



## **Newsletter of the NOW Foundation Family Law Advisory Committee Spring 2021**

### **CUSTODY EVALUATORS AND OTHER COURT PROFESSIONALS & FAMILY COURT INVOLUNTARY DISCLOSURE OF MENTAL HEALTH RECORDS**

#### **A WORD FROM THE COMMITTEE**

*We hope people are remaining safe and staying healthy in this unprecedented time. Now is the time that we should watch our state legislatures for bills filed that impact safety for women and children. Abusive parents may take advantage of court closures, perhaps removing children, when the protective parent had no recourse. Parents may also use this time to consent to the marriages of their minor daughters (when court appearances are not in person) resulting in abuse going unnoticed by the judges.*

*At this time domestic violence, child abuse and other violence against women and children have risen. This is a dangerous time for victims of all types who still suffer the effects of the pandemic.*

*The National Domestic Violence Hotline is 800-799-7233 (800-799-SAFE). You can call them from anywhere in the United States. You can chat live from here: [Get Help | The National Domestic Violence Hotline \(thehotline.org\)](https://www.thehotline.org)*

### **OHIO SUPREME COURT PROPOSES CUSTODY EVALUATOR RULES**

**By Michael R. Smalz, NOW Family Law Committee**

The Ohio Supreme Court has proposed new “rules of superintendence” setting forth required qualifications, training requirements, evaluator fees, reports, and other standards governing the performance of custody evaluators in child custody cases. This is the first time that the Supreme Court has proposed uniform, statewide guidelines for custody evaluators in divorce and other contested child custody cases. The initial public comment on these proposed

rules has expired. The Court's Commission on Rules of Superintendence will review the public comments and possibly make changes to the proposed rules to incorporate input from the commenters. The Supreme Court will then review the proposals and determine whether they should be adopted as binding rules applicable to all domestic relations and juvenile courts in Ohio.

In general, these proposed rules, if adopted, should improve the qualifications and performance of custody evaluators in Ohio family courts and result in fair, less biased, and more child-focused reports recommendations by custody evaluators. More specifically, these rules would benefit victim/survivors of domestic violence and ensure that custody evaluators take into account domestic violence in evaluating the best interest of the children in contested custody or parenting time cases. This article will discuss the relevance of domestic violence to child custody and parenting time determination and highlight several key areas of the proposed rules.

### **Relevance of Domestic Violence**

Custody evaluators should be aware of the detrimental effects of domestic violence on children. Research conducted on a large national sample found that at least 50% of batterers who physically abused their wives also physically abused their children. The nonprofit research organization Child Trends reported in 2018 that at least 6% of kids nationally – about 4.5 million children – had seen or heard a parent slap, hit, kick, or punch the other parent. Other research has estimated that as many as 15 million children are exposed to physical violence in the home every year. According to a 2018 study published by the American Medical Association, children who witness domestic violence had the same risk and incidents of Post-Traumatic Stress Disorder (PTSD) as soldiers returning from war. Such “toxic stress” on children can harm their mental and physical health and their lifelong learning. These changes lead to lower grades and a greater probability of dropping out of school. Moreover, domestic violence cuts across all social, demographic, educational, and socioeconomic groups.

However, these effects can be reversed or mitigated with treatment and with the support of a loving, nonviolent parent. According to the National Child Traumatic Stress Network, “a strong relationship with a caring, nonviolent parent is one of the most important factors helping children grow in a positive way despite their experiences.” A custody evaluator can play an important role in screening for and identifying domestic violence in contested custody cases. Additionally, a custody evaluator's report can help to ensure that children are placed in the care of a loving, nonviolent, non-abusive parent who will help the children overcome their previous traumatic experiences and not place the child at risk of further harm.

### **Important Provisions of Proposed Rules of Superintendence**

The proposed rules of superintendence address these concerns. They provide critically important guidance to courts in custody evaluators in a number of areas.

Rule 91.03 establishes a process for accepting, considering, and resolving comments and complaints regarding the performance of custody evaluators, including requirements that the court give prompt consideration to each comment or complaint and take appropriate action, maintain a record regarding the nature and disposition of each comment or complaint, and notify the commenter/complainant and the custody evaluator of the disposition of the comment or complaint.

Rule 91.05(B) requires that the court's order of appointment of a custody evaluator include "any provision the court deems necessary to address the safety and protection of all parties, the children of the parties, any other children residing in the home of a party, and the person being appointed." Therefore, the court must consider domestic violence in setting forth the duties and what protective safeguards the custody evaluator must follow in conducting their investigation.

Rule 91.05(E) provides reasonable and equitable guidelines regarding the allocation of custody evaluator fees. These provisions are very similar to the GAL fee provisions in Rule 48.03(H) of the recently finalized rules of superintendence governing the allocation of fees for guardians ad litem (GALs). In many cases the victim/survivor of domestic violence is indigent or has far fewer financial resources than the abusive spouse or partner, and is thus unable to bear the burden of paying a large share of the custody evaluator fees. Rule 91.05(E) addresses these situations by providing that the parties have a right to be heard on the issue of the appointment and allocation of fees, requiring the court to make a determination of the ability of any party to pay for the likely custody evaluator fees and expenses, and, in making that determination, to consider the financial circumstances of the parties (including qualification for any means-tested public assistance), the complexity of the issues, and the anticipated fees and expenses of the custody evaluator. In addition, the court, after its initial allocation of payment of the custody evaluators fees and expenses, may, for good cause shown based on an unforeseen change of circumstances, recalculate fees or expenses or require a party to reimburse another party in part or in whole for fees or expenses paid.

Rules 91.06 and 91.07 set forth reasonable and necessary pre-appointment training and continuing education requirements, including 40 hours to qualify for initial appointment as a custody evaluator and six hours of annual continuing education requirements.

Rule 91.08 sets forth the specific responsibilities and authority of custody evaluators.

### **Suggested Changes to Proposed Rules of Superintendence**

The proposed custody evaluator rules of superintendence are comprehensive, well-written, and address a wide range of issues including the grounds for

appointment of a custody evaluator, custody evaluator qualifications and training requirements, the duties and authority of custody evaluators, fees and expenses, written reports, the role of the courts, and a process for addressing comments and complaints regarding the performance of custody evaluators. However, Ohio NOW, the Ohio NOW Education and Legal Fund, and the ACTION OHIO Coalition for Battered Women have suggested the following improvements to the proposed rules and training guidelines.

First, proposed Rule 91.05 (E) (3) could be amended to clarify and reinforce the requirement that the court take into account the parties' ability to pay the custody evaluator's fees and expenses in allocating the payment of those fees and expenses. The following language (new language bolded and in CAPS) would be helpful:

“(3) Upon determination that the appointment of a custody evaluation should proceed, **AND TAKING INTO ACCOUNT THE PARTIES' ABILITY TO PAY THE EVALUATOR'S FEES AND EXPENSES**, the court shall issue an order regarding allocation of payment of the evaluator's fees and expenses which shall consist of both of the following:

- (a) any requirement for a party to pay fees and expenses, including an initial deposit;
- (b) Any requirement for any other entity or individual to contribute toward fees and expenses.”

Second, Rule 91.08 (E) (7) could be amended to require consideration of the safety of the parents and other parties as well as that of the children in all phases of the process, by adopting the following language (new language bolded and in CAPS):

“(7) Consider the health, safety, welfare, and best interest of the child, **AND THE SAFETY OF THE PARENTS AND OTHER PARTIES**, in all phases of the process, including interviews with parents, extended family members, counsel for the child, and other interested parties or collateral sources.”

Third, the Initial Training Program requirements under the proposed Custody Evaluator Training Guidelines could be amended to include “assessing for lethality and safety” as a required training topic. This would be consistent with the corresponding language for the pre-service training requirements for GALS in Ohio's recently adopted Guardian ad Litem rules of superintendence (Ohio Supreme Court Rule of Superintendence 48.04 (B)(4)(d), effective January 1, 2021). Therefore, advocates recommended the following amendment to paragraph (a) under the Initial Training Program requirements (new language bolded and in CAPS):

“(a) The dynamics of high-conflict families and parenting time disputes, including parent-child relationships, blended families, extended family relationships, child resistance/refusal, **AND ASSESSING FOR LETHALITY AND SAFETY;**”

### **Conclusion**

A few states may have similar existing rules or court guidance. Advocates in other states should consider pushing for their state supreme courts to adopt similar or even stronger rules or guidance for their local family courts. In some states, legislation may be required. Such efforts could greatly benefit mothers and children – especially those in domestic violence situations – by enabling judges to make fairer and more reasonable child custody determinations based on the best interests of the children.

## **OHIO SUPREME COURT UPHOLDS DIVORCE COURT’S ORDER COMPELLING RELEASE OF WIFE’S MENTAL HEALTH RECORDS TO OPPOSING PARTY**

**By Michael Smalz, NOW Family Law Committee**

On January 18, 2020, the Ohio Supreme Court, by a 4-3 vote, issued a troubling decision affirming the divorce court’s order compelling the release of the wife’s mental health (psychiatric) records to her husband and his attorney. *Torres Friedenber* *v. Friedenber*, Slip Opinion No. 2020-Ohio-3345. A “protective order” limited disclosure of the records to counsel, the parties, and their experts. The parties were contesting custody of their minor children, and the records were deemed relevant because under Ohio law the trial court must consider “the best interest of the children” in determining child custody (“allocating parental rights and responsibilities” in Ohio legal terminology). Under Ohio statutes, the parties’ mental health is a mandatory factor that the court must consider in determining both the “best interest of the children” for child custody purposes and spousal support.

The issue before the Ohio Supreme Court was whether the wife’s psychiatric records were protected by the physician-patient privilege under Ohio law. (Ohio has a similar psychologist-patient privilege.) The purpose of the privilege, which ordinarily protects confidentiality of physician-patient communications, is to enable appropriate and complete treatment of the patient by enabling patients to disclose their symptoms and conditions to their positions without fearing that these matters will later become public. Psychiatry is especially dependent upon a relationship of confidence and trust between the therapist and patient.

However, the Ohio legislature has carved out a number of exceptions to the physician-patient privilege. For example, the privilege does not apply and a physician may be compelled to testify if the patient files “any type of civil action” where such testimony or records are “relevant” to the issues in the civil action. Since under Ohio law a party’s mental health must be taken into account by the court in determining child custody and alimony, the party’s psychiatric records may be relevant and subject to disclosure in divorce and child custody proceedings.

But not every conversation between the patient and his or her physician is subject to mandatory disclosure. The Ohio statutes provide that such information is relevant only to the extent that the communication “related causally or historically to physical or mental injuries relevant” in the civil action filed by the patient.

What is especially troubling about this decision by the Ohio Supreme Court is that the majority upheld the magistrate’s (trial court) order compelling disclosure of the wife’s psychiatric records based on the magistrate’s general finding that the records were “relevant” without an explicit finding that the records were causally or historically related to a physical or mental injury of the wife. In fact, the husband did not allege any mental injury or unfitness on the part of his wife or raise her mental health as an issue in the case. The majority opinion thus failed to strictly apply Ohio’s statutory protection against disclosure of physician-patient communications in the absence of such a finding.

Although the disclosures in this case apparently did not affect the outcome of the divorce and child custody case, the Ohio Supreme Court’s holding is disturbing because it could encourage spouses and parents to seek and obtain the other spouse’s or parent’s physical or mental health records in any divorce or child custody case and subject those parties to a fishing expedition through all of their physical or mental health records even when there is no issue of mental unfitness. As noted in the dissenting opinion, even marriage counseling records may be subject to disclosure in discovery proceedings. Therefore, the majority opinion may subvert the legislative intent in limiting such disclosure to cases where there is an issue regarding a relevant “physical or mental injury” of the party.

It remains to be seen whether the lower courts in Ohio will use the majority opinion in *Friedenberg* to open the floodgates to involuntary disclosure of mental health records in Ohio divorce and child custody cases. But it could have a chilling effect on some patients when they consider seeking treatment or when they are communicating with their therapist. Spouses or parents who contemplate a possible divorce or custody battle may be deterred from seeking necessary and appropriate treatment or may not feel comfortable disclosing pertinent information to their therapist.

## **Resources and News Articles**

**Parts One and Two of a Six-part investigative series looking into reported corruption in the Missouri Judiciary and family courts.**

Part One: Missouri case where judge send 14-year-old girl to live with her allegedly abusive father, while jailing her mother.

[Missouri Judge Puts a Girl With Allegedly Abusive Dad – PJ Media](#)

Part Two: 31 Missouri Judges recuse themselves from lawsuit alleging family court guardians and psychologists orchestrated money-making scheme.

[31 Missouri Judges Recuse Themselves from Lawsuit Alleging Family Court Guardians and Psychologists Orchestrated Money-Making Scheme – PJ Media](#)

## **A Call to Action**

Join with others in your NOW community to work on the issue of training needed for Custody Evaluators, Guardians ad Litem, Visitation Coordinators and other Family Court Professionals. Ask your state courts to adopt rules similar to the Child Custody Evaluator Rules recently proposed by the Ohio Supreme Court. Contact your local courts about developing local court rules. Ask the American Psychological Association or other professional organizations to strengthen the rules for custody evaluators. Ask courts to set up a complaint mechanism, if one does not exist. Ask your courts to require training on at least domestic violence for custody evaluators and other court professionals. And on the issue of court release of mental health records, consider approaching your legislators to prohibit this dangerous practice. On a personal level, people using therapists or counselors, might consider asking those professionals to take minimal or no notes on their sessions.

## **General Information on Family Courts**

A clearinghouse of materials the committee has compiled can be found at the NOW Foundation web site at this link, <http://now.org/now-foundation/crisis-in-family-courts/>. There are additional materials at the Chapters only web site on the NOW, Inc. website.

The Family Law Advisory Committee's Brochure the Family Courts is available here: [FamilyLawBrochure2017-11-08.pdf \(now.org\)](#)

To reach the Family Law Committee, please email: [famlaw@now.org](mailto:famlaw@now.org)