

Discovery of Mental Health Records in Custody Cases

A litigant must be prepared to show the court that they are mentally fit to care for the child

Are the mental health records of custody litigants discoverable? The answer lies in 50 P.S. 7111 (a) of the Mental Health Procedures Act and 42 Pa. C. S. 5944 (Confidential communications to psychiatrists or licensed psychologists).

A custody litigant, whether it is a parent, a grandparent, a step-parent or any other individual that stands *in loco parentis* to the child, must be prepared to demonstrate to the court that he is mentally fit to care for the child. If that individual is receiving mental health treatment, he must be prepared to establish to the court that his mental health issues do not impair his ability to properly care for the best interests of the child at issue. This does not give the opposing party the right, however, to delve into the mental health records of the party receiving such treatment.

Instead, the relevant custody statute sets forth a mechanism whereby the court can determine the mental stability of a custody litigant without impinging upon his right to confidentiality. Confidentiality is essential to the effective treatment of any mental health issue.

42 Pa.C.S. 5944 prohibits the disclosure of any confidential communications with a psychiatrist or psychologist. Looking at this statute alone, one might conclude that records that do not disclose confidential communications are therefore discoverable. 42 Pa.C.S. A. 5944 does not prohibit the disclosure of treatment summaries,

observations, medications, diagnoses and treatment plans to the extent that these records do not disclose confidential communications. But the inquiry does not end there.

50 P.S. 7111(a) of the Mental Health Procedures Act provides, in pertinent part,



that “all documents concerning persons in treatment shall be kept confidential and, without the person’s written consent, may not be released or their contents disclosed to anyone.” There are certain exceptions to this rule but none of the exceptions apply to custody cases. This statute prohibits the disclosure of any mental health records, regardless of whether or not the records contain any confidential communications.

In recognition that the court must have some way to determine the mental stability of custody litigants, Pa.R.C.P. 1915.8. Physical and Mental Examination of Persons was enacted. This statute allows the court to conduct an examination of custody

litigants to determine if the mental health issues of a custody litigant will negatively impact upon that litigant’s ability to provide for the best interests of the children at issue. This statute gives the court evidence of the mental health of the custody litigants without impinging on the litigant’s privacy rights.

The issues of the mental health of a custody litigant and the discovery of her mental health records were addressed in *Gates v. Gates*, decided March 10, 2009, by the Superior Court. While the trial court understood the parameters of the Mental Health Act and the statute protecting confidential communications made to a psychologist or psychiatrist, it incorrectly concluded that the mother had waived the provisions of these statutes by testifying that she received mental health treatment.

The Superior Court overruled the trial court, finding that the mother repeatedly asserted the privilege throughout her testimony at trial. The fact that she testified that she received mental health treatment did not amount to a waiver of her privilege of confidentiality. The case is a good example of the general confusion which exists among the bench and the bar regarding the discovery of mental health records.

The Superior Court in *Gates* also overruled the trial court’s finding of contempt. The trial court held the mother in contempt for not turning over the records to the father after the court ordered her to do so. The mother argued that she appealed the deci-

sion ordering the records to be turned over. If she was successful in the appeal but turned over the records during the pendency of the appeal she would be irreparably harmed. The Superior Court agreed with the mother's argument, noting the decision of *Zane v. Friends Hospital*, 575 Pa. 236, 836 A. 2d 25 (2003).

In *Zane*, the Supreme Court, when discussing the issue of the enforcement of an order to turn over mental health records while an appeal of the order was pending, stated: "to release such documents for review..., only to have an appellant court reverse such a decision on appeal, would result in the confidential nature of the records being forever lost. In conclusion, we find that disclosure of the otherwise confidential mental health records would create a manifest injustice..."

The Superior Court in *Gates* thus concluded that the trial court's finding of contempt against the mother was in error.

The relevant statutes and case law support the purpose behind the confidentiality of mental health records: to allow individuals to obtain mental health treatment free of any concerns that the records of their treatment will be subject to disclosure. It cannot be emphasized enough that the efficacy of mental health treatment is dependent upon its confidential nature. Custody litigation does not give a litigant the ability to override the confidentiality implicit in such mental health treatment. Other means exist to determine the mental stability of a custody litigant. The right to obtain a mental health examination of a custody litigant is intended to address any mental health issues that might negatively impact upon a child.

Understanding the parameters of the statutes governing mental health records and mental examinations of custody litigants is essential to trying a custody case where the mental health of a custody litigant is at issue. ■

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Diversity Summit Sept. 22

The Philadelphia Bar Association's Chancellor's Forum and Diversity Summit will review the real-life struggles and successes of diverse Philadelphia lawyers from the past and present on Tuesday, Sept. 22.

Panelists will examine where and who we currently are as an Association with respect to diversity and inclusion – both the challenges we have faced as well as our many accomplishments. Topics will include recruitment and retention of diverse individuals; future diverse leadership at the Bar Association and law firm management; the impact of the economy on diversity; and implementation of the Statement of Diversity Principles resolution.

Panelists include U.S. District Court Senior Judge Norma Shapiro; Butler

Buchanan, a shareholder with Marshall, Dennehey, Warner, Coleman & Goggin; former Chancellor Andrew A. Chirls; Roberta Liebenberg, a member of Fine, Kaplan & Black, R.P.C.; Nadeem Bezar, a partner at Kolsby, Gordon, Robin, Shore & Bezar; Brandi Brice, assistant city solicitor, City of Philadelphia Law Department; John Encarnacion, an associate with White and Williams LLP; Thomas Fitzpatrick, a partner with Fitzpatrick & Long, LLC; Heather J. Holloway, an associate with Thorp Reed & Armstrong LLP; Richard Negrin, vice president and associate general counsel, ARAMARK; Jamie Ray, Center for Disability Law Policy; and Lynn Zeitlin, executive director of Equality Advocates.

Visit philadelphiabar.org for more information as it becomes available. ■

Multiple Honors for Bar Association

The Philadelphia Bar Association will accept its fourth Harrison Tweed Award, one of the American Bar Association's most prestigious honors, for its work with the Residential Mortgage Foreclosure Diversion Pilot Program, designed to help low-income homeowners facing mortgage foreclosure.

The ABA also announced that the Association's Law Practice Management Division is the recipient of the ABA General Practice, Solo and Small Firm Division Solo and Small Firm Project Award. The award is designed to reward bar leaders and associations for their successful implementation of a project or program specifically targeted to solo and small firm lawyers.

The Tweed Award was created in 1956 to recognize the extraordinary achievements of bar associations in increasing access to justice for the poor. The award

is given annually by the ABA Standing Committee on Legal Aid and Indigent Defendants and the National Legal Aid and Defender Association, is presented during the ABA Annual Meeting at a joint luncheon of the National Conference of Bar Presidents, National Association of Bar Executives and National Conference of Bar Foundations. The Bar previously won the award in 1970, 1988 and 1996.

The Philadelphia Bar Foundation's "Case for Support," a marketing piece that describes the Bar Foundation and articulates the importance of its mission, accomplishments and needs that was designed by Hollister Creative of Wynnewood, Pa., won "The Award of Distinction" in the Communicator Awards competition. "The Award of Distinction" is presented by the International Academy of the Visual Arts for projects that exceed industry standards in quality and achievement. ■