DISCLOSURE OF PSYCHIATRIC TREATMENT RECORDS IN CHILD CUSTODY DISPUTES

REPORT OF THE TASK FORCE ON DISCLOSURE OF PSYCHIATRIC TREATMENT RECORDS IN CHILD CUSTODY DISPUTES

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INTRODUCTION

When estranged parents fight over the custody of their children, psychiatrists may find themselves in the thick of a legal skirmish. If one parent has received psychiatric treatment, the opposing parent, the guardian at litem, or the court may seek access to the parent-patient's treatment records. Also, if the child who is the subject of a custody dispute has undergone psychiatric treatment, the child's records may be demanded by one parent or the other. In some cases, the psychiatrist is subpoenaed to testify in the custody proceeding.

The scope of judicial authority to compel disclosure of information revealed in psychiatric treatment for use in custody disputes has been litigated with growing frequency in recent years. Courts deciding custody cases under the "best interest of the child" standard tend to liberally admit a wide range of evidence that might be relevant to the issue of custody. Thus, it is not surprising that, when one parent has undergone psychiatric treatment, the other may view disclosures made in that treatment as a potential source of damaging evidence that may influence the court in deciding custody. Although this liberal stance on admissibility of evidence in custody proceedings is often appropriate, compulsory disclosure of information gained in confidential psychiatric treatment and the admissibility of such information in evidence generate heavy social and personal costs which many courts have failed to take into account.

The compelled testimony by a treating psychiatrist or disclosure of treatment records in a custody dispute violates the patient's expectation of confidentiality. This expectation and the trust in which it is based are at the core of the relationship between therapist and patient and are essential to effective psychiatric treatment. Not only can compelled disclosures destroy existing treatment relationships, but the threat of disclosure can discourage individuals from seeking necessary treatment.

In general, the law recognizes that protecting the confidentiality of the psychiatrist/patient relationship is necessary for effective psychiatric treatment, and thus offers important personal and societal benefits. Statutes in most states recognize a testimonial privilege which erects barriers against compulsory disclosure of therapeutic information in legal proceedings. However, most of these statutes afford uncertain protection of psychiatric records in child custody disputes, and judicial decisions interpreting them have varied widely. Some courts have upheld the privilege, favoring a compulsory psychiatric examination of a parent seeking custody when a substantial question is raised about that parent's psychological condition.[1] Other courts have ruled that, by seeking custody, a parent places his or her mental condition at issue and thus automatically waives the statutory physician/patient privilege.[2] Still other courts, although declining to find that petitioning for custody amounts to an automatic waiver of the privilege, have ordered disclosure of treatment records in some cases when the parent's mental health is at issue. In some of these cases, courts have emphasized that disclosure is required if circumstances indicate that information disclosed in treatment may provide evidence of abuse or neglect.[3]

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1. *E.g.*, Husgen v. Stussie, 617 S.W.2d 414 (Mo. App. 1981).
2. *E.g.*, Baecher v. Baecher, 396 N. Y.S. 2d 447 (1977). These courts, in essence, view parents disputing custody as coming within the patient-litigant exception to the protection of the privilege statute.
3. *E.g.,* In re marriage of Norby, 705 P.2d277 (Wash.App.1985): Matter of Yon Goyt 461 So.2d821 (Ala. Civ. App. 1984). Indeed, in general, evidence of abuse is excluded from the protection of the privilege either explicitly or implicitly under child abuse reporting statutes imposing a duty to report child abuse. See Cal Penal Code §§ 11165-72.

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This Task Force takes the position that a court deciding custody should permit the disclosure of confidential information revealed in psychiatric treatment[4] only when such information is likely to be of real importance to the custody determination and is not available from other sources. Because psychiatric treatment offers valuable social and individual benefits and because confidentiality is critical to the success of this treatment, confidentiality should be breached only when substantial evidence before the court indicates that the parent whose treatment records are at issue may be psychologically unfit to function as a parent, and that information revealed in psychiatric treatment will be important in resolving this issue. Moreover, by employing independent psychiatrists to review the record, courts can assure that only information relevant to the patient's parenting capacity is disclosed. Through this approach, disclosure will be permitted in cases in which it is necessary to assure the child's well-being, while confidentiality of the therapeutic relationship is protected to the maximum extent possible.

