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Commonwealth Court of Pennsylvania.

Jan C. GROSSMAN, Petitioner,
v.
STATE BOARD OF PSYCHOLOGY, Respondent.

Submitted on Briefs Jan. 17, 2003.
Decided June 2, 2003.

Psychologist appealed Board of Psychology's imposition of disciplinary measures, No. 0093-63-00. The Commonwealth Court, No. 3023 C.D. 2001, McGinley, J., held that: (1) Board did not abuse its discretion by not allowing former Board member to testify; (2) finding that psychologist violated rule of Professional Psychologists Practice Act and particular principle of Psychology Board's Code of Ethics by conducting a psychological evaluation with child with respect to a custody proceeding without knowledge or consent of child's father was not against weight of evidence; and (3) psychologist did not receive adequate notice of charge that he engaged in immoral or unprofessional conduct by conducting a psychological evaluation with child with respect to a custody proceeding without knowledge or consent of child's father.

Affirmed in part; reversed in part.

West Headnotes

[1] Administrative Law and Procedure ⇐741
15Ak741 Most Cited Cases

An adjudication made by an administrative agency must be affirmed on appeal unless constitutional rights have been violated, an error of law has been made, rules of administrative procedure have been violated or a finding of fact necessary to support the adjudication is not supported by substantial evidence.

[2] Health ⇐204
198Hk204 Most Cited Cases

Principle of Board of Psychology's Code of Ethics that stated psychologists were to act in accordance with American Psychological Association (APA) standards, provided notice and clarification as to what would happen if an APA guideline or standard was updated, even though psychologist, in disciplinary proceeding, claimed Board did not inform him or other psychologists when APA published guidelines that were applicable to principle; principle stated it would adhere to standards and guidelines of APA, and thus if APA issued a new set of guidelines, new guidelines would have applied to State licensed psychologists. 49 Pa.Code § 41.61(3)(e).

[3] Health ⇐105
198Hk105 Most Cited Cases

Principle of Board of Psychology's Code of Ethics that stated psychologists were required to act in accordance with American Psychological Association (APA) standards, was not unconstitutionally vague and did not fail to contain reasonable standards to guide conduct to satisfy requirements of due process; principle required adherence to the standards and guidelines of the APA. 49 Pa.Code § 41.61(3)(e).

[4] Health ⇐204
198Hk204 Most Cited Cases

Guidelines published by American Psychological Association (APA) that were incorporated into principle of Board of Psychology's Code of Ethics that stated psychologists were required to act in accordance with American Psychological Association (APA) standards, were applicable to psychologist who was subject of disciplinary proceeding, even though psychologist claimed guidelines were only aspirational; Board made the guidelines mandatory when it required compliance with the standards and guidelines of the APA. 49 Pa.Code § 41.61(3)(e).

[5] Health ⇐223(1)
198Hk223(1) Most Cited Cases

Psychologist, in disciplinary hearing, waived for appellate review his claim that his conviction of immoral and unprofessional conduct was a gross abuse of discretion, where psychologist raised such claim in under argument section of brief that indicated he failed to receive proper notice of Board of Psychology's guidelines. Rules App.Proc., Rule 2116(a), 42 Pa.C.S.A.

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[6] Health ⊂=204
198Hk204 Most Cited Cases

Psychologist was not excused from obtaining consent from child's father prior to psychologist conducting psychological evaluation of child with respect to custody proceeding, merely because child was returned to mother not freshly bathed and coiffured, and thus psychologist was subject to discipline for failure to obtain such consent; child's uncleanliness did not constitute a "bona fide emergency" which allowed for a psychologist to not obtain consent of both parents when performing a custody evaluation.

[7] Health ⊂=218
198Hk218 Most Cited Cases

State Board of Psychology did not abuse its discretion in disciplinary proceeding by not allowing former Board member to testify; Board would not have been bound by opinion of member, and Board's rules and policies spoke for themselves.

[8] Health ⊂=218
198Hk218 Most Cited Cases

Finding that psychologist violated rule of Professional Psychologists- Practice Act and particular principle of Psychology Board's Code of Ethics by conducting a psychological evaluation with child with respect to a custody proceeding without knowledge or consent of child's father, was not against weight of evidence; three experts agreed that in an evaluation performed on child for custody determination, dual consent was required, testimony was given that psychologist's meeting with child constituted a child custody evaluation, and testimony was given that psychologist obtained no consent from child's father prior to performing evaluation. 63 P.S. § 1208(a)(9, 11); 49 Pa.Code § 41.63(e).

[9] Administrative Law and Procedure ⊂=787
15Ak787 Most Cited Cases

[9] Administrative Law and Procedure ⊂=793
15Ak793 Most Cited Cases

It is not a function of an appellate court to judge the weight and credibility of evidence before an administrative agency.

[10] Constitutional Law ⊂=318(1)
92k318(1) Most Cited Cases

In an administrative proceeding, the essential elements of due process are notice and an opportunity to be heard. U.S.C.A. Const.Amend. 14

[11] Constitutional Law ⊂=318(1)
92k318(1) Most Cited Cases

Notice, the most basic requirement of due process in an administrative proceeding, must be reasonably calculated to inform interested parties of the pending action, and the information necessary to provide an opportunity to present objections. U.S.C.A. Const.Amend. 14.

[12] Health ⊂=222(2)
198Hk222(2) Most Cited Cases

Psychologist did not receive adequate notice of charge that he engaged in immoral or unprofessional conduct by conducting a psychological evaluation with child with respect to a custody proceeding without knowledge or consent of child's father, and thus $1,000 fine imposed for finding that psychologist engaged in such unprofessional conduct was subject to reversal. 63 P.S. § 1208(a)(11).
*750 Jan C. Grossman, petitioner, pro se.

