. P. 277 explain: "An inferential rebuttal issue disproves the existence of an essential element submitted in another issue or question.

*Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978). It presents a contrary or inconsistent theory from the claim relied upon for recovery. *Id.* Inferential rebuttal issues attempt to disprove a claim by establishing the truth of a positive factual theory that is inconsistent with some factual element of the ground of recovery. *Id.* ‘Inferential rebuttal questions shall not be submitted in the charge.’ Tex. R. Civ. P. 277.”

28. Questions about past dependence on legally prescribed drugs, without any evidence that such prior use continues or poses a current problem, is more in the nature of an inferential rebuttal issue rather than an essential element. It is not sufficient to trigger the litigation exception to the privilege.

29. Case law, cited by Respondent prior to the passage of HIPAA or Ch. 181 Health & Safety Code, should not be swallowed whole but should be analyzed in the light of greater privacy regulations.

#### **D. FEDERAL LAW as APPLIED TO THIS CASE**

**1. Federal Regulations Regarding Substance Abuse Records** do not control the outcome of this court’s state privilege determination. Records do not have to qualify under multiple privileges, both state and federal, to be protected. That they qualify under any law is sufficient. Respondent notes: “Under federal law, patient records obtained or maintained by federally assisted drug or alcohol abuse programs shall be confidential and not subject to disclosure, except pursuant to limited exceptions. 42 U.S.C.A. § 290dd-2 (West 2003). A patient, however, may consent to the disclosure of their own records” or may obtain copies of their own records. *Id.*

2. True. And... so what?



3. Respondent alleges that the federal regulations only apply to drug or alcohol abuse information that is “[o]btained by a federally assisted. . .program.” *See* 42. C.F.R § 2.12. Whether the IOP treatment was federally assisted drug or alcohol abuse program is irrelevant because state law declares them privileged. The IOP records are privileged.

4. Whether the life coach treated Petitioner for drug dependence is irrelevant. TRE 510 protects, as privileged, the life coach records because Petitioner “consulted” with her for an “emotional condition” and reasonably believed the life coach is a professional:

A “patient” is a person who: (A) consults or is interviewed by a professional for diagnosis, evaluation, or treatment of **any mental or emotional** condition or disorder, **including** alcoholism and drug addiction;

The privilege includes – but is not limited to -- treatment for drug addiction. The privilege extends to consultation for “**any ... emotional condition.**” Petitioner consulted her for an emotional condition. The life coach records are privileged.

5. And, Respondent continues: “However, a patient may obtain access to their *own* substance abuse records and the federal regulations do not prohibit such records from being used in civil proceedings. *See* 42 C.F.R. §2.23.”

6. Again, even if true, so what? Petitioner did not “consent” to Respondent intercepting her records and invading her privacy. And personal possession of her records does not waive Petitioner’s privilege to those records. The fact that Petitioner is entitled to her own records does not mean Respondent can compel her to hand them over to him, much less steal them. Because Petitioner’s records are privileged under TRE 509 and 510, it does not matter whether there is a different federal law under which the records may or may not also be privileged.

#### **E. APPLICATION OF TRE 510 TO LIFE COACH**

**1. Contents of Life Coach Sessions are NOT Discoverable because Petitioner Reasonably Believed the Life Coach is a “Professional” under TRE 510(a)(D).** Petitioner

