

Ethics and Risk Management in Providing Care to High-Conflict Families

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1 Contact Hour (New York Board of Psychology)

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Disclosures/Conflicts of Interest

- Other than my affiliation as a risk management consultant with The American Insurance Trust, I have no conflicts of interest to disclose.

Learning Objectives

1. Identify relevant ethical standards regarding parent and minor consent to care
2. Explain three consequences of accepting one-parent consent to services in high conflict families
3. Apply two methods of navigating consent to and records access for a minor's psychological care

Providing Services to Minor's in High Conflict Families

Who consents?

- There are at least two inter-related issues:
 - Parents' constitutional rights
 - Minors' typically lack legal competence to make their own health care decisions
- Constitutional cases affirm that parents have the fundamental right and obligation to make decisions on behalf of their children.

Individual psychotherapy with minor children: Who consents?

- For example, in *Troxel v. Granville* (2000), the Court noted that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."

Individual psychotherapy with minor children: Who consents?

- In general, parents are given the responsibility to make decisions about their children, including medical care.
- Their guardianship rights stem from the presumption that minors lack the competence to make these decisions and parents are the best substitute decision makers.
- This usually includes the right to consent to medical treatment and the right to access records of that treatment.

Individual psychotherapy with minor children: Who consents?

- But parent rights are not absolute. They must be balanced against other important public policy issues, such as:
 - Child protective laws
 - Right to independently consent to certain medical procedures
 - Rights to privacy of mental health information

How Does this Relate to Minor Consent?

- Minors do not have the same rights as adults, nor are they typically considered legally “competent” to enter into legally binding contracts, decide on their own education, or give informed consent to health care services.
- But at times, and in keeping with the legal limitations on parental decision making, states have also given rights to minors to consent to services and to psychologists to restrict access to sensitive treatment information (see <http://www.ncbi.nlm.nih.gov/pubmed/25870511>).

How Does this Relate to Minor Consent?

- It is thus fair to assume that parental consent is generally required on behalf of minors.
- If an exception applies, psychologists can provide services—but state law will specify conditions under which that consent is valid, and it must be followed carefully.
- With married parents, this means that either parent can consent to psychological services (though it is not a bad idea to obtain the agreement of both—which we'll get to shortly).
- More complicated situations arise when parents were never married, separated, divorcing, or divorced.

Parental Consent for Treatment of a Minor Child

- With never married, separated, divorcing and divorced parents
 - Assume joint custody unless there is a contrary court decree.
 - With joint custody, **though** usually either parent can legally consent unless the decree mandates otherwise
 - **From a risk perspective**, it's best to obtain consent from both parents
 - That means, reach out to the non-help-seeking, jointly custodial parent (see later slide), as well as the parent who presents the child for services

Parental Consent for Treatment of a Minor Child

- Somewhat paradoxically, with jointly custodial, EITHER parent can demand an end to the therapy of his/her minor child.
- If that happens, risks increase if the psychologist continues to provide care over the objection of one parent
- Psychologists resist that demand at their own risk - it could result in a disciplinary complaint and sanction.
- Remember—we are not judges, we are mental health providers

Parental Consent for Treatment of a Minor Child

- When **legal/physical custody is divided**:
- Insist on contacting/meeting with both parents unless there are very good reasons not to (e.g., domestic violence, child abuse).
- Where joint custody (or ambiguity as to who has custody) is the case, insist on consent of both parents unless there are very good reasons not to.
- Where a **parent claims sole legal custody**, request a copy of the divorce decree.
- Where a **parent is not available** or where contact with a parent could seriously damage the treatment of child, record pros and cons of non-contact and be sure to seek consultation.

Parental Consent for Treatment of a Minor Child

- Of course, consent to treatment does not insure payment for treatment.
- There may not be a psychotherapist-patient privilege for the parent, where a parent participates in treatment only for purposes of the child.
 - Information is still confidential and cannot be released to a third party without consent.
- If a parent is not considered a patient, he/she should be specifically informed orally and in writing, before any professional activities take place (as noted earlier), and should be informed regarding how individual parent meetings with the child's therapist will be handled.

What about Parental Access to a Minor's Treatment Information?

- In ordinary circumstances, parents are presumed to be responsible and to act in their children's best interest.
 - They have the right to make decisions for their minor children.
 - *This includes the same right of access to a child's medical and psychological record that a child would have were they an adult.*
 - But there are many exceptions to this rule depending on the laws and court decisions of your state and the interaction of those laws with HIPAA.

