Treatment of Children – Joint Legal Custody

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In the September 2017 issue of this Avoiding Liability Bulletin, I raised a number of questions concerning situations involving the treatment of children during the period of time that there is a custody dispute or an existing court order regarding custody affecting parents who are divorcing or who are already divorced. More specifically, I asked the following questions regarding joint legal custody situations:

What if the parents share legal custody (joint legal custody) and one of the parents demands that treatment of the 12 year old child/patient cease? *May* the practitioner continue treatment with the consent of just one of the parents if the practitioner believes that treatment is essential to the child's mental health? *Should* the practitioner continue to treat the minor with the consent of just one of the parents? Are there any risks if the practitioner complies with one parent's demand that treatment of the child ceases forthwith? If both parents initially consented to the treatment of the minor, must both parents request/demand a termination in order for the practitioner to cease treatment?

The answers to these questions are of course dependent upon the laws in a particular state and the specific facts and circumstances involved. Depending upon a multitude of variables, there is not one answer to each of these questions. For example, when I ask whether the practitioner *should* continue to treat the minor with the consent of just one of the parents, the answer depends upon the confidence and competence of the individual practitioner, the degree of commitment to the best interests of the child/patient, the degree of fear that the practitioner has to an inquiry from the licensing board, the clarity of the court order and applicable law, and other factors.

I am aware that some mental health practitioners who treat children may try to avoid accepting new clients if they are aware that the parents are engaged in a custody dispute or appear likely to soon be subject to a court order regarding custody. Nevertheless, many practitioners do treat children during a divorce/dissolution proceeding or while there is an existing order regarding custody, whether knowingly and willingly or because of the unfolding of unexpected events. In any case, knowledge of the state laws defining such terms as physical custody, legal custody, joint custody, and joint legal custody (or terms of similar import) is essential in order to avoid trouble and disruption. It is also essential to be confident that the custody arrangement described by the parent bringing the child to treatment is truthful and accurate. This may necessitate a conversation with that parent's attorney or receipt of a copy of the most recent court order regarding custody, or both.

If the parents share legal custody (joint legal custody), that generally means that both parents share the right and the responsibility of making decisions regarding the health, education, and welfare of the

child, such as authorizing or consenting to treatment by a mental health practitioner. It also may mean that either parent can authorize or consent to treatment of a child and that the consent of both parents is not required. In fact, in California, the relevant statute specifies that in making an order of joint legal custody, the court shall specify the circumstances under which the consent of both parents is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. In all other circumstances, the statute provides, either parent acting alone may exercise legal control of the child. Is the law in your state of practice similar?

When authorization or consent to treat is obtained from only one of the parents who has joint legal custody, prudence may require the practitioner to ascertain why only one parent is authorizing treatment, and whether and how the other parent will be told that treatment of the child has begun or is about to begin. While it is sometimes wise to seek the consent or authorization of the other parent so as to avoid later conflicts, it is not always possible and sometimes not appropriate or indicated by the circumstances. Of course, practitioners must be careful not to be manipulated by the parent bringing the child to treatment and to unwittingly appear to "conspire" with that parent to keep the other parent clueless as to the ongoing treatment. Such situations are likely to turn ugly as soon as the other parent learns that treatment of the child has begun. Each situation is different, and practitioners must exercise careful judgment and must comply with the requirements of applicable law.

If the child is lawfully being treated with the consent of only one parent who has joint legal custody, a later demand by the other parent that treatment of the child cease presents a dilemma for the practitioner. Should there be a termination in order to avoid disruption and a possible undermining of the treatment, or should treatment continue? That same dilemma can occur when the consent of both parents is initially obtained, but some time later, one of the parents (e.g., a parent not having primary physical custody) demands an immediate cessation of treatment. There are many situations where the parent demands a cessation of treatment well after treatment has begun, and does so for reasons that the practitioner deems to be without merit or ill-motivated. It is not unusual for custody disputes to result in adversarial (and sometimes threatening) behaviors between and by parents, often without due regard for the mental and emotional well-being of the child.

I have felt comfortable advocating that the practitioner in California, who I trust is operating in the best interests of the child (the patient), should let the dissenting parent know that treatment was properly authorized (the parent and child consented to the treatment) and that the parent who initially sought and consented to the treatment does not want the treatment to end. In fact, in the opinion of the practitioner, a sudden termination would likely be harmful to the child's mental and emotional well-being. Some therapists may fear that a sudden termination, when not required by law or court order, might amount to an abandonment of the patient. I have spoken with practitioners who felt comfortable telling the demanding parent that their treatment records will reflect that the therapist informed that parent of the harm that might be caused by a sudden termination, and that the parent refused to respect or accept the judgment of the practitioner – who was acting in the best interests of the patient.

Additionally, it may be appropriate and helpful to talk with the attorney for the parent who authorized

the treatment and who wants treatment to continue. The attorney surely has an opinion about the law and the court order, and the appropriateness of continued treatment with the consent of only one of the parents. The attorney may be willing to contact the opposing attorney regarding the issue so that the opposing attorney can get the demanding parent to back off – that is, to confirm the fact that under the existing law and court order, either parent can consent to treatment. In more ambiguous situations, perhaps the attorneys will agree to bring the matter before the court in order to resolve the dispute. Court orders are sometimes ambiguous and subject to varying interpretations. For example, a court order merely requiring the joint custodians "to consult with one another" before one of them takes action with respect to the child's health care needs may cause ambiguities and result in varying interpretations.

I have also felt comfortable advocating, even in cases involving a court order specifying that both parents shall consent to medical or mental health treatment, that the later demand by one of the parents that treatment should cease immediately can and should properly be viewed as a demand for termination of treatment – even though the dissenting parent says, "you no longer have my consent to treat." The therapist might argue that the consent to treat, as per the court order, was mutual and was given some months (or whatever the time period) earlier and that a later demand or request for termination must likewise be mutual. Of course, the specific wording of the court order (and applicable state law) will dictate whether such a line of argument or defense is appropriate.

A parent who demands a cessation of treatment may threaten to complain to the licensing board or to take other action. The confident, competent, and informed practitioner may understand that the licensing board receives a significant percentage of complaints related to custody disputes, and that most of those cases are closed without any disciplinary action being taken. Some practitioners may feel comfortable enough with the law and the facts to inform a demanding parent that a complaint to the licensing board is not feared and would be easy to answer. Such demanding parents can sometimes be advised to consult with their attorney and to bring the matter (the request for a cessation of treatment) before the family law judge. Some practitioners are willing, even eager, to testify at a custody hearing and to inform the judge about the necessity of continued treatment and the unreasonable and perhaps manipulative and disruptive demands for termination.

It is helpful to be aware of the laws related to the treatment of children without parental consent. In many situations, although a child is being treated with the consent of one or both parents, the law would allow the practitioner to treat the child without any parental consent – just the child's consent. Thus, when one of the parents in such custody situations demands a cessation of treatment, there is an additional argument and legal justification for the practitioner to continue treatment and to resist the demand to cease treatment – that is, the child alone may consent to treatment. In California, children who are twelve years of age and older can in broad circumstances consent to mental health treatment without parental consent or approval.