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# Orders for the Release of Confidential Drug Treatment Records in Child Custody/Welfare Cases

By Kimberley Keyes | August 07, 2018

Family Law Guardianships Child Custody Department of Children and Families

*Massachusetts attorney Kimberley Keyes reviews how and when Massachusetts courts will release federally-protected drug treatment records in child welfare cases.*

The Massachusetts Appeals Court recently weighed in on a pressing dilemma that occasionally develops in family-law cases: When a parent has undergone drug-rehabilitation or substance abuse treatment, should the other parent be allowed to subpoena medical and therapeutic records from the treatment facility? Massachusetts courts have repeatedly found that drug treatment providers can be forced to provide substance abuse treatment records in response to a subpoena in parenting cases, despite rigorous privacy protections covering such records under federal law.

Federal law provides significant protection for the privacy of substance abuse treatment. The federal statute, 42 U.S.C.S. § 290dd-2, provides as follows:

> Records of the identity, diagnosis, prognosis, or treatment of any patient … relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall … be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

The statute pays particular attention to limiting disclosures in criminal cases, providing in 42 U.S.C.S. § 290dd-2(b)(2)(c) the narrow grounds for disclosure of substance abuse records of criminal defendants:

> Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.

These narrow grounds are defined in 42 U.S.C.S. § 290dd-2(b)(2)(C) as follows:

> Record[s] may be disclosed … [i]f authorized by an appropriate order of a court … after application showing good cause therefore … In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.

The "public interest" concerns articulated in 42 U.S.C.S. § 290dd-2 focus primarily on criminal proceedings in which the release of a criminal defendant's substance abuse treatment records may be used to establish a defendant's illegal conduct. The primary concern under the statute is the release of treatment records in criminal proceedings, where policy-makers fear that addicts will avoid substance abuse treatment if records of their battles with addiction are easily obtained by police and prosecutors.

Arguably, a somewhat less stringent standard applies to the production of records in civil cases – such as family law cases – where 42 C.F.R. § 2.64(a) provides:

> An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which it appears that the patient records are needed to provide evidence. …. [I]f the court determines that good cause exists.

However, even this standard seems constrained by an additional section that heightens the requirements for release, where 42 C.F.R. § 2.64(d) provides:

> Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that: (1) Other ways of obtaining the information are not

> available or would not be effective; and (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

Even if good cause is shown and the record produced, 42 C.F.R. § 2.64(e) seeks to restrict the records to only those most needed in the case with the following restrictions:

> (1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order; (2) Limit disclosure to those persons whose need for information is the basis for the order; and (3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

Because most family law cases focus on state statutes and appellate law, family law attorneys can sometimes struggle with the unfamiliar tangle of federal law that dictates the release of federally-protected substance abuse records. A recent Massachusetts Appeals Court case shows how a request for drug treatment records can play out at the state level.

## Adoption of Lisette: How Massachusetts Courts Address the Release of Drug Treatment Records

*Adoption of Lisette (2018),* an opinion of the Massachusetts Appeals Court published on May 30, 2018, concerned the termination of a mother's parental rights with respect to her two young children. The mother had a history that involved both substance abuse and domestic violence, which led to her children—one of whom had significant medical problems that required close care—being taken into the custody of the state Department of Children and Families (DCF).

At a subsequent trial in the Juvenile Court over whether the mother's parental rights should be terminated, DCF officials learned that the mother had been discharged from a drug-rehabilitation program. DCF subpoenaed the rehabilitation program's records for details on the mother's discharge, but the rehab program's manager objected based on confidentiality concerns. At the trial judge's suggestion, the parties (including the mother) agreed on a compromise: A court order for an affidavit from the program manager limited the records produced to information surrounding the mother's discharge (rather than actual records from the program). The trial judge then admitted the affidavit in evidence, over the mother's objection.

On appeal, the mother argued that the trial judge erred by admitting the affidavit in violation of federal law that protects the confidentiality of those who seek substance-abuse treatment. The Appeals Court agreed with the lower court, finding no error occurred in the admission of the affidavit and affirming the Juvenile Court's finding of unfitness against the mother.

