

Custody and Visitation Disputes - The Big Mistake

written by Richard Leslie | May 24, 2016

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... Suppose that you are treating a mother and her two children (ages 9 and 11) who are involved in a custody and/or visitation dispute with the mother's spouse, the father of the two children. Suppose further that the mother's attorney requests that you provide a declaration or affidavit wherein you describe the nature of the therapy you are doing with the mother and the girls, and that you express your opinions regarding what you believe would be a custody and/or visitation arrangement in the best interests of the children. The attorney for the mother agrees to provide you with appropriate written authorizations from the mother, both on behalf of herself and on behalf of her two children. Should you cooperate and comply? While the answer will vary depending upon the circumstances and applicable law, this commonly occurring aspect of practice is often a "land mine" for the unwary therapist or counselor.

I have often advised therapists not to comply with such a request (for a variety of reasons) and to instead request or insist upon being subpoenaed to testify in court. By taking this route, the therapist is somewhat insulated from claims by the father that the therapist too quickly took sides and was too willing to cooperate with the mother, that the therapist provided information about the children without the father's authorization, that the therapist breached the confidentiality of the children, or in some circumstances (such as where the father was seen once, either alone or in combination with the wife or a child), that the therapist breached the father's privacy and confidentiality. Even though there may be adequate answers for some or all of the father's assertions, therapists and counselors don't want to have to deal with complaints and allegations of improper conduct. And, in highly charged legal proceedings involving custody and visitation, complaints are more likely.

When the therapist or counselor is in court pursuant to a subpoena, the other side (the father and his attorney) has the opportunity to object to the testimony of the therapist or counselor on the grounds of psychotherapist-patient privilege or on other grounds. The respective attorneys will usually argue the issue and the judge will make a ruling. Thus, the issue of privilege will be resolved and the judge will either direct the therapist to answer the questions or will uphold the claim of privilege and bar or limit the therapist's testimony. As to the actual testimony, the therapist or counselor must, among other things, be careful not to characterize the behavior of the father as if the therapist has observed the behavior, but rather, the testimony should make clear that according to what the mother has said, the father behaves in a certain way.

If the therapist is to express an opinion related to custody or visitation, it is important for the therapist

to clarify that the testimony is based upon the limited exposure of the therapist to the patients, and not the result of an evaluation. Some would argue (and ethics may dictate) that the therapist should not express an opinion on a custody or visitation arrangement unless the therapist performed an independent and objective evaluation. What the therapist might say, which should not be objectionable, is that he or she believes, based upon the work done with the patients, that the mother would make (and/or has been) a good custodial parent (if that is the therapist's belief, of course) or that based solely upon what the children have said, it would not be in the best interests of the children if there were unsupervised visitation with the father at the present time.

It is critically important to remember that in many cases, the child will be the holder of the privilege – not the parent. Thus, the therapist might be obligated to assert privilege on behalf of the minor when he or she is initially served with a subpoena for the records of the children. In some cases, the court will appoint an attorney, a guardian ad litem, or other named individual to represent the child in the custody or visitation proceeding. This individual will often be able to waive or assert the privilege upon behalf of the minor child. Remember, there is a difference between who is the “holder of the privilege” and who signs an authorization form on behalf of a minor.