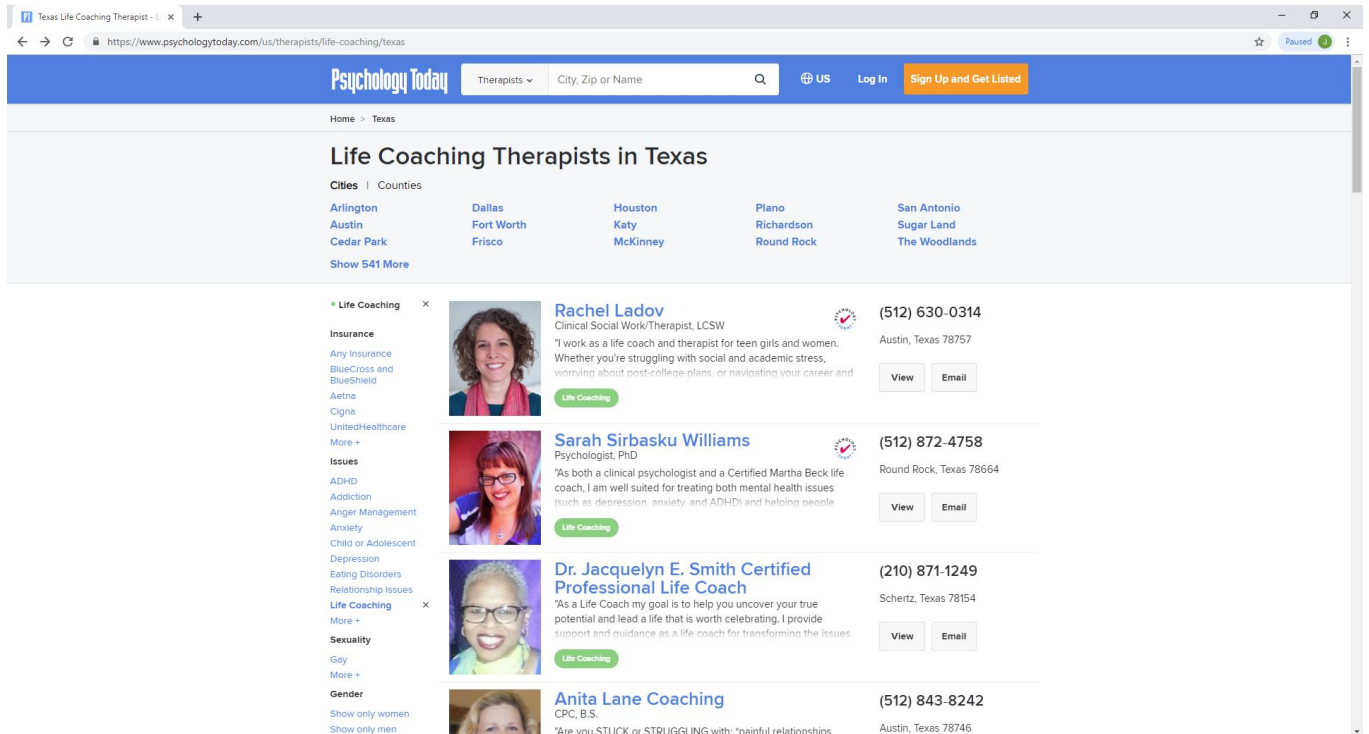
should not be compelled to answer deposition questions regarding the sessions with her life coach.

2. Whether or not the life coach is actually a licensed “professional” for purposes of the mental health privilege under TRE 510(a)(1) is irrelevant. Whether she is authorized to practice medicine, or licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental health or emotional disorder, Petitioner reasonably believed that her counselor was a professional who was licensed to help her. Petitioner was not seeking coaching to increase business efficiency or improve her time management skills, she sought treatment from the life coach in connection with her depression. Maternal depression is not uncommon after giving birth. Depression is a medical condition often treated by licensed counselors and therapists.

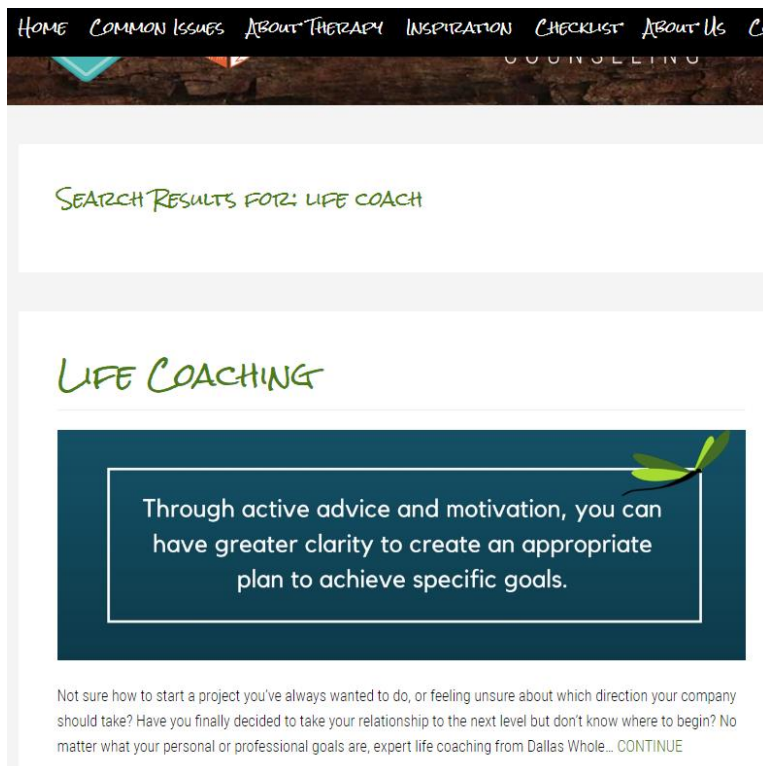
3. A quick internet search for “life coach” leads to listings sponsored by Psychology Today. The certifications and licenses, granted by the State of Texas, are featured in the profile of each life coach, along with sidebars showing the medical insurance plans available for these professionals. Representative examples are attached in the appendix to this Response. (Counsel for Petitioner stopped counting at 85 listings.) Each listing features the designation “Life Coaching” and lists a veritable alphabet soup of licenses and certifications, including Ph.D. (psychologist), LCSW (licensed clinical social worker), LPC (licensed professional counselor), Dr./Certified Professional Life Coach, licensed/certified Psychotherapist, PCLC (Licensed Clinical Professional Counselor) and more.

4. Each of these life coaches has some kind of designation after their name which would lead the average person to believe each life coach is a professional and that conversations with them are privileged. TRE 510 does not require Petitioner to conduct legal research into the various designations and determine which set of letters represents actual licensure by the state.

5. The first page of listings illustrates the point:



6. Petitioner reasonably believed her comments would remain confidential. Indeed, the website for Dallas Whole Life Center offers Life Coaching and promises confidentiality, leading a reasonable person to believe that her sessions would be protected as privileged:



Dallas Whole Life Center website



## CONFIDENTIALITY

Almost all material discussed in any therapy session is fully confidential, meaning that the therapist may not disclose personal information about the client to any party without the client's permission.

Almost all material discussed in any therapy session is **fully confidential**, meaning that the therapist may not disclose personal information about the client to any party without the client's permission. However, there are some important limits to confidentiality of which clients should be aware. Currently, Texas state law requires that mental health professionals contact appropriate authorities if there is suspected child abuse, elder abuse or dependent adult abuse, or if the client represents an imminent threat to himself or others (ie. the client directly indicates a real and immediate intention of committing suicide or homicide).

### Dallas Whole Life Center website

7. Petitioner's conversations would have remained privileged had Respondent not violated the federal wiretapping law by intercepting electronic communications. It is not in the children's best interest to reward their father's illegal behavior by punishing their mother's candid efforts to seek help. Candor and counseling should remain privileged, so parents feel free to obtain help during their temporary depression.

8. Petitioner's motion for protection should be granted and she should not be compelled to answer deposition questions regarding her sessions with the life coach, much less sanctioned for first seeking due process: protection and an order from the court.

### **E. APPLICATION OF COMMON SENSE AND CONSISTENCY**

1. Respondent "contends that WIFE cannot meet the children's needs due to her abuse of prescription medications." Respondent "contends that WIFE is dependent on prescription drugs

which affects her parenting abilities.” These present sense statements misrepresent Petitioner’s actual condition to the Court. Her treatment was successful. She is no longer dependent on medication.

2. Respondent’s statements also expose his inconsistency and call his motives into questions. He alleges she is unfit to parent... And yet... he decided to have another baby with her, and leave the infant in her sole care, after her successful treatment. He delivered the twins into her care while he remained hundreds of miles away. Respondent’s actions belie his pleadings. Using the medical records against Petitioner would have a chilling effect on Petitioner and other parents if this court allows Respondent to steal medical records and bully Petitioner for seeking help.

3. If Respondent’s concern for his children was the true motivation for his discovery efforts and motion to compel, he would have shown respect for the court’s due process. His actions prove a much less salutary intent and those motives should inform the court’s analysis.

### **III.**

#### **MOTION FOR SANCTIONS**

Petitioner was justified in refusing to waive her privilege and in seeking due process through the court. Co-Counsel will respond to the Motion for Sanctions.

The only party who has “failed to comply with the discovery rules”; has “impeded discovery in this matter” and, “as a direct consequence, has caused [a party] to incur additional unnecessary attorneys' fees and costs” is Respondent. Petitioner prays the court protect her legitimate privilege and privacy interests.

#### **PRAYER**

WHEREFORE PREMISES CONSIDERED, Petitioner prays that the Court grant this her Motion for Protection, sustain the claims of privilege as to the IOP records, the life coach records, any other medical records, quash the deposition questions, and grant all relief requested

in Petitioner's Motion.

Respectfully Submitted,

Hays, Haston & Wrampelmeier  
1850 Sycamore Street,  
Denton, Texas 76025  
Tel: (xxx) xxx-xxxx  
Fax: (xxx) xxx-xxxx  
E-mail: Chris@HHW.com

By: Judy Kostura, co-counsel and  
By: /s/ Christopher K. Wrampelmeier  
Christopher K. Wrampelmeier  
State Bar No. 00788721  
Attorney for ALLISON GELBE-PINKUS,  
Petitioner

**NOTICE OF HEARING**

The above motion is set for hearing on February 23, 2019 at \_\_\_\_\_M. in the  
\_\_\_\_\_ District Court of Denton County, Texas.

SIGNED on \_\_\_\_\_.

\_\_\_\_\_  
JUDGE OR CLERK

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document has been delivered or forwarded to all counsel and unrepresented persons as listed below, [ ] by personal delivery or receipted delivery service, or [ ] by certified or registered mail, return receipt requested, by depositing the same, postpaid, in an official deposit under the care and custody of the United States Postal Service, or [ ] by facsimile to the recipient's facsimile number identified below, or [ X ] by e-service to the recipient's email address identified below and the electronic transmission was reported as complete, on this the 20<sup>th</sup> day of February, 2019, in accordance with the Rule 21a of the Texas Rules of Civil Procedure:

s/

---

Judy Kostura

**CERTIFICATE OF CONFERNCE**

Pursuant to Rule 191.2 of the Texas Rules of Civil Procedure, the undersigned certifies that a reasonable effort was made to resolve this dispute without the necessity of court intervention and the effort failed.

s/

---

Judy Kostura



Life Coaching x

Insurance

Any Insurance

BlueCross and BlueShield

Aetna

Cigna

UnitedHealthcare

More +

Issues

ADHD

Addiction

Anger Management

Anxiety

Child or Adolescent

Depression

Eating Disorders

Relationship Issues

Life Coaching x

More +

Sexuality

Gay

More +

Gender

Show only women

Show only men



Rachel Ladov

Clinical Social Work/Therapist, LCSW

"I work as a life coach and therapist for teen girls and women. Whether you're struggling with social and academic stress, worrying about post-college plans, or navigating your career and

Life Coaching

(512) 630-0314

Austin, Texas 78757

View

Email



Sarah Sirbasku Williams

Psychologist, PhD

"As both a clinical psychologist and a Certified Martha Beck life coach, I am well suited for treating both mental health issues (such as depression, anxiety, and ADHD) and helping people

Life Coaching

(512) 872-4758

Round Rock, Texas 78664

View

Email



Dr. Jacquelyn E. Smith Certified Professional Life Coach

"As a Life Coach my goal is to help you uncover your true potential and lead a life that is worth celebrating. I provide support and guidance as a life coach for transforming the issues

Life Coaching

(210) 871-1249

Schertz, Texas 78154

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Email



Anita Lane Coaching

CPC, B.S.

"Are you STUCK or STRUGGLING with: \*painful relationships

Life Coaching

(512) 843-8242

Austin, Texas 78746

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Email







**Better Life Wellness Center, Lake Conroe**  
"I founded Better Life Wellness Center on Lake Conroe to give the families of Montgomery, Conroe, Willis, The Woodlands, Huntsville, Spring, and surrounding areas a serene, private place

Life Coaching

(936) 570-2560

Montgomery, Texas 77356

View Email



**Krysten Mabry**  
BS, LCDC-I  
"Online sessions are available. Are you frustrated in your relationships? Are you struggling with worry and fear in everyday situations? Are you feeling overwhelmed and stressed? As a

Life Coaching

(832) 981-2845

Deer Park, Texas 77536

View Email



**Bob Paluszak**  
Licensed Professional Counselor, MS, LPC  
"At times our responsibilities, emotions, and relationships may create stress and anxiety in our lives. Not knowing where to turn to get help is an uncomfortable feeling. I will help you look at all

Life Coaching

(281) 653-6594

Pearland, Texas 77584

View Email



**Kristin Nunn**  
Licensed Professional Counselor, MA, LPC  
"Teen Girl or Parent of teen girl? Breakup or Divorce? One Time Consulting also. If you are a teen girl struggling with self worth, relationships or self harm I can help. Parent needing guidance to

Life Coaching

(940) 257-2720

Denton, Texas 76201

View Email



**Jennifer Kruse**  
Licensed Professional Counselor, MEd, LPC  
"When the life you are living is not the life you imagined, an alternate perspective could make a difference. I believe in working with individuals from a holistic perspective to create

