*Adoption of Lisette*, 93 Mass. App. Ct. 284 (2018) & *Adoption of Virgil*, 93 Mass. App. Ct. 298 (2018)

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These cases are the first appellate decisions to address the federal statute and regulations that protect the confidentiality of substance use disorder patient records, 42 U.S.C. § 290dd-2 and 42 C.F.R. §§ 2.1-2.67, in the context of care and protection proceedings.

Adoption of Lisette

In this appeal from a decree terminating her parental rights, the mother argued, inter alia, that the trial judge violated the statute by ordering the treatment program where she had been enrolled to produce an affidavit giving the reasons for her discharge from that program and allowing the affidavit into evidence. The Appeals Court concluded that the trial judge had good cause to authorize disclosure because (1) there was no other effective way to obtain the information, and (2) the interests of the children in being free from abuse and neglect and the judge’s need to learn the circumstances of the mother’s discharge from the program substantially outweighed any unlikely injury to the mother, the patient-physician relationship, or to the treatment services from disclosure.

*Facts:* DCF filed care and protection petitions for Lisette and her brother, Adam, due to the mother’s substance use and domestic violence. Before trial, the mother enrolled in an inpatient substance use treatment program. During trial, the mother was terminated from that program. DCF subpoenaed the mother’s program records relating to the reasons for her discharge. The program manager objected to the subpoena, citing the confidentiality provisions set forth in 42 U.S.C. § 290dd-2. At a hearing on the objection, the judge suggested that he order the program manager to prepare an affidavit limited to the circumstances of the mother’s discharge as a less intrusive alternative. The judge permitted the mother to agree to the affidavit alternative without waiving her objection to disclosure. The next day, the program manager submitted the affidavit and DCF sought to admit it into evidence. The mother’s counsel objected. The judge allowed the affidavit into evidence over the mother’s objection.

*Discussion:* The broad purpose of the statute is to protect the confidentiality of information about a person’s participation in substance use treatment so that they seek out and benefit from that treatment. It provides that any record concerning the identity, diagnosis, prognosis, or treatment of a patient for substance use disorder is confidential and may not be disclosed absent patient consent, with certain limited exceptions. One such exception is where disclosure is authorized by a court order. To obtain a court order removing the prohibition on disclosure, the party seeking disclosure of the records must demonstrate good cause. To establish good cause, the party must show that (1) the information cannot be obtained elsewhere, and (2) the public interest and need for disclosure outweigh injury to the patient, to the patient-physician relationship, and to the treatment services. The regulations impose an even higher standard for disclosure of confidential communications contained within the records. Disclosure of confidential communications must be “necessary to protect against an existing threat to life or of serious bodily injury.” This includes “circumstances which constitute suspected child abuse and neglect.” If good cause is established, the court must limit disclosure to only those portions of the records that are necessary to accomplish the purpose of the order.

The Appeals Court here gave careful consideration to the statute, and wholeheartedly endorsed the trial judge’s decision to preserve the mother’s objection while allowing into evidence the narrowly tailored affidavit. First, it determined that there was no effective way to obtain the program discharge information other than through the program manager’s affidavit because of “significant evidentiary obstacles.” It reasoned that the trial judge was within his discretion to decide that he needed an independent source of the information and could not rely on the mother’s testimony about her discharge alone. But testimony from the DCF social worker about what the program staff told her about the mother’s discharge would constitute inadmissible hearsay. Hearsay problem aside, even if the mother were to authorize the program to disclose the details of her discharge to the social worker, federal regulations prohibit the social worker from re-disclosing the information in court without her consent.

Second, the Appeals Court determined that the interests of the children in being free from abuse and neglect and the judge’s need to learn the circumstances of the mother’s discharge from the program substantially outweighed any unlikely injury to the mother, the patient-physician relationship, or to the treatment services from this limited disclosure. The Appeals Court reiterated that in care and protection proceedings, the child’s welfare and the state’s interest in protecting it outweigh the rights of the parent. The circumstances of the mother’s discharge from the program were an important part of the trial judge’s fitness analysis because her substance use and failure to engage in treatment services led to the filing of the care and protection petition in the first place. In contrast, there was little risk to the mother because care and protection proceedings are impounded and therefore not open to public inspection. Because the mother’s treatment at the program had already ended, disclosure had minimal, if any, impact on that patient-physician relationship. Additionally, the mother subsequently identified a different program in which she intended to enroll, so she was not deterred by the disclosure from seeking treatment elsewhere. The Appeals Court noted that the mother opened the door to an exploration of her program compliance by testifying that she was in compliance with its rules. And the narrowly focused affidavit explaining only the reasons for the mother’s discharge, coupled with the program’s “zealous protection” of her rights in contesting DCF’s subpoena, minimized any risk of injury to the program.

Adoption of Virgil

In this appeal from a decree terminating her parental rights, the mother argued, inter alia, that she did not receive adequate notice to respond to DCF’s motions seeking disclosure of her substance use treatment records as required by 42 C.F.R. § 2.64 because the motions were filed and allowed on the same day. The Appeals Court concluded that the mother was not prejudiced by the same-day notice and affirmed.

*Facts:* DCF filed a care and protection petition for Virgil due to the mother’s mental health issues and the condition of the apartment in which they lived. The mother overdosed several months later, and entered into substance use treatment at two different programs – first at Habit Opco and then at Women’s View. In treatment, the mother disclosed that she had been using opiates for five years. DCF filed a motion seeking disclosure of Habit Opco’s records. The judge allowed the motion that day. Those records were subpoenaed two months later. They were admitted in evidence nearly two months after that. DCF then filed a motion seeking disclosure of Women’s View’s records. The judge again allowed the motion that day. Those records were subpoenaed two days later. They were admitted in evidence almost one month after that. The trial judge stated in his orders allowing DCF’s motions that “the safety and best interests of the child in this matter constitute good cause, within the meaning of 42 U.S.C. § 209dd-2(b)(2)(C) to order disclosure of these records” and that the “records are subject to limited confidentiality under G.L. c. 111E, § 18 and 42 U.S.C. § 290dd et seq.”

*Discussion:* Disclosure of substance use treatment records involves a two-step process. First, the party seeking disclosure must file a motion demonstrating good cause. Before a court order authorizing disclosure of the records may issue, federal regulations provide that both the patient and the treatment provider must be given notice and an opportunity to respond either in writing or in person. The judge may examine the records in camera. The other parties should not be permitted to see the records prior to issuance of an order though. The court order only removes the prohibition on disclosure. The party seeking disclosure must then serve a subpoena on the record holder to compel disclosure.

Here, the Appeals Court determined that although it would have been better practice to have given more advance notice and opportunity to be heard, the mother was present when DCF filed the motions. She had plenty of time to file her own motions, including a request for an in camera hearing before the records were disclosed, but did not do so. She then waived any objection by testifying about the contents of the records at trial. Although the mother did not object to disclosure of her treatment records, the Appeals Court stated in dicta that a child’s interest in a care and protection case – protection from physical, mental, or emotional harm – and the state’s interest in protecting the child’s welfare outweigh any potential injury to the parent from disclosure of their treatment records. Because of the mother’s substance use history, her participation in treatment was “highly relevant” to the judge’s assessment of her fitness and Virgil’s best interests. The mother’s treatment at each program had already ended when the records were disclosed, too.

Practice Tip

Here’s how this *should* happen:

* DCF (or another party) files a motion seeking disclosure of a parent’s substance use treatment records and the motion is scheduled for hearing.
* The motion and any objections to it are heard, and the judge determines whether there is good cause for disclosure. If the judge finds good cause, they enter an order authorizing disclosure. But only the parent’s attorney may access the records. The judge sets a date by which the parent’s attorney must file objections to privileged information contained within the records. This is because the regulations impose an even higher standard for confidential communications contained within the records. Disclosure of those communications must be “necessary to protect against existing threat to life or of serious bodily injury.” And disclosure must be limited to only those parts of the record that are necessary to accomplish the purpose of the order. **This process must be clearly spelled out on the record.**
* A subpoena issues to compel disclosure of the treatment records.
* The treatment provider produces the records to the clerk’s office, where they are kept in a sealed envelope.
* The parent’s attorney reviews the records in the clerk’s office and files motions in limine to strike privileged information. Each objection should clearly identify the document, page number, statement, and treatment provider’s license.
* The judge conducts an in camera review and rules on the motions.
* The records are redacted accordingly.
* Then the other parties may review the records in the clerk’s office.

If this is not how it happens in your court, request an opportunity to review the records and file motions in limine, and file a motion for a protective order to prevent the other parties from seeing the records until your motions are ruled on and the records are redacted.

A trend has emerged in many courts whereby DCF requests court orders authorizing disclosure of parents’ substance use treatment records as a matter of course. These cookie cutter motions are often, as in *Virgil*, filed and heard on the same day. This practice raises a number of issues.

Without advance notice, counsel may not be able to prepare a meaningful response, thereby denying the client their due process right to effective assistance of counsel. Lack of advance notice may effectively prevent the treatment program from providing a response, too. Sometimes DCF does not even bother to serve the treatment program with its motion. Juvenile Court Rule 5 requires that these motions are served at least seven days in advance (ten if service is by mail) and accompanied by an affidavit explaining why the records are needed. As a matter of fairness, DCF should have to follow the rules just like everyone else. Counsel should object to any deficiencies in notice, and request that the motion hearing be continued to provide both the client and the treatment program a sufficient opportunity to respond. If necessary, counsel may seek interlocutory relief.

Treatment providers have an independent interest in the confidentiality of their patients’ records because of the potential for harm to their services from disclosure. Even when treatment providers are properly served with a motion of this sort, they do not always respond though. Counsel should consider contacting the treatment provider and requesting that they, too, oppose disclosure of the client’s confidential information. The motion hearing is an opportunity to educate the judge about the importance of patient confidentiality and the harm to the therapeutic relationship caused by disclosure. Of course, the client must sign a release authorizing this communication between their treatment provider and counsel.

In both of these cases, the records in question were held by former treatment providers. Where the records being sought are held by a current, ongoing treatment provider, counsel should argue that disclosure will have a significant damaging impact on the patient-physician relationship; that it is best for the parent to maintain the confidentiality of that relationship to ensure that they continue to seek out and benefit from treatment without fear that DCF will then access and use that information against them, and also, that it is best for the child that the parent succeeds in treatment so they can return home.

Disclosure must be limited to only those parts of the record that are necessary to accomplish the purpose of the order. If counsel does not object to disclosure, and does not ask for the order to be narrowly tailored to disclose only what is needed, the judge might permit the entire record to be disclosed. That’s what happened in *Virgil*. But a narrowly tailored order, like in *Lisette*, might be less damaging to the parent.

In addition to the federal statute, the trial judge in *Virgil* cited to G.L. c. 111E, § 18 in his orders allowing DCF’s motions. State law protects the confidentiality of substance use treatment records, too, but the federal statute is more protective of client confidentiality.

Counsel’s choice of words can be significant when representing clients with issues of substance use. For example, describing a parent as “abusing substances” implies the parent has made a choice and chooses to “abuse” drugs or alcohol at the expense of their children’s care. The medical model, adopted by the Supreme Judicial Court and now cited with favor in case law, views addiction to drugs or alcohol as a disease. The term “substance use disorder” reflects the lexicon of the medical model. Although the federal statute has not been amended, the attendant regulations now say “substance use disorder” rather than “substance abuse.”

The disclosure process is not special to this statute. Although the standard is different for releasing mental health treatment records under state law, the process is the same. For more on this subject, counsel should consult the Massachusetts Court Improvement Program’s recently released “Guide on the Disclosure of Confidential Information.” The Guide is available online at <https://www.mass.gov/handbook/guide-on-the-disclosure-of-confidential-information>. We are making efforts to distribute hard copies of the Guide at trainings and other local events, too.