



## Parental Mental Health as a Factor in Deciding Custody The Role of Human Service Agencies



**A** relevant factor for a court to consider when deciding custody is the mental health of each parent. According to Mental Health America, “a higher proportion of parents with serious mental illness lose custody of their children than parents without mental illness. There are many reasons why parents with a mental illness risk losing custody, including the stresses their families undergo, the impact on their ability to parent, economic hardship, and the attitudes of mental health providers, social workers and the child protective system.”<sup>1</sup> How often mental health is a factor in litigated custody disputes is unknown.<sup>2</sup>

A court may order a mental health evaluation whether or not treatment from a mental health specialist is already ongoing. A determination of mental illness or instability does not obligate the court to award custody to the other parent.<sup>3</sup> Nor is the parent

with a mental illness barred from parenting. Some states disallow courts from viewing a mental or physical illness or disability as the sole factor in a custody decision, but they can hear evidence regarding these conditions. Colorado’s statute is typical:

“C.R.S. § 14-10-124. (2013). Best interests of child.

... (1.5) Allocation of parental responsibilities. The court shall determine the allocation of parental responsibilities, including parenting time and decision-making responsibilities, in accordance with the best interests of the child giving paramount consideration to the child's safety and the physical, mental, and emotional conditions and needs of the child as follows:

(a) Determination of parenting time. The court, upon the motion of either party or upon its own motion, may make provisions for parenting time

that the court finds are in the child’s best interests unless the court finds, after a hearing, that parenting time by the party would endanger the child’s physical health or significantly impair the child’s emotional development. In addition to a finding that parenting time would endanger the child’s physical health or significantly impair the child’s emotional development, in any order imposing or continuing a parenting time restriction the court shall enumerate the specific factual findings supporting the restriction. In determining the best interests of the child for purposes of parenting time, the court shall consider all relevant factors, including: ... (V) The mental and physical health of all individuals involved, except that a disability alone shall not be a basis to deny or restrict parenting time; ...”

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Many parents going through a custody dispute suffer from conditions such as clinical depression, obsessive compulsive disorder, or a personality disorder. From the court's perspective, to adversely affect custody or parenting, the mental condition must cause a parent to be "unfit" to exercise custody. Of course, each custody case is so unique that it is not possible to have a blanket protocol. For this reason, courts turn to professionals such as psychiatrists, social workers, psychologists, attorneys, Guardians ad litem, and school personnel to help them assess the mental fitness of the parents. How can courts benefit by hearing from human service agencies?


The admissibility of a parent's mental health care record may devolve into a struggle between the court's duty to act in the best interests of the child<sup>4</sup> and a person's right to confidentiality and privacy. It is important to consider the impact of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its impact on state law. Assuming no confidentiality, privacy, or privilege issues dictate otherwise, human service agencies can assist family courts by sharing objective, impartial, and reliable information that has a direct bearing on the "best interests" of a child involved in a custody matter. The human service agency and its staff are not the ally of either parent. Rather, they are likely to have valuable information that will be useful to the

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court as it decides the issue of custody. Such contemporaneously documented, recent, and historical information may include:

- Whether the child benefits emotionally from active contact with both parents
- How the parents communicate with each other and with their child(ren)
- The extent to which each parent has actively cared for the child
- Whether a particular custody arrangement may be in accord with the child's desires
- Whether a history of domestic abuse exists
- Evidence that a parent with a mental illness is being treated for that illness

According to New Jersey family law attorney Bari Z. Weinberger, impartial and accurate information concerning a parent's mental health and how it affects their ability to parent may be

the "make or break" evidence in a custody dispute. "The insight provided by qualified therapists, social workers, custody evaluators, and other mental health workers and human service agencies can determine whether the courts decide to terminate parental rights based on mental incapacity or provide a structured visitation plan to allow the parent and child to remain in contact. When possible, continuity—however limited the parenting time may be—can be in the best interests of children, and ultimately, in the best interests of the child's own mental health." 

#### Reference Notes

1. <http://www.mentalhealthamerica.net/parenting>
2. Geva, A.S. (2012). Judicial determination of child custody when a parent is mentally ill: A little bit of law, a little bit of pop psychology, and a little bit of common sense. *U.C. Davis Journal of Juvenile Law & Policy*, 16(1).
3. See the landmark California Supreme Court case, *In re Marriage of Carney*, 598 P.2d 36 (Cal. 1979). The court emphasized that it is impermissible to rely on a diagnosis or disability as prima facie evidence of unfitness to parent.
4. E.g., N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2010)).


**Daniel Pollack** is a professor at Yeshiva University's School of Social Work in New York City. He can be reached at [dpollack@yu.edu](mailto:dpollack@yu.edu), (212) 960-0836

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sessions will include how to better align Department of Labor and TANF work programs; utilize behavioral economics within human services; manage knowledge for the best impact; develop two- and multi-generational approaches to service delivery; frame discussions so that the public has a better understanding of health and human services; and utilize data analytics to improve outcomes for children and families.

We look forward to learning from all of you able to participate in the National Summit. Your insights and contributions at the Summit will be captured and developed into a master blueprint for the next Administration and Congress—a blueprint aimed at effectively framing our members' policy positions, particularly those ripe for policy change, and placing our members and strategic partners squarely at the negotiating table to

drive solutions. For those of you unable to join us at the National Summit, check out future issues of *Policy & Practice*, as well as our new blog and website, for details on what happens at the Summit and post-convening plans! 

*Tracy Wareing Evans*