



# When Kids Are Involved: Selected Legal & Risk Management Issues

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# Disclosures

Neither I nor my spouse/partner has a relevant financial relationship with a commercial interest to disclose.

# Agenda

- Custody & Divorce
- Informed Consent
- Confidentiality
- Off-Label Treatment
- Mandatory Reporting

# Custody & Divorce

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# Determining Paternity

- When married parents have a child, parentage is presumed
- When parents are not married, only mother's parentage is established by birth of child
  - Typically, paternity established through:
    - Voluntary agreement by mother/father of child, or
    - By court order with finding of paternity

# Physical Custody

- Physical custody:
  - Role & responsibility of providing day-to-day care
- Primary Physical Custodian:
  - Individual providing majority of day-to-day care
- Parenting Plan:
  - Court-ordered division of physical custody between custodians

# Legal Custody

- Legal custody:
  - Authority to make major life decisions for child
    - Healthcare, education, religious upbringing, etc.
- Legal custody typically is binary
  - You have it or you don't
- When parenting capacity a concern, a court may alter or sever legal custody

# Other Custody Forms

- Guardianship:
  - Judicially appointed individuals with various arrangements of physical and legal custody of children
  - State Custody (Child Welfare/Foster Care/ Correctional)
- Emancipated Minor:
  - Judicial act to free a minor from control of parents, and parents freed from responsibility for child
- Mature Minor:
  - A minor may possess the maturity to choose or reject a particular health care treatment and in their best interest to not involve parent/guardian as typical



# Treating Kids of Divorced Parents (I)

- Divorce almost always alters physical custody, and may alter legal custody
  - Typically, parents share both physical and legal custody
- Working with divorced parents sharing legal custody is analogous to working with married parents
  - Parents are expected to collaborate in decisions

# Treating Kids of Divorced Parents (II)

- Recommend at a minimum ‘other’ parent assents to treatment of child
- In emergencies or critically acute situations, one parent’s consent is sufficient
- Where parents sharing legal custody disagree about treatment, your role is to not negotiate their discord

# Considerations in High Conflict Divorce

- ~10% of all divorces are high conflict (involve extension litigation)
- Children's treatment often a nexus of conflict
- Maintain your focus on need of patient
- Risks:
  - Being enlisted as partisan
  - Being misperceived or misrepresented

# Maintain your Neutrality

- Ensure both parents have equal access to you
- Provide both parents with same timely information
- Unless acting in formal forensic capacity, do not:
  - Critique parent's behavior/decision-making,
  - Critique parenting plans,
  - Offer opinions regarding parenting capacity

# Considerations for Informed Consent

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- Minors are presumed incapable of informed consent
  - Important to obtain assent (expression of willingness or agreement ) of child if developmentally appropriate
- Aim to balance the perspectives, autonomy, and wishes of the parent, child, and the clinician

# Are the parents competent?

- Parents assumed competent to make treatment decisions regarding their children
- However, could be incompetent
  - Incompetent: Status of an individual defined by functional deficits (due to mental illness, mental retardation, or other mental conditions) judged to be sufficiently great that the person cannot meet the demands of a specific decision-making situation at the time, weighed in light of its potential consequences

# Exceptions to Presumption of Incompetence in Kids

- Emergency
- Mature Minor
- Statutory exceptions:
  - STD, HIV, family planning/reproductive health, mental health treatment, or substance abuse treatment
- Judicial bypass in minor seeking abortion



# Considerations for Confidentiality

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- Those with the legal authority to consent to treatment have the legal authority to access all the information disclosed in treatment and to the pertinent medical records

# Balancing Spheres of Privacy

- At the outset of treatment, delineate with the adolescent and the parents the expectations around disclosure of information
- Treaters should encourage developmentally appropriate fostering of adolescents' growing independence
  - Encourage parents to do the same

# Disclose Information Relevant to Wellbeing

- Never withhold information from parents that may help protect patient from serious harm
- Considerations:
  - Legal and ethical obligations to disclose,
  - Potential value of parents being aware,
  - Impact of disclosure on treatment
- Strategize and collaborate with patient on how best to disclose

# Exceptions to Maintaining Confidentiality in Kids

- Mandated reporting of abuse and neglect
- Emergency
- Safety of patient/others
- Malpractice suits
- Civil commitment
- HIPAA Exceptions
- Judicial waiver of privilege

# Off-Label Use of Medications

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# Federal Drug Administration Approval of Medications

- Approval given to marketing information based on research-proven efficacy and safety
- Not intended to interfere with doctor/patient decisions regarding use of medication
- Many, many psychiatry medications are used off label in child psychiatry

# Physician Uses Professional Judgment

- Lack of FDA approval is not a material risk.
  - Rather, lacking use of professional judgment/standard of care provides basis for malpractice claim
- Best Protection = studies of safe use + community practice
  - For guidance, look to literature, guidelines, and peer practice
- Black Box Warnings:
  - Pay attention to them
  - Include in informed consent



# Mandatory Reporting

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# Mandatory Reporting

- Typical obligation to report of abuse and neglect of child (or vulnerable person) to State Child Welfare Agency
  - If, in your professional capacity, you have reasonable cause to believe is being physically, emotionally, or sexually abused or is being neglected

# Thank you for your attention!

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# Outline

- Custody & Divorce
- Informed Consent
- Confidentiality
- Treating Off-Label
- Mandatory reporting