**STATE OF TENNESSEE**
# OFFICE OF THE ATTORNEY GENERAL

May 14, 2014

Opinion No. 14-55

Obtaining a Parent's Mental-Health Information in Child-Custody Cases

## QUESTIONS

1. To what extent may a parent subpoena or otherwise obtain the mental-health records of another parent or the testimony of treating mental-health professionals for use in child-custody proceedings?

2. Is a parent who wishes to introduce evidence of the mental-health status or changes of another parent able to obtain those records by subpoena or otherwise in order to support a motion under Tenn. Code Ann. § 36-6-106(a)(5), when asking the court for a Tenn. R. Civ. P. 35.01 examination of the mental or emotional health of another parent?

3. Under Tenn. Code Ann. § 36-6-106(a)(5), does the mandate that a court consider the mental health of a parent in child-custody matters create any presumption in favor of providing full disclosure of a parent's mental-health treatment, including counseling records?

4. Under the statutory language of Tenn. Code Ann. § 36-6-106(a)(5), is the disclosure of health records limited to records of mental-health professionals or would it include all health records (at least to the extent that such records reasonably may contain information relevant to a parent's mental health)?

## OPINIONS

A person's mental-health information is confidential and privileged under Tenn. Code Ann. §§ 24-1-207 (psychiatrist-patient privilege) and 63-11-213 (psychologist-client privilege), and thus in a child-custody proceeding, one parent may not obtain by subpoena the mental-health information of another parent, unless the privilege has been waived. Where a parent's mental health is at issue in a child-custody proceeding, a court may order *in camera* review of the parent's mental-health records in order to conduct the comparative-fitness analysis required by Tenn. Code Ann. § 36-6-106. And "if necessary for the conduct of the proceedings," a court may order disclosure of "confidential mental health information" of a parent pursuant to Tenn. Code Ann. §§ 36-6-106(a)(5) and 33-3-105(3), i.e., mental-health information pertaining to services applied for, provided under, or regulated under Title 33 of the Tennessee Code.

## ANALYSIS

Tenn. Code Ann § 36-6-106 provides a list of factors to be considered by a court, as applicable, in making custody determinations in suits for annulment, divorce, separate maintenance, or any other proceeding requiring the court to make a custody determination regarding a minor child. *Id.* § 36-6-106(a). That list includes the mental and physical health of the parents or caregivers. *Id.* § 36-6-106(a)(5).

A person's mental-health information, however, is confidential and privileged, pursuant to Tenn. Code Ann. §§ 24-1-207 (psychiatrist-patient privilege) and 63-11-213 (psychologist-client privilege).[1] *See Culbertson v. Culbertson*, 393 S.W.3d 678, 683 (Tenn. Ct. App. 2012) ("Tennessee law recognizes a privilege against compelled disclosure of confidential communications between a psychologist and client."); *Herman v. Herman*, No. M2012-00395-COA-R10-CV, 2012 WL 1655717, at *2 (Tenn. Ct. App. May 9, 2012) ("little doubt" that mental-health records sought in divorce proceeding were confidential). Although a typical civil litigant is entitled to discovery only of relevant, non-privileged information, *Culbertson*, 393 S.W.3d at 683 (citing *Powell v. Cmty. Health Sys., Inc.*, 312 S.W.3d 496, 504 (Tenn. 2010)), a statutory privilege is not absolute. In child-custody cases, "the paramount consideration is the best interest of the child," and a child's best interests must be determined in light of the comparative fitness of the parents. *Id.* at 685.

Nevertheless, a parent who seeks custody does not automatically waive his or her claim to the confidentiality of mental-health information, nor does a parent who denies allegations of mental instability. *Id.* at 686. "If this were the law in Tennessee, there would be no [such] privilege in child custody cases; a party seeking privileged mental health records could obtain them *simply by alleging the mental instability of his or her adversary*." *Id.* (emphasis added). In other words, the mere fact that a parent's mental health may be at issue in a child-custody proceeding does not entitle the other parent to obtain his or her mental-health information.

In *Culbertson*, therefore, the Court of Appeals held that the trial court had erred in ordering disclosure of a father's psychological records without properly considering the application of the psychologist-client privilege or whether the privilege had been waived. Mindful of the trial court's concerns for the best interests of the children, however, the court ordered disclosure of the records to the trial court for *in camera* review "for the purpose of conducting the comparative fitness analysis" required by Tenn. Code Ann. § 36-6-106(a). *Culbertson*, 393 S.W.3d at 687. This decision supports the proposition that where a parent's mental health is at issue in a child-custody proceeding, a trial court may order disclosure of the parent's mental-health information at least for *in camera* review.

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[1] *See also* Tenn. Code Ann. § 63-22-114 (therapist/counselor-client privilege); *id.* § 63-23-109 (social worker-client privilege).

In 2013, the legislature amended § 36-6-106(a) relative to a court's consideration in child-custody proceedings of the mental and physical health of a parent or caregiver.

> The court may, when it deems appropriate, order an examination of a party pursuant to Rule 35 of the Tennessee Rules of Civil Procedure and, if necessary for the conduct of the proceedings, order the disclosure of confidential mental health information of a party pursuant to § 33-3-105(3). The court order required by § 33-3-105(3) shall contain a qualified protective order that, at a minimum, expressly limits the dissemination of confidential protected mental health information for the purpose of the litigation pending before the court and provides for the return or destruction of the confidential protected mental health information at the conclusion of the proceedings.

Tenn. Code Ann. § 36-6-106(a)(5).[2] Rule 35 of the Rules of Civil Procedure allows a court to order a party to submit to a physical or mental examination by a licensed or certified examiner. Tenn. R. Civ. P. 35.01. In order to invoke Rule 35 successfully, a party must establish that another party's mental or physical condition is "in controversy" and that "good cause" exists for the physical or mental examination. *Odom v. Odom*, No. M1999-02811-COA-R3-CV, 2001 WL 1543476, at *5 (Tenn. Ct. App. Dec. 5, 2001).

Tenn. Code Ann. § 33-3-105(3) similarly provides that confidential mental-health information may be disclosed without consent "[a]s a court orders, after a hearing, upon its determination that disclosure is necessary for the conduct of proceedings before it and that failure to make the disclosure would be contrary to public interest or to the detriment of a party to the proceedings." This statute, however, which is part of the statutory scheme setting forth the powers, duties, policies, and work of the Tennessee Departments of Mental Health and Intellectual and Developmental Disabilities, applies only to "[i]nformation that is confidential under § 33-3-103." Tenn. Code Ann. § 33-3-103 provides:

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[2] The statute was recently amended again. Effective July 1, 2014, § 36-6-106(a) will direct a court making a custody determination to consider *inter alia*:

> The moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child. The court may order an examination of a party under Rule 35 of the Tennessee Rules of Civil Procedure and, if necessary for the conduct of the proceedings, order the disclosure of confidential mental health information of a party under § 33-3-105(3). . . .

2014 Tenn. Pub. Acts, ch. 617, § 4. The analysis above, however, would be the same under this amended version of the statute.

> All applications, certificates, records, reports, legal documents, and pleadings made and *all information provided or received in connection with services applied for, provided under, or regulated under this title and directly or indirectly identifying a service recipient* or former service recipient shall be kept confidential and shall not be disclosed by any person except in compliance with this part.

(emphasis added). A "service recipient" is "a person who is receiving service, has applied for service, or for whom someone has applied for or proposed service because the person has mental illness, serious emotional disturbance, or a developmental disability." Tenn. Code Ann. § 33-1-101(23). Tenn. Code Ann. § 33-3-105(3) thus provides for the court-ordered disclosure of confidential mental-health information pertaining only to services applied for, provided under, or regulated under Title 33. *See Herman*, 2012 WL 1655717, at 2 (citing *State v. Fox*, 733 S.W.2d 116, 118 n.1 (Tenn. Crim. App. 1987)) (concluding that § 33-3-105 did not apply to father's disclosure request because mother was not a mentally ill or intellectually disabled person "in the care and custody of the State of Tennessee").[3]

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[3] *State v. Fox*, cited by the Court of Appeals in *Herman*, was decided in 1987. In 2000, Title 33 of the Tennessee Code was substantially revised, *see* 2000 Tenn. Pub. Acts, ch. 947, § 1, and one result of that revision is that the confidentiality provision of § 33-3-103 now extends to information pertaining to services "regulated under [Title 33]."