

Consent to Treat Minor (Sole and Joint Legal Custody)

Avoiding Liability Bulletin - March 2007

Divorce (marital dissolution), child custody, and visitation disputes often involve very contentious parties who will not be hesitant to complain about a therapist or counselor who treats their minor child without appropriate consent. Litigating parties sometimes have a misunderstanding about custody and control issues, including consent to treat, and sometimes they will try to scare the therapist or counselor into doing something that may not be in the patient's best interests (or the best interests of the counselor or therapist).

If a minor is not able to consent to treatment on his or her own behalf (state laws vary widely in this regard), then generally, consent must be given by a parent or guardian, or under certain circumstances, by both parents. In an intact family, the general rule is that either parent may consent to the child's treatment. Typically a therapist or counselor may want to get the consent of the other parent, or may want to inform the other parent of the treatment, but at other times, such action may not be possible or warranted. Some state laws, however, contain requirements regarding notification of the other parent. Those laws may provide for exceptions to the requirement of notification.

With respect to sole "legal custody," the person who has such custody is the one who must authorize or consent to treatment of the minor. The sole legal custodian is generally viewed as the one who has the right and the responsibility to make the decisions related to the health, education and welfare of the child. "Physical custody" is simply about whom the child resides with – sometimes referred to as the residential parent or the custodial parent. A parent who does not have legal custody, whether sole or joint, will generally have limited rights with respect to their minor child – such as limitations regarding the authorizing or consenting to care and accessing the medical or mental health records of the child. State laws vary widely with respect to the extent of such limitations.

With respect to joint legal custody, both parents will typically share the right and responsibility to make the decisions related to the health, education and welfare of the child. Stated otherwise, the general rule is that either parent may authorize or consent to treatment of their minor child unless the court order specifies otherwise. The court order will sometimes specify those circumstances when the consent of both parents is required, or when other conditions are placed upon the right of a joint custodian to act unilaterally. Again, some states may require notification of the other parent before or after a child is brought to a doctor or mental health professional by the other parent.

Sometimes the court order of joint legal custody may be ambiguous, such as when it requires the parents to consult with each other (rather than agree) prior to one of the parents obtaining care for

the child. Therapists and counselors must be careful under these circumstances and do not want to commence treatment without proper authority. Aside from respectfully declining to treat under such circumstances (with appropriate explanation), the therapist might want to seek clarity about the court order from the attorney for the parent who seeks to obtain treatment for the minor. Perhaps that attorney would be willing to put something in writing with respect to his or her client's compliance with the court order.

A safer way to proceed, if the circumstances warrant, is to tell the parent who seeks treatment that you will only treat the minor child if both parents consent. If they cannot agree, let the attorneys or the parties themselves work it out, perhaps with court oversight or involvement. It can be very disruptive to therapy and to the practitioner to be in the middle of a fight between two parents over whether or not treatment was appropriately authorized. These kinds of matters often find their way to the licensing board in the way of a complaint.

I have previously written (under the category of "Termination of Treatment" – in the June 2005 issue of the Avoiding Liability Bulletin – see the Archives section) about a troubling circumstance often faced by therapists and counselors in cases where there is joint legal custody and the court order requires the consent of both parents with respect to health care decisions. It is worth repeating here. Suppose that both parents consent to treatment of the child as per the requirements of the court order. Later, one of the parents calls the therapist or counselor and demands that he or she terminates treatment with the child. The parent may think of this or refer to it as a withdrawal or revocation of a consent previously given.

What is the therapist or counselor to do? What are the wishes of the other parent and the child? Should the therapist immediately cease treatment of the child? Could this constitute an abandonment or improper termination of the child's treatment? These are but some of the questions that arise in such situations. It is important to point out here that each state may approach this situation differently and that there may be some ambiguity as to how this situation may be properly resolved. I have previously advised therapists in such situations to continue to treat the minor patient if the minor and the other parent want treatment to continue and if the therapist feels that a sudden termination would negatively affect the well being of the patient.

An argument in favor of continued treatment would be that the one parent is demanding a termination of treatment, but the court order requires the consent of both parents with regard to the major health care decisions affecting the child. The consent of both parents was acquired prior to commencement of treatment, and now the consent of both parents should be required for a termination. If the minor is a patient who under applicable state law can consent to his or her own treatment, the therapist's decision to continue treatment is easier to make. Practitioners in such situations must be sure to obtain legal consultation before opting for such an approach, since the requirements and nuances of state law will affect the course of action taken.

I favor this approach (when lawful) because it puts the patient's interests first and because it

prevents the parent from manipulation. It is sometimes helpful to let the parent who demands a termination know that a sudden termination might be harmful to the child's mental health and that the therapist will make note (in the records) of the fact that this was communicated to such parent. Depending upon circumstances, a court might view that parent's action to be disruptive and manipulative, and this may affect the court's ultimate determination of a custody or visitation arrangement.

Author:

Richard Leslie