

Full Mental Disclosure

Disclosing Often-Crucial Mental Health Records In Child Custody Cases

It is axiomatic that, in every child custody case, a judge is charged with determining what is in the best interests of the child. What happens, though, when one parent is seeking treatment for a psychological condition and refuses to disclose their mental health records? It is certainly no stretch of the imagination that a parent's mental health condition, treatment, and prognosis is a crucial factor in determining what is the best interests of the child. Yet, under Pennsylvania law, a parent cannot be compelled to turn over their mental health records in child custody litigation. This has been underscored in the recent Superior Court of Pennsylvania case of *M.M. v. L.M.*

In *M.M.*, the father of the minor child was diagnosed with bipolar personality disorder. He had multiple hospitalizations in mental health facilities due to his condition and exhibited troubling behavior throughout the custody litigation. In fact, the father allegedly assaulted the maternal grandfather during a custody exchange and bit his ear.

Following the incident with the maternal grandfather, the father voluntarily checked himself into an inpatient psychiatric facility and remained hospitalized for one week. Understandably, the mother filed a petition seeking to compel the father to release the mental health records concerning the hospitalization. The father objected and, ultimately, the trial court directed the father to produce the records. The trial judge, in part, based this decision on the severity of the father's condition.

In reversing the trial court, the Superior Court cited to the Mental Health Procedures Act (MHPA) in the seminal case addressing this issue, *Gates v. Gates*, which was decided by the Superior Court in 2009. *Gates* interpreted the MHPA



for the first time in a custody case and held that a party cannot be compelled to disclose mental health records. The reasoning behind this general rule is that requiring a party to disclose their records could place a chilling effect on individuals when seeking mental health treatment.

In *M.M.*, the Superior Court found that the trial court erred in requiring the father to turn over these records. The Superior Court held that concerns over the severity of the father's condition did not vitiate the expectation of confidentiality the father held with regard to his mental health records. Further, the court found that there were less intrusive alternatives to ascertain the nature of the father's psychological condition, including an updated court-ordered psychological evaluation.

The court addressed the mother's claim that the father had waived the statutory right of privilege regarding his mental health records. Specifically, the court found that just because father submitted to a court-ordered psychological evaluation in 2010 and consented to his treating psychiatrist to be deposed, it did not work as a waiver for his mental health records in the future. In short, the court found that, absent an express and clear waiver by the father, his privilege

would be protected.

The decision in *M.M.* has a broad impact on custody disputes in Pennsylvania when one party suffers from a mental health condition. Indeed, competing interests exist when trying to paint a full and accurate picture of the parties' parenting ability in front of the judge and, at the same time, not discouraging one of the parents from seeking mental health treatment. However, what potentially gets lost in the mix is what is in the best interests of the child and whether a parent's mental health condition impacts their ability to safely parent.

The parent who seeks mental health treatment is the exclusive holder of the privilege. Thus, that parent could disclose certain records and refuse to disclose others. It is conceivable that a parent, when making progress with his or her mental health condition, would be glad to disclose those records and allow a judge or a court-ordered psychologist to examine those. This could certainly minimize the true severity of the condition. At the same time, during particularly serious and dangerous bouts with the mental health condition (like when the father in *M.M.* sought treatment after biting maternal grandfather's ear), the parent seeking treatment could refuse

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to turn over those records so no one, including the judge, could see them. In this scenario, it would be virtually impossible to achieve an accurate idea of the parent's psychological condition and, more importantly, whether they pose a threat to the child. The information available to the judge and any court-ordered psychologist would be only those records showing the parent's improvement through treatment or periods of mental stability.

The court's solution in *M.M.* was to require the father to submit to an updated psychological evaluation. But, how accurate and effective could this evaluation be if the court-ordered psychologist was deprived of the mental health records generated from the father's particularly severe bout with his bipolar disorder? It seems these would be the most vital of all mental health records in the entire case.

One important exception under the MHPA is that the Act does not protect opinions, observations and diagnoses of a psychologist or psychiatrist. While these would certainly be helpful in a custody case, all too often, opinions, observations and diagnoses are intertwined directly with a patient's communication with their mental health professional, making the same non-discoverable. Regardless, it may be possible to elicit a professional's opinions, observations and diagnoses via a deposition or expert interrogatories without breaching privilege. While this is better than nothing, it is certainly not the same as a full disclosure of records.

In the end, it appears the Superior Court correctly applied the MHPA to the facts in *M.M.*. Perhaps the fix lies with the Pennsylvania legislature to carve out an exception in child custody cases. What if, for example, in a custody case, a judge could review mental health records

in *camera* so as to fully make a well-reasoned and informed decision? The parties in *M.M.* actually agreed to do this for some of the father's older records. It seems a more reasonable solution than allowing the other parent unfettered access to the records.

However, until such time that the Act is amended, the rule in Pennsylvania is clear: a party cannot be required to turn over mental health records in a custody action. ■

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