NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA

NO. 43,647

IN THE MATTER OF	**§**	**IN THE DISTRICT COURT OF**
THE MARRIAGE OF	**§**	
	§	
ALLISON GELBE-PINKUS	**§**	
AND	**§**	**510th JUDICIAL DISTRICT**
MARK PINKUS	**§**	
	§	
AND IN THE INTEREST OF	**§**	
TODD PINKUS, THOMAS PINKUS	**§**	
AND LUCY PINKUS, CHILDREN	**§**	**DENTON COUNTY, TEXAS**

MOTION TO COMPEL DISCOVERY AND MOTION FOR SANCTIONS

COMES NOW Respondent, MARK PINKUS, ("HUSBAND"), who files this his *Motion to Compel Discovery and Motion for Sanctions*, and in support of the same would show as follows:

I.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

1. This is contested child custody proceeding in which HUSBAND requests the exclusive right to designate the children's primary residence without a geographic restriction.

2. Petitioner, ALLISON GELBE-PINKUS ('WIFE") has a history of drug abuse and depression, including "doctor shopping" to feed her addiction to prescription medications.

3. In March 2017, WIFE's prescription drug abuse spiraled out of control and she entered a sixty (60) day in-patient drug rehab facility but left after only thirty (30) days. HUSBAND was concerned that WIFE left the rehab facility early and believed she may be unable to care for the parties' minor children if she was still abusing prescription medications.

4. Upon information and belief, in November 2018, WIFE began utilizing the services of a life coach, Tiffany Rodriguez, to assist with bouts of depression shortly after the birth of the parties' youngest child, Lucy.

5. On January 24, 2019, WIFE appeared for her oral deposition and the undersigned attempted to question WIFE regarding her in-patient treatment and therapy sessions with her life coach. WIFE's counsel vehemently objected to these questions, asserted the mental health privilege under Rule 510 of the Texas Rules of Evidence, and instructed WIFE not to answer.

6. By way of this Motion, HUSBAND now seeks the assistance of the Court in compelling WIFE's answers to the deposition questions lodged by the undersigned and related to WIFE's in-patient treatment and sessions with her life coach.

II.

ARGUMENT AND APPLICABLE LAW

A. THE LAW

1. Mental Health Privilege Only Applies to "Professionals."

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). However, the mental health privilege only applies to a "professional," which the rule defines as a person who is: (1) authorized to practice medicine in any state or nation; (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. 510(a)(1).

2. Treatment Records Are Discoverable Under Texas Law.

The Texas Rules of Civil Procedure allow for broad discovery. The Rules 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). 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). 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.

3. "Litigation Exception" to Physician-Patient and Mental Health Privileges.

Both the physician-patient and mental health privileges are limited by several exceptions, including a "litigation exception," which 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). 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). If both parts of the test are satisfied, when requested, the trial court must perform an in-camera inspection and ensure that production is no broader than necessary. *Id.* 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.

4. Federal Regulations Regarding Substance Abuse Records

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. *Id.* The relevant portions of 42 U.S.C.A. § 290dd-2 states as follows:

> " **(a) Requirement.** Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).
>
> **(b) Permitted disclosure**

> **(1) Consent**
>
> The content of any record referred to in subsection (a) may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g).

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. The relevant provisions of the Federal Regulations state as follows:

> **§ 2.12 Applicability**.
>
> (a) *General–(*1) *Restrictions on disclosure*. The restrictions on disclosure in the regulations in this part apply to any information, whether or not recorded, which:
>
> (i) Would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person; **and**
>
> (ii) Is drug abuse information **obtained by a federally assisted drug abuse program** after March 20, 1972 (part 2 program), or is **alcohol abuse information obtained by a federally assisted alcohol abuse program** after May 13,1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment. . . .

42. C.F.R § 2.12 (emphasis added).

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. The regulations provide, in relevant part, as follows:

> **§2.23 Patient access and restrictions on use.**
>
> (a) ***Patient access not prohibited***. **These regulations do not prohibit a part 2 program from giving a patient access to their own records**, including

> the opportunity to inspect and copy any records that the part 2 program maintains about the patient. The part 2 program is not required to obtain a patient's written consent or other authorization under the regulations in this part in order to provide such access to the patient.
>
> (b) ***Restriction on use of information***. Information obtained by patient access to his or her patient record **is subject to the restriction on use of this information to initiate or substantiate any criminal charges against the patient or to conduct any criminal investigation** of the patient as provided for under §2.12(d)(1).