Judith Pachter Schulder, Harrisburg, for respondent.

Susan M. Shanaman, Harrisburg, for amicus curiae, The Pennsylvania Psychological.

BEFORE: McGINLEY, Judge, SIMPSON, Judge, and KELLEY, Senior Judge.

OPINION BY Judge McGINLEY.

Jan C. Grossman, Ph.D. (Dr. Grossman) petitions for review of the order of the State Board of Psychology (Board) that reprimanded Dr. Grossman and assessed a $1,000.00 civil penalty.

The "M" family is composed of B.P., mother, D.M., father, and L.M., a daughter. B.P. and D.M. separated and ultimately divorced in 1994. At the

time of the separation, B.P. and D.M. shared legal custody of L.M. who was approximately four years old. The Court of Common Pleas of Montgomery County (common pleas court) appointed Margaret Cook, Ph.D. (Dr. Cook), to perform a custody evaluation of the M family and to make a recommendation with respect to L.M.'s custody. Dr. Cook recommended that joint legal custody continue.

B.P.'s attorney, Lori Shemtob (Attorney Shemtob), hired Dr. Grossman to review Dr. Cook's report. Dr. Grossman asked Attorney Shemtob to obtain D.M.'s consent before Dr. Grossman evaluated L.M. in July 1996. Attorney Shemtob attempted to obtain D.M.'s consent through correspondence with his attorney. Because D.M.'s attorney was in the process of ending their attorney-client relationship, D.M. did not receive the letters for some time.

During the first week of July, Dr. Grossman met with B.P. and her then husband, Michael (M.P.), for approximately one hour. On July 9, 1996, Dr. Grossman met with L.M., B.P. and M.P. After a brief introduction, Dr. Grossman met with L.M. alone for approximately one hour. Dr. Grossman's initial meeting with L.M. was to determine whether L.M. could verbally assess her needs, communicate realistically, describe her two home environments and to ultimately evaluate Dr. Cook's determination that L.M. was not a reliable witness. B.P. expressed her concern to Dr. Grossman that D.M. was not bathing L.M. when she stayed with him. B.P. arranged with Dr. Grossman to meet in a restaurant after B.P. picked up L.M. on July 14, 1996.

Though Dr. Grossman had requested Attorney Shemtob to obtain D.M.'s consent before he met with L.M., he did not confirm with Attorney Shemtob whether D.M. consented. He also did not contact D.M. prior to the July 9, 1996, meeting. On July 10, 1996, D.M. learned from his *751 daughter of her meeting with Dr. Grossman the previous day. On July 12, 1996, D.M. telephoned Dr. Grossman and told him not to meet with L.M. again. D.M. sent a letter by fax and by certified mail to Dr. Grossman and reiterated his objection to Dr. Grossman. During the telephone conversation, Dr. Grossman failed to inform D.M. that he was scheduled to meet with L.M. on July 14, 1996. Dr. Grossman did not receive the fax until Monday, July 15, 1996, when he returned to his office.

On July 14, 1996, Dr. Grossman met L.M., B.P., and M.P. at a restaurant. After first meeting together, B.P. and M.P. moved to another table as far away from Dr. Grossman and L.M. as possible. To determine whether D.M. had cared for L.M. properly, Dr. Grossman picked up some of L.M.'s hair and also lifted her arms to smell L.M.'s hair and armpits.

After the common pleas court became aware that Dr. Grossman met with L.M. without D.M.'s consent, the common pleas court ordered that neither parent could take L.M. to another professional unless the other parent consented. Dr. Grossman did not prepare a formal report but provided "feedback" to Attorney Shemtob.

Dr. Grossman testified at the custody trial. Dr. Grossman testified that he asked Attorney Shemtob to obtain the cooperation of all parties. Notes of Testimony, January 28, 1997, (N.T. 1/28/97) at 451 [FN1]. Dr. Grossman also testified that in his telephone conversation with D.M., D.M. "did not forbid or, in any way, stop me from seeing his daughter." N.T. 1/28/97 at 468- 469. Dr. Grossman described L.M.'s condition when he met her at the restaurant as having matted hair with a slight smell about her. N.T. 1/28/97 at 470. Dr. Grossman criticized Dr. Cooke's evaluation because there was no meeting with the parents together and no interview of L.M. N.T. 1/28/97 at 478-481. Dr. Grossman stated that the fact that D.M. sold insurance could present a child care problem because he might have to contact customers at night. N.T. 1/29/97 at 505-506; Reproduced Record (R.R.) at 372a-373a. Dr. Grossman concluded that Dr. Cook did not collect sufficient data to draw the conclusions in her report. N.T. 1/29/97 at 515. On cross-examination, Dr. Grossman admitted that while meeting with B.P. and M.P., he made a note that D.M. consumed 750 milligrams per day of caffeine. N.T. 1/29/97 at 550; R.R. at 386a.

FN1. The Reproduced Record does not contain the complete notes of testimony.

On or about February 14, 2000, the Commonwealth of Pennsylvania Bureau of Professional and Occupational Affairs (Commonwealth) filed a Notice and Order to Show

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Cause why the State Board of Psychology (Board) should not suspend, revoke or otherwise restrict Dr. Grossman's license, certificate, registration or permit, or impose a civil penalty. Count One of the Order to Show Cause alleged:

9. On or about July 9, 1996, Respondent [Dr. Grossman] met with L.M., then approximately 5 1/2 years old, for approximately one hour in his office at the request of L.M.'s mother, B.P. and without the knowