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Mental health confidentiality laws tightly written for children, teens

Family law attorneys often struggle with understanding how mental health confidentiality laws affect their cases. Most likely, you have been either the attorney who wishes to introduce mental health records and/or communications or the attorney seeking to keep that information out.

This two-part series will discuss current Illinois mental health law and its application to children and adults.

Children are undoubtedly the most vulnerable piece of the divorce puzzle. The law proscribes different legal protections and procedures depending on a child's age when it comes to their mental health records.

The Health Insurance Portability and Accountability Act (HIPAA) lays out the various ways in which a child's information can be released without authorization rather than proscribing mechanisms for how this information can be protected.

In Illinois, our Mental Health and Developmental Disabilities Confidentiality Act is more stringent in many ways than HIPAA and, therefore, trumps the federal law. The general rule is that all records and communications are confidential and shall not be disclosed with specific carved-out exceptions.

Obtaining a child's mental health information depends on several factors: a) Who is requesting it; what their relationship to the child is; whether the request is valid and the age of the child.

Release of records and parental communications

Joseph T. Monahan, founder and principal of Monahan Law Group LLC and adjunct professor at Loyola University Chicago School of Law, said: "Parents of children under the age of 12 will be entitled to virtually all of their child's mental health records and communications."

These communications include therapy notes and what was discussed in therapy ... it is a common misconception that if the therapist did not write it down that it didn't happen." Parents may request, copy and inspect these records.

In order to be considered a parent for purposes of obtaining these records, paternity must be acknowledged. If parents are married at the time the child is born, a presumption of paternity exists.

As practitioners, one must consider these factors based upon the current Illinois Marriage and Dissolution of Marriage Act. Under the act, parents must allocate who will make decisions related to their minor children's care.

To ensure clarity, Monahan recommended, "When drafting parenting allocation judgments, consider parsing out mental health information from other aspects of health decision-making to ensure you have covered all of your bases."

In sharp contrast, children between 12 and 17 years of age have the right to control their own mental health records. Monahan elaborated, "If the child is over the age of 12, the therapist cannot tell the parent anything without written permission from the child."

A parent may request, copy or inspect the record only if the child is informed and does not object to the disclosure or if the therapist does not find any compelling reason to withhold.

COLLABORATIVE CONCEPTS

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In Illinois, our Mental Health and Developmental Disabilities Confidentiality Act is more stringent in many ways than HIPAA and, therefore, trumps the federal law.

Notably, Monahan stated, "Even if a minor over 12 does not consent to the release of information, the law provides that a parent may still receive information; however, it is limited to only the child's physical and mental condition, diagnosis, treatment needs, services provided, medications and services needed."

Release of records and communications to third parties

Attorneys representing children 12 or older in any judicial or administrative proceeding may obtain records so long as there is a court order providing for the release. The same procedure applies when seeking to have the child's therapist testify in court.

According to the Illinois mental health act, neither party nor his or her attorney is permitted to serve a subpoena seeking to obtain access to records or communications unless the subpoena is accompanied by a written order or by the written consent of the person whose records are being sought.

Monahan stated, "Prior to the issuance of the court order, each party is entitled to be heard and written notice of the motion must be provided to both the recipient of services and the treatment provider." Failing to provide notice will result in an incorrectly issued subpoena thereby barring disclosure of records.

Therapists can disclose requested mental health information absent a court order only if written authorization has been given. Children over the age of 12 control their own records and thus it is their authorization rather than the parents that will be required.

The Illinois Mental Health Act specifies the following requirements for an authorization to be valid:

- In writing;
- Specific to whom information can be released and who is releasing information;
- Specifies the information to be disclosed;
- Reason for disclosure/consequences of nondisclosure;
- Right to review and copy record before disclosure;
- Right to revoke at any time;
- Requires a witness, signature and date;
- Specifies time period for which consent is effective.

Generally, as for children under 12, only one parent's authorization is needed to release information to third persons. *In re Marriage of Troy S.*, 319 Ill. App. 3d 61 (3rd Dist. 2001).

Note a major distinction: While only one parent's authorization is needed to release information to third persons, both parents must consent when treatment is initially sought.

These are two major reasons to parse out mental health when allocating health decision-making in parenting allocation judgments to avoid any potential confusion for the parties and treatment providers down the road.

Protecting the child

Releasing a child's mental health information may be harmful to the child in the long-term. As such, all professionals, including the providers and the attorneys should attempt to safeguard the child's interests.

Under the Illinois mental health act, even when the child authorizes the release of information, providers can object to the release on behalf of their patients. Similarly, attorneys should strategically object to the introduction of a child's mental health records on relevancy grounds.

Accordingly, the pros and cons of making such information available to the public should be of paramount concern and all professionals should consider that above any and all other interests.

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