42 C.F.R. §2.23 (emphasis added).

B. APPICATION OF LAW TO FACTS

1. Contents of Life Coach Sessions are Discoverable

WIFE should be compelled to answer deposition questions regarding the sessions with life coach because such information is relevant, discoverable, and the life coach is not a "professional" for purposes of the mental health privilege under TRE 510 (a) (1). The life coach is not authorized to practice medicine. The life coach is not licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental health or emotional disorder. WIFE sought advice (not diagnosis, treatment, or evaluation) from the life coach in connection with her "depression" and her negative feelings towards her children. She did not engage life coach for treatment in connection with her drug abuse. *See* Tex. R. Evid. 510(a)(1)(C). Moreover, due to the life coach's lack of qualifications, WIFE could not have reasonably believed the Life Coach to be a "professional" under the Rule. Accordingly, WIFE should be compelled to answer deposition questions regarding her sessions with the life coach because they are relevant, discoverable, and are not protected from disclosure by the mental health privilege.

2. Treatment Records are Not Privileged or Protected by Federal Law

In this case, HUSBAND contends that WIFE cannot meet the children's needs due to her abuse of prescription medications. As such, the Treatment Records and WIFE's testimony

regarding the same are relevant to the Court's best-interest analysis when determining custody of the children. These Treatment Records (and WIFE's testimony regarding the same) are also discoverable and not privileged because HUSBAND contends that WIFE is dependent on prescription drugs which affects her parenting abilities. *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); *In re Walters*, 39 S.W.3d 280, 289 (Tex. App.—Texarkana 2001, no pet.) (consideration of a child's best interests may include whether a parent has a dependence on drugs or alcohol). Additionally, the Treatment Records are not privileged because they fall within the "litigation exception" contained in Rule 510 (d)(5) ("The privilege does not apply if. . . a party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense. . ."*see also In re Morgan*, 507 S.W.3d 400, 404 (Tex. App.—Houston [1st. Dist.] 2016, no pet.)(orig. proceeding).

The Treatment Records are not protected from disclosure by federal law because HUSBAND does not seek disclosure of same from a "federally assisted" drug or alcohol abuse "program." As a patient of the facility, WIFE has the right to custody and control of her own in-patient records and the information contained therein. Likewise, HUSBAND has the right to question WIFE regarding the substance of these records by way of deposition. Moreover, federal law does not restrict the use of the Treatment Records in this proceeding since it's a civil proceeding and not a criminal proceeding. 42 C.F.R. § 2.23. WIFE should therefore be compelled to answer deposition questions regarding the Records.

III.

MOTION FOR SANCTIONS

The deposition questions which WIFE refused to answer are relevant, discoverable, and necessary to the issues involved herein. HUSBAND would show the Court that WIFE's failure to comply with the discovery rules have impeded discovery in this matter which, as a direct consequence, has caused HUSBAND to incur additional unnecessary attorneys' fees and costs. Further, as a direct result WIFE's conduct, the ultimate resolution of this matter may be unnecessarily delayed. Accordingly, HUSBAND requests the Court impose sanctions against WIFE under Rule 215 of the Texas Rules of Civil Procedure, including, but not limited to, an award of attorneys' fees and court costs against Respondent for her failure to comply with the discovery rules, which necessitated the filing of this Motion.

PRAYER

WHEREFORE PREMISES CONSIDERED, Respondent, MARK PINKUS prays that the Court grant this Motion and all relief requested herein and require WIFE to answer the deposition questions which she refused to answer.

Respondent, MARK PINKUS, prays that the Court impose discovery sanctions against Petitioner pursuant to Rule 215 of the Texas Rules of Civil Procedure and require Petitioner to reimburse Respondent for the additional litigation costs and attorneys' fees incurred as the result of Petitioner's discovery abuse.

Respondent, MARK PINKUS prays for all further relief to which he may be justly entitled.

Respectfully Submitted,

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By: /s/ Aimee Pingenot Key
Aimee Pingenot Key
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Attorney for MARK PINKUS,
Respondent

NOTICE OF HEARING

The above motion is set for hearing on February 23, 2019 at _____.M. in the 510th 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 19th day of February, 2019, in accordance

with the Rule 21a of the Texas Rules of Civil Procedure:

Karl Hays

/s/ Aimee Pingenot Key
Aimee Pigenot Key

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/ Aimee Pingenot Key
Aimee Pigenot Key