## Court Finds Good Cause to Disclose Information About Mother's Drug Treatment Discharge

In *Adoption of Lisette*, the Mother objected to the entry of the affidavit from her drug treatment provider on two principle grounds. First, she argued "that the department had other sources from which to obtain this evidence, namely, either her own testimony or the testimony of the department's social worker assigned to the mother's case."

According to the court, there were no other available or effective ways of obtaining the information sought other than through the affidavit from the program manager. It rejected the mother's contentions that the trial court could have relied on either the testimony of the social worker involved, or on her own testimony. Testimony from the social worker was not available or effective not only because it would constitute inadmissible hearsay, but also because the mother could withhold her consent for the social worker to testify at trial. As to whether the mother herself could provide reliable testimony, the trial judge questioned whether he could trust the mother's credibility in the absence of an independent source to verify her claims.

Next, the Court addressed the second prong of the "good cause" test: Whether the need for disclosure outweighed the potential injury to the mother, the physician-patient relationship, and the treatment program. Here, the Court provided a clear justification for the release of substance abuse records in cases involving the care and custody of children:

> In assessing the public interest, our courts have long held that in care and protection matters, the interests of a child in being free from abuse and neglect, and the Commonwealth's interests in protecting the child's welfare, outweighs the concerns of the parent.

The Court also focused on the limited scope of the affidavit, which focused on the mother's discharge from treatment rather than her intake or entire treatment history. The Court found that "the circumstances of the mother's discharge from the treatment program was an important component of [the judge's] fitness determination." The Court found that the mother's discharge was directly related to her history of relapsing into drug use:

> Here, the judge decided that evidence of the circumstances of the mother's discharge from the treatment program was an important component of his fitness determination, and concluded that, "because the underlying allegations involve a significant repetitive history of substance abuse and her failure to engage in services that would remedy the circumstances that led to the filing of this care and protection [petition], I have to find that there is good cause for a disclosure of the records." Thus, both the public interest and the need for the judge to learn the circumstances of the mother's program discharge weigh heavily in favor of disclosure.

The Court did not ignore the mother's privacy concerns in the decision. In addition to the narrow scope of the affidavit itself, the Court touched on the private nature of Juvenile Court proceedings, and the fact that the mother was no longer being treated at the facility. The court also noted that the mother "opened the door to an exploration of her program compliance by testifying that she was in substantial compliance with its rules."

After weighing the pros and cons of disclosing the circumstances of the mother's discharge from rehab, the court concluded that the public interest in protecting the children from abuse and neglect "substantially outweighed" the mother's privacy interests in these circumstances.



## The Release of Drug Treatment Records in Divorce and Child Custody Cases

There are some important differences between care and custody proceedings – in which the state, acting through DCF, seeks to take custody of children from a parent in the Juvenile Court – and child custody proceedings in the Probate and Family Court, which typically involves two parents seeking custody of children. Because care and custody proceedings involve *state* action, parents in such cases are typically afforded additional rights and due process, such as the appointment of free attorneys for parents whose parental rights are at risk.

In Probate and Family Court, a parent must only prove his or her case for child custody by a preponderance of the evidence. In Juvenile Court, DCF and the

state must prove its case by clear and convincing evidence. In short, Massachusetts courts are especially mindful of the parents' due process rights – including privacy rights – when the state is directly involved as a party.

Although the federal statutes discussed in this blog make no distinction between DCF actions for care and custody in the Juvenile Court and child custody cases between parents in the Probate and Family Court, many family law attorneys believe that Probate and Family Court judges are somewhat less demanding when it comes to the release of such records compared to the Juvenile Court.

What *Lisette* makes clear is that Massachusetts courts are willing to order the release of confidential drug treatment records when the potential risk of harm to children is a factor in the case. Obtaining such records can be challenging – where drug treatment providers will often pay their own attorneys to resist the release of records – but can be accomplished by a qualified attorney with the right facts on his or her side.

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