DEFINING THE CONFLICT: THE INTERESTS AT STAKE

Information from a parent's psychiatric treatment may be sought in a custody proceeding in a variety of situations. Consider the following cases:

CASE I. Two young married professionals have a four-year old daughter. After the mother suffered a setback at work, the father discovered a note from her explaining that she was moving to another city to change jobs and start a new life. She apologized for leaving so unexpectedly, wished her husband well and asked him to take care of their daughter. The father entered psychotherapy for depression and to address his feelings of abandonment. After three months of silence, the mother telephoned to announce that she lived in a city 3,000 miles away, had a new job, and desired joint custody of her daughter. The father refused to agree to joint custody and initiated custody proceedings in court.

Both parents petitioned for sole custody. During the dispute, the mother became aware of the father's psychiatric treatment and requested access to his treatment records. The father countered by requesting records of outpatient psychiatric treatment undergone by the mother three years previously.

CASE 2. During the two years following their divorce, a couple shared joint custody of their nine-year old daughter. The father suffered from depression and, since the divorce, had been treated periodically as an outpatient for a major affective disorder. While the child and her father were staying at a summer resort, the father attempted suicide by slashing his throat. From the adjoining room, the child heard the noises and discovered her injured father. She telephoned her mother in another city who, in turn, contacted the police. Emergency surgery saved the father's life, but he was hospitalized for six weeks thereafter in a psychiatric unit.

Following this episode, the mother petitioned for sole custody of her daughter and sought to limit the father's contact to supervised visits. The father opposed any change in the original joint custody arrangement. The mother petitioned the court to provide records concerning the father's hospitalization following the suicide attempt, and concerning his outpatient psychiatric treatment during the preceding two years.

CASE 3. A father of four children, ages 5 to 15, sought a divorce, finally acknowledging his homosexuality which he had hidden from everyone, including his wife. The two worked out an amicable joint custody agreement. Three years after the divorce, however, the mother expressed concern about the father's conduct. She returned to court and petitioned for sole custody of the children, alleging that the father had involved himself with a number of men and was exposing the children to his "promiscuous" lifestyle. She contended that his relationships had a negative influence on the children. After learning that the father had been seeing a psychiatrist since the divorce, but not knowing the reason for the treatment, the mother requested the court to issue a subpoena compelling the psychiatrist to testify.

As these cases suggest, disclosure of information obtained in psychiatric treatment is sought in a variety of situations. Sometimes access to a parent's psychiatric record is sought simply as part of a "fishing expedition." Parties in custody disputes have every incentive to gather as much potentially detrimental information about the other parent as might be available. Many divorce lawyers, upon learning that the opposing parent was in therapy, routinely petition for disclosure of psychiatric records or subpoena the treating psychiatrist to testify. In Case I above, the parties seem to be engaged in such a fishing expedition. There is no indication that the psychiatric records will reveal important evidence relevant to either parent's ability to provide for the needs of the child. On the other hand, as suggested in Case 2, a severe psychiatric disorder can affect a parent's competence to function as a fit parent. In such a case, information from the psychiatric treatment records could be very important to the court in deciding issues related to custody and visitation, and compulsory disclosure of such records would seem appropriate. In other cases, such as Case 3, information from the psychiatric treatment could be relevant to custody issues, but the information may be available from other sources. In this case, for example, an *in camera* interview with the children might provide the court with information about their life with their father. In contrast, testimony by the father's psychiatrist could cause serious harm to him while yielding only marginally useful information.

These cases illustrate the key factors relevant to the balance that must be struck. Clearly the state has a compelling interest in avoiding placement of a child in the custody of a parent who is psychologically unfit to provide adequate care, or who, because of psychiatric disorder, presents a risk of harm to the child. Information that might prevent such a detrimental placement is highly relevant. Thus it is not surprising that courts often are eager to learn whatever a treating psychiatrist may know or have recorded about a parent's mental health. However, a routine practice of compelling disclosure often could result in costs, to both parents and children, that far outweigh the beneficial value of this information.

Treatment records frequently contain information about the parents, the child, and other family members that may distress or stigmatize the parent/patient and the child both at the time of disclosure and in the future. A parent may respond to the prospect of coerced disclosure of treatment information by deciding not to contest custody, or by making substantial concessions about support and property to avoid adjudication. In effect, the threat of court-ordered disclosure can too easily become a strategic weapon for the other parent.

Compelled disclosure of treatment information will impair the potential benefits of treatment. Indeed, parents who anticipate the possibility of divorce in their future could well be deterred from seeking psychiatric care, a decision that will be detrimental to both the parent and the child. Unhappy spouses often enter psychotherapy in response to marital stress; if successful, such treatment can benefit all family members. However, individuals will be less inclined to enter treatment if disclosures to a psychiatrist could later be used in a custody dispute. In general, a cost to society is incurred if persons who experience impairment in functioning or in relationships due to psychological difficulties are reluctant to seek treatment out of fear that private disclosures may later be made public. The cost may be increased when psychiatrists anticipating the possibility of coerced disclosure feel ethically obligated to warn patients at the commencement of treatment that the promise of confidentiality is qualified. Such a practice potentially could undermine the therapeutic relationship, whether or not the patient ever actually faces a custody battle.

When the child is in psychiatric treatment, access to information obtained in that treatment may also be the subject of a petition in a custody proceeding. Disclosure of the child's psychiatric record may seriously undermine the therapeutic relationship between the child and therapist with resulting harm to the child. In the context of marital

4. Such disclosure could take the form of either compelled testimony by the treating psychiatrist or compelled disclosure of treatment records.

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dissolution, the child's relationship to a therapist may be an important source of stability and security. The child's trust in that relationship can be destroyed if the treating psychiatrist is required to reveal statements by the child about the parents in a judicial proceeding. Thus, a court order allowing access to information from the child's psychiatric treatment in a custody dispute may be contrary to the best interest of the child even if the information may be of some value in the custody decision.

Legislatures and courts attempting to devise a coherent policy to deal with the admissiblity of confidential psychiatric information in custody proceedings face a difficult task of balancing the two competing interests -- the potential value of the information to the decision-making process versus the potential harm to a parent and/or the child. A policy of routinely overriding the psychiatrist/patient privilege will seriously compromise the benefits of psychiatric treatment, sometimes in situations when the disclosures will be of minimal value to the custody decision. On the other hand, a policy that too severely restricts disclosure may result in courts making custody decisions without the benefit of important information about the parent's functioning. Although this latter response pro- vides maximum protection of the therapeutic relationship, it does so at an unacceptable cost, given the paramount importance of the welfare of the child in the custody dispute.

TASK FORCE RECOMMENDATIONS

Judicial decisions concerning disclosure of information obtained in psychiatric treatment in custody proceedings often give inadequate attention to harms that may result from such disclosure. Moreover, state legislatures have not given courts making this decision adequate guidance about factors relevant to the disclosure determination. Two factors may lead courts to order disclosure with- out adequate consideration of the possible, harmful effects. First, there is a tradition of liberal admissiblity of evidence in divorce custody proceedings. Since a wide range of evidence may be relevant to the decision under the "best interest" standard, absent a good reason for excluding evidence, it usually will be admitted. Secondly, courts may be influenced to order disclosure of psychiatric records by the fact that the psychiatrist/patient privilege which protects these records is generally not applicable to custody proceedings involving abuse and neglect.[5] Since the privilege is often set aside in abuse and neglect proceedings, courts tend to respond similarly in what may appear to be analogous divorce custody cases.

In the opinion of the Task Force, a sharp distinction should be drawn between the typical divorce custody proceeding and the relatively uncommon divorce case in which a parent's capacity to care adequately for the child because of "emotional instability" is at issue. In most divorce custody disputes, including those in which one parent has received psychiatric treatment, both parents are capable of providing for the child's care. To be sure, a parent's psychiatric records might provide "useful" evidence for the other parent because candid disclosures to a psychiatrist may be embarrassing or present a parent in a less than favorable light. However, if there is no substantive evidence that the parent who has undergone psychiatric treatment presents a risk of harm to the child or is unable to provide the child with adequate care, whateyer information might be gained from the disclosure is not likely to be intrinsically important to the court's judgment about custody. Moreover, compulsory disclosure of such information is likely to result in substantial and unjustified costs of the kind described above.

Based on this analysis, the Task Force recommends that courts be directed to order disclosure of information revealed in psychiatric treatment in divorce custody proceedings only in situations in which one disputant offers substantive evidence that the parent who has received psychiatric treatment is currently unable to provide adequate care for the child, and that the information sought is likely to support this allegation. In essence, the standard requires a threshold showing of evidence of parental unfitness, a concept with which courts are very familiar. Courts currently make inquiries into parental unfitness in child protective proceedings dealing with abuse and neglect and termination of parental rights, and occasionally in divorce custody proceedings. A parent is unfit to fulfill custodial responsibilities if (i) there is a substantial risk that the parent will inflict serious physical or emotional harm on the child; or (ii) the parent is unable to fulfill the child's basic physical and emotional needs at an adequate level.

This approach recognizes and accommodates the two important, but conflicting interests that are at stake when one parent seeks disclosure of the other parent's psychiatric record. If a parent has experienced a serious psychiatric disorder that may impair his or her ability to care for the child, it is critically important that pertinent information regarding the parent's functioning be presented to the court deciding custody. For example in Case 2, the father's suicide attempt in the presence of the child suggests that his mental illness may lead him to engage in conduct that is harmful to the child. Given that the hospitalization was recent, the court would legitimately insist on inspecting the treatment record or requiring testimony by the treating psychiatrist before deciding the issues of custody and visitation. On the other hand, the important value of confidentiality in psychiatric treatment should not be sacrificed in situations such as Case 1 in which one parent is engaging in a "fishing expedition" in seeking psychiatric records of the other parent.

This approach also accommodates two strong legal policy goals that are reflected in current law. Privilege statutes are an explicit recognition that the law recognizes the societal and individual value of confidentiality in the doctor/ patient relationship and of the harm that may result if such information is disclosed without good cause. On the other hand, protection of the welfare of children from the harmful conduct of their parents is an important policy goal. For this reason, the psychiatrist/patient privilege is restricted and set aside in child protection proceedings when parental conduct may create a risk of harm to the child. The Task Force recommendation uses a similar approach in divorce custody proceedings. Moreover, it conforms to the approach adopted by Congress in the Alcohol, Drug Abuse and Mental Health Administration Act. This statute exempts child abuse proceedings from its stringent regulations protecting the confidentiality of alcohol and substance abuse treatment records.[6]

The essential features of the approach recommended by the Task Force are set forth below.

1. Criteria for determining when disclosure is appropriate.

In evaluating whether the disclosure of psychiatric treatment information is necessary to assist the court in making a judgment about the parent's current fitness to care for the child, the following criteria should be considered:

i. The recency/chronicity of the psychiatric treatment.

Treatment for psychological problems is likely to be relevant to the judgment about a parent's current ability to care for his or her child only if the treatment is fairly recent. In the absence of any indication of a recurrence of a psychiatric disorder, it is unlikely that the records of a patient's condition more than 3 years earlier will shed any light on the adequacy of the parent to provide for the needs of the child currently.

5. See note 3.

6. *E.g.,* 42 U.S.C. § 5290 AA-290FF (1979). In this statute, Congress recognizes that the success of drug abuse and alcohol treatment will depend on confidentiality of treatment records; without the assurance of confidentiality, many persons would not be inclined to seek such treatment. However, not only is the statutory protection not applicable to child protection proceedings, but some courts have held that records of alcohol and drug treatment are admissible in a private custody proceeding if sus- pected child abuse is at issue. e.g., Matter ofDoe Children, 402 N. Y.S.2d 958 (1978). Susan W. v. Ronald A., 558 N.Y.S.2d 813 (1990).

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ii. The severity of the psychiatric disorder and the nature of the treatment.

If a parent has suffered from a seriously disabling mental illness, the court may well determine that obtaining as much information as possible about the illness and the treatment is necessary to the judgment about the parent's fitness to care adequately for the child. (Of course, the relevance depends in part on how recently the treatment occurred). On the other hand, if a parent seeks outpatient psychotherapy because of situational stresses or minor problems with functioning, such information is likely to have little bearing on the judgment of whether that parent can provide care for the child. Many persons enter psychotherapy when they experience periods of dissatisfaction or unhappiness in their marriage. Indeed, as mentioned above, psychiatric treatment often represents an effort to salvage the marriage. Information from this type of treatment is unlikely to be a fruitful source of evidence about parental fitness. It would be an ironic and unfortunate result if fear of disclosure of psychiatric records in a future custody dispute should discourage parents from seeking treatment to resolve stresses in the marriage.

In general, patients in outpatient psychotherapy are less likely to experience the kind of disabling impairment in their functioning that would be relevant to the question of parental fitness than are those whose treatment involved hospitalization. Of course this is not always the case; individuals in outpatient treatment can be seriously ill, and hospitalization in itself does not demonstrate a level of impairment that calls parental fitness into question. Especially when a litigating parent petitions for records of outpatient treatment, however, the court should look carefully for confirming extrinsic indicators that disability may have impaired parental functioning.

iii.Reliable independent evidence of impairment

A petition for disclosure of information about a parent's psychiatric treatment should be supported by other reliable evidence about the parent's current functioning that strongly indicates that the parent's capacity to provide adequate care for the child has been seriously compromised by the emotional disorder for which the parent is receiving treatment. An extended hospitalization in itself could constitute such evidence. On the other hand, a parent might be receiving treatment in outpatient therapy for an extended period of time and continue to function as the child's primary caretaker. In this situation, unless the opposing parent can produce substantial independent evidence to support the allegation that during this time the parental care has been substantially impaired, then psychiatric information should not be disclosed.

iv. Insufficiency of evidence from other sources.

In some cases the evidence that might be revealed through testimony or psychiatric records about parental fitness will be available from other sources and the compelled treatment information, in effect, is extraneous. Disclosure should be permitted only if a reliable judgment about parenting cannot be made without this source of information. For example, an Alabama court found that, although, in the case at hand, the disclosure of records was inappropriate, it was harmless error because so much evidence of the mother's unfitness aside from the records had been presented in the case.[7] In general, a party seeking access to confidential treatment information should be required to demonstrate that *evidence important to the judgment of a parent's fitness that is not otherwise available to the court* will be found in the psychiatric records.

v. Alternative of court-ordered contemporaneous psychiatric evaluation is inadequate substitute .

Courts frequently order psychological evaluations in custody proceedings either of a parent or of the entire family. If one parent's fitness is at issue, the court deciding custody should consider whether a psychological evaluation could provide necessary information about that parent's capacity to adequately care for the child. In truth, most experts on child custody are skeptical about the value of court-ordered psychiatric evaluations of a parent alone. A more useful source of information for the court (although still limited) is an evaluation of both parents and the children.[8]

2. Petition for disclosure of child's psychiatric records.

The Task Force recommends that the same general approach be applied when a party seeks access to information from a child's psychiatric treatment in a custody dispute. Compulsory disclosure of such information should not be ordered unless a party seeking disclosure has provided substantial support for the allegation that the disclosure contains evidence not otherwise available that one parent is unfit to provide adequate care for the child. Some of the criteria considered by the court deciding about compulsory disclosure of information about a parent's treatment will not be applicable here. For example, the severity of the child's disorder is not directly relevant to the disclosure decision. Other criteria, however, will be the same in this context. The court should consider, for example: (i) whether the child's treatment was recent; (ii) whether the petitioner has offered substantial independent evidence that the parent's ability to care for the child is impaired; (iii) whether sufficient evidence about the parent's unfitness is available from other sources; (iv) whether a court-ordered family evaluation is an adequate substitute.

3. Procedure for obtaining information from records.

If the court should conclude that important information relevant to the determination of a parent's fitness for custody is contained in confidential psychiatric records or available from the treating psychiatrist and is not otherwise available to the court through extrinsic evidence, then the following procedure should be employed:

The court should appoint an independent psychiatrist whose participation is approved by both parties. This psychiatrist should be directed to review carefully the psychiatric treatment records and also to confer with the treating psychiatrist to gather general information about the parent's condition and treatment, without delving unnecessarily into sensitive and confidential material. The independent evaluator should be directed to provide a summary report to the court describing all information derived from the treatment records and the treating psychiatrist that is directly relevant to the issue of the parent's ability to provide adequate care for the child. Alternatively, the independent psychiatrist could be directed to screen out material that is not relevant to the parent's ability to care for the child before making records available to both parties and to the court.

SUMMARY OF TASK FORCE RECOMMENDATIONS

I. The court, in a divorce custody proceeding, should order compulsory disclosure of confidential psychiatric treatment information of either the parent or of the child only when the petitioning party has demonstrated that such disclosure is likely to provide important evidence that is otherwise unavailable that one parent is unfit to care for the child.

II. The court should order compulsory disclosure of confidential psychiatric treatment information only after all of the following findings are made:
   1. The petitioner must demonstrate that the treatment is recent enough to be relevant to the custody decision.
   2. The petitioner must provide some substantive evidence that the parent's capacity to care for the child may be seriously impaired.
   3. The court must conclude that the compulsory disclosure of records is necessary because sufficient evidence regarding the parent's impairment is not available from other sources.

7. Matter ofVon Goyt, 461So.2d 821(Ala. Civ. App. 1984).

8. American Psychiatric Association Task Force on Child Custody, Child Custody Consultation Guide (1988)

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4. The court must conclude that the alternative of a court-ordered contemporaneous evaluation of the parent or family is not adequate as a substitute for information in psychiatric records.
5. The court must conclude that, given the severity of the parent's disorder and the nature of the treatment, disclosures made in that treatment are likely to be relevant to that parent's fitness to care for the child.

III. If a court decides that compulsory disclosure of confidential psychiatric treatment information is necessary to resolve the custody dispute, an independent court-ordered psychiatrist should review the records, confer with the treating psychiatrist, and submit a report to the court containing only information that is relevant to a parent's fitness to care for the child. Alternatively, the independent psychiatrist should remove from the records information that is not relevant to parental fitness, after which the records should be made available to both parties and the court.

CONCLUSION

Preserving the confidentiality of psychiatric treatment records benefits patients, their children and society in important ways. The legal privilege that protects the confidential relationship between psychiatrist and patient is not something that should lightly be set aside simply because a parent seeks custody of his or her child in a legal proceeding. When one parent seeks access to the confidential psychiatric treatment information of the other parent or of the child in a custody dispute, the court should compel disclosure of these records only when doing so is essential to protect the child's best interests. The approach that the Task Force recommends is to allow access to treatment information only when it will offer relevant evidence regarding the parent's fitness to care adequately for the child. This approach recognizes the important value of protecting the welfare of the child in the custody decision; at the same time, it protects the confidentiality of the psychiatrist/patient treatment relationship in situations in which the information in records would be of only marginal benefit to the custody decision. The Task Force believes that this approach offers the optimal recognition and accommodation of two important values without un-duly sacrificing either one.

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