What about Parental Access to a Minor's Treatment Information?

- **HIPAA specifically defers to state law** when the state law explicitly requires, permits, or prohibits parental access to minors' medical records:
 - For example, when a minor has the right to consent and she/he holds the exclusive right to disclose (or not disclose) treatment information, and there's no law allowing parent access to that information;
 - Where explicit state law does not exist, HIPAA provides that a psychologist may elect to disclose or not, through the exercise of professional judgment;

What about Parental Access to a Minor's Treatment Information?

- Further, clinicians *can* choose not to treat the parent as a legal representative *if* the professionals have reasonable belief that:
 - Child may be/has been subject to abuse or neglect, or...
 - Doing so would endanger child and...
 - Psychologist decides, through exercise of professional judgment, it is not in child's best interest to do so.

Parental Access to a Minor's Treatment Information

- Further, in the absence of explicit state law to the contrary, HIPAA also allows parents to agree to a contract limiting their access to their children's treatment information.
- There is some controversy about the enforceability of these contracts; it will be state and case dependent
- If parents agrees, but then insists on violating these agreements, and accessing their children's information, there may be some risk to the therapist if they refuse such requests or defer the matter to court decisions.
- In this situation, **consultation is strongly recommended.**

Parental Access to a Minor's Treatment Information

- In the absence of state law to the contrary (e.g., New York), a contract may be used that limits the information provided to parents. For example, the psychologist will:
 - Provide regular progress summaries
 - Encourage the child's disclosure when appropriate
 - Report attendance or other problems
 - Give a summary to parents at termination
 - Inform parents of any imminent risks of harm to the minor – (it is useful to give examples to parents)
 - Clarify the clinician's policies about court involvement
- The Trust has sample language for a child/adolescent addendum to our consent form; see <https://parma.trustinsurance.com/Resource-Center/Document-Library-Quick-Guides>

Sharing Information About Child Clients With Court: Sample Terms of the Confidentiality Contract

- Therapy needs to be a safe place for all participants; and parents need to know information that allows them to fulfill their responsibilities as parents.
- The therapist will keep all information learned from and about a child confidential unless the child agrees that it will be shared but will encourage and assist child in sharing information with parents where appropriate.
- Parents will get regular reports from therapist regarding how therapy is progressing.

Sharing Information About Child Clients With Court: Sample Terms of the Confidentiality Contract

- Parents will receive summary after termination.
- If the therapist believes that a child is at serious risk of harm or is at serious risk of harming another person, he/she may non-consensually breach the child's confidentiality and inform parents and other appropriate parties.
- Discuss what constitutes serious harm with parents and adolescents to avoid confusion.

Sharing Information About Child Clients With Court: Sample Terms of the Confidentiality Contract

- Separation or divorce are hard on everyone, especially children and adolescents.
- With parents' relationship in turmoil, it is even more important for therapy to be a safe therapeutic environment.
- This environment is undermined when children worry that what they say in therapy will be revealed in court & used against a parent.

Sharing Information About Child Clients With Court: Sample Terms of the Confidentiality Contract

- To protect that environment, I want us all to agree that the therapist will not be called as a witness by either party.
- A judge, though, may decide not to honor this agreement and I may be required to be a witness, although I will try to prevent that from happening.

Sharing Information About Child Clients With Court: Sample Terms of the Confidentiality Contract

- It is unethical of me to give any opinion about custody or visitation arrangements, even if I am compelled to be a witness.
- If asked to give information to any court appointed custody evaluator or person representing the legal interests of your children, I will first ask for your permission (unless it is not legally required; for example, when there is a court appointed guardian ad litem, or minor's counsel).
- I will not make any recommendations about custody, visitation or parental fitness.

Records Access when Parents are Disputing Custody

- In most states, parental rights to a minor's records treatment do not change merely because a couple is divorcing or re-litigating custody.
- BUT some states, like Massachusetts and Maryland, make the assumption that parents in that context are less capable of keeping children's interests paramount, and thus courts appoint GALs to help determine whether the minor's privilege should be upheld when parents request their records in custody proceedings (see *Adoption of Diane*, 1987).

Q&A With Dr. Taube



- We will read select questions that were submitted via the Q&A feature throughout the presentation.
- Due to time constraints, we will not be able to address every question asked.

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