Life Coaching

(817) 241-2457

Southlake, Texas 76092

View Email



Texas Life Coaching Therapist - L x +

← → ↺

https://www.psychologytoday.com/us/therapists/life-coaching/texas?sid=5c6d7a252aca8&rec\_next=21

☆ Paused J

Psychology Today


Therapists ▾

City, Zip or Name

🌐 US

Log In

Sign Up and Get Listed



Debbie Tudor

Licensed Professional Counselor, LPC-S

"Too busy to leave the office or home? Let's have a Remote Therapy session! Is a parent, spouse, ex, or someone else in your life calling you crazy or too sensitive? My book, It's Not You, It's

Life Coaching


Psychology Today

(972) 905-4004

Rockwall, Texas 75032

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Email



Spencer Consulting Firm and Coaching

LPC Intern, MS

"You Are Not Alone. Together we can get through this! I have worked with adolescents and adults struggling with mental health issues such as depression, low self-esteem, lack of motivation,

Life Coaching


Psychology Today

(281) 645-5525

Houston, Texas 77082

View

Email



Jason Branson

Licensed Professional Counselor, MA, LPC, BCPC

"LIFE IS SUPPOSED TO BE GOOD! I'm here to help custom-tailor a strategy for making this declaration a reality for YOU. Problems with communication? Suffering from anxiety or depression? Is a

Life Coaching


Psychology Today

(972) 528-8023

Plano, Texas 75093

View

Email



Talk It Out Counseling & Psychological Services

Licensed Professional Counselor, MS, LPC, EMDR, PhD(c), PsyD(c)

"I am a Marriage and Family Therapist as well as a Licensed Professional Counselor and currently working towards my PsyD and PhD. I am also EMDR trained. In my work I endeavor to

Life Coaching


Psychology Today

(346) 214-4189

Houston, Texas 77056

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Wellspring Wellness Manifest

MA, MHFA, LCDCI, RSS, BCLC

"Are you feeling stuck in life? Are you feeling overwhelmed with the demands of your life, career, or relationships? Do you have mental health concerns due to substance use and other habitual

Life Coaching

Psychology Today

(210) 625-7689

San Antonio, Texas 78213

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Email



Life Coaching



Maggie Roney

Licensed Professional Counselor, MS, NCC, LPC

"Welcome! My practice focuses on children, teens and adults who struggle with any addiction, domestic violence, sexual abuse, anger depression, anxiety, trauma and recovery, parenting, family

Life Coaching



(469) 844-4921

Wylie, Texas 75098

View Email



InTown Counseling + Consulting

Clinical Social Work/Therapist, MSW, LCSW-S, TTS

"Experience across various social aspects including mental health, substance abuse, and trauma.Treatment modalities depend on patient needs from depression, to anxiety, to issues

Life Coaching



(832) 924-0480

Houston, Texas 77008

View Email



Katie Hermes

LPC Intern, MS, LPC-I

"Are you feeling 'lost', 'stuck', or 'overwhelmed' in your life? Are you thinking everyone seems to have it together while you never seem good enough? Whether you are facing relationship

Life Coaching



(469) 828-7497

Dallas, Texas 75219

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Harley Steen Psychotherapy

LPC Intern, MA

"My deepest professional goal in life is to enable others to discover their own motivations for change and to find within themselves the ability to take responsibility for their thought life

Life Coaching



(512) 766-6866

Austin, Texas 78701

View Email



## BUSINESS COACHING

Business coaching is not therapy. Although our business coaches are also licensed professional counselors, coaching sessions differ from traditional therapy sessions in several ways: Coaches offer active advice and energetic encouragement Coaching sessions focus more on the Here and Now, less on the past and family background Coaching sessions involve structured homework and concrete goal... [CONTINUE](#)

## LIFE COACHING

Through active advice and motivation, you can have greater clarity to create an appropriate plan to achieve specific goals.

Not sure how to start a project you've always wanted to do, or feeling unsure about which direction your company should take? Have you finally decided to take your relationship to the next level but don't know where to begin? No matter what your personal or professional goals are, expert life coaching from Dallas Whole... [CONTINUE](#)

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## CONTACT US

### North Dallas Location

6380 Lyndon B Johnson Freeway  
Suite 299  
Dallas, TX 75240

### Plano Location

Lincoln Legacy One  
6860 North Dallas Parkway



## CONFIDENTIALITY



Almost all material discussed in any therapy session is fully confidential, meaning that the therapist may not disclose personal information about the client to any party without the client's permission.

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