

Children's' Rights to Confidentiality

Introduction

One of the most common legal problems for social workers involves responding to a subpoena for the records of child clients when the parents are involved in custody litigation. A simple legal response is often difficult to formulate due to the multiple legal issues and interests presented, including:

- What is the right of each parent to access the minor child's treatment records?
- What information is contained in any existing court order or voluntary separation agreement?
- What is the age of the child involved?
- In the therapist's opinion, is disclosure of information during legal proceedings in the best interests of the child?
- Is there a danger that a child may be abused or neglected by a parent if information is disclosed to the parent?
- Is one of the parents attempting to misuse the clinical record to harm the other parent?
- Has a guardian ad litem (GAL) or law guardian been appointed by the court to protect the child's interests?
- What are the rights of the GAL to access the child's treatment records?
- Must the parents provide written consent before information may be disclosed to a GAL?

In the Matter of Berg Court Decision

The Supreme Court of New Hampshire addressed these issues in an unpublished case decided October 18, 2005. The facts involved a divorced couple with four children, shared custody by the parents, and a failure of visitation with the father. The circumstances surrounding the difficulties with paternal visitation by the children were subject to dispute.

Three of the children participated in ongoing individual therapy to address their resistance to visitation and the relationship with their father. After the father filed a motion for contempt against the mother for interfering in his relationship with the children, the mother filed for a modification of the visitation schedule. A GAL was appointed. The father requested copies of the children's therapy records, and the therapist refused to produce the records, indicating that disclosure was not in the children's best interests.

The GAL filed a motion to have the children's records sealed by the court and not subject to disclosure to the father. The lower court declined to seal the records relying on its conclusion that the parent had a constitutional right to access his children's records. An appeal followed and the case was transferred to the state supreme court.

In a detailed opinion, the court clarified the judiciary's ultimate discretion to make decisions concerning the release of records, based on the facts of the case, even though it may affect the parents' right to access information about their children. The court concluded that parents "do not have the exclusive right to assert or waive the privilege on their child's behalf. The trial court has the authority and discretion to determine whether assertion or waiver of the privilege is in the child's best interests."

Although it failed to provide a specific procedure for asserting a child's right to privilege, the court stated that attempts to assert or waive privilege by a number of third parties would not be definitive.

This includes therapists, parents, guardians or GALs. The court found that a GAL could be appointed solely to determine whether therapist-client privilege should be asserted or waived, and that such a limited GAL or the court itself, could have access to the therapy record to make such determinations. Thus, the result could be a release of the records to the judge or to a stranger to the minor child (a court-appointed GAL), but not to a parent with legal custody, in some instances.

The court also acknowledged that minor children may be capable of asserting or waiving privilege if they are of sufficient maturity. Three factors were outlined for consideration:

- the child's age, intelligence, and maturity;
- the intensity with which the child advances his preference; and
- whether the preference is based upon undesirable or improper influences.

Finally, the New Hampshire court ruled that the HIPAA Privacy Rule does not create an absolute right in the father to access his children's therapy records.

HIPAA Privacy Rule Applicability

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) authorized the promulgation of federal regulations regarding medical privacy (the Privacy Rule) which were amended in 2002. The HIPAA Privacy Rule provides that generally the parents of a minor child are deemed to be the child's "personal representative" for purposes of exercising the child's privacy rights, but also provides several bases for denying a parent access to a child's records.

- The Privacy Rule follows existing state law as to access to records by parents of minors. Thus, if a state allows minors of a certain age to consent to treatment independently, and also prohibits disclosures to parents, then the practitioner should deny access by the parent.
- The Privacy Rule also permits practitioners to deny access by parents if the parents previously agreed that the minor child's information would be kept confidential from the parents.
- The Privacy Rule permits providers to deny access by a personal representative if access is likely to cause substantial harm to the client. An example would be a situation where the social worker has legitimate concerns about potential child abuse by the parent who is requesting the minor's records. Social workers may choose not to treat the parent as the minor's personal representative under those circumstances by following certain procedures. A written determination of the denial is to be provided to the parent, and a right is provided for the parent to have the initial denial reviewed by another mental health professional of the provider's choosing. A recommendation regarding access by the reviewing professional becomes mandatory for the treating clinician to follow. In addition, HIPAA requires that all documentation about the request by a personal representative and any denial of access is to be included as part of the medical record.
- The Privacy Rule permits practitioners to deny access to psychotherapy notes that are maintained separately from the general clinical file. Thus, having notes from child therapy sessions in a file separate from the child's formal record of evaluations, summary progress notes, session start and stop times, dates of treatment, and billing information may provide additional privacy protection for child clients.

Analysis and Conclusions

The New Hampshire court has essentially held that minors have a right to privacy in their psychotherapy records that is separate from that of their custodial parents, if, in the court's

determination, access by the parent may interfere with the child's treatment. This interpretation goes a long way towards protecting children's access to confidential treatment, but potentially at a cost to parental rights.

The court's holding that therapists may deny custodial parental access to minors' records if providing the record could "interfere with treatment," shifts an enormous amount of authority in New Hampshire to the mental health professional in derogation of parental rights. This ruling suggests that if parents are involved in a custody case, therapists should not automatically hand over records for litigation purposes, even if there is parental consent, but instead may consider the effect of the disclosure on the child before deciding whether to take legal steps to block requests for disclosure.

The court's holding does not squarely address a parent's general right to access records outside of legal proceedings. Thus, left unanswered among other questions is the issue whether, in New Hampshire, the same parent could obtain copies of a record for other purposes deemed legitimate by the courts, such as to review the appropriateness of treatment and/or to facilitate a review of the treatment.

Clinical social workers should consider how to address confidentiality when the children of divorced or separated parents enter treatment, even if they are not currently involved in legal proceedings. One option may be for the therapist to notify the parents that the records may not be accessible for litigation purposes if a court determines that disclosure would be detrimental to the child.

The New Hampshire court's interpretation of the HIPAA provisions for denial of access to parents was limited and did not clarify the full process that is to be utilized if such a denial is implemented. Social workers should be sure to follow the procedural steps outlined by the Privacy Rule in applicable situations.

Resources

In the Matter of Berg, --- A.2d ---, 2005 WL 2648915 (N.H.).

U.S. Department of Health and Human Services. (2002, August 14). *Standards for privacy of individually identifiable health information: Final rule*. 45 CFR Parts 160 and 164. *Federal Register* 67, no. 157. §§ 164.501, 164.502 (g)(1), 164.524 (Regulation Text, Unofficial Version, December 28, 2000 as amended: May 31, 2002, August 14, 2002, February 20, 2003, and April 17, 2003) [Online]. Retrieved from <http://www.hhs.gov/ocr/combinedregtext.pdf> on April 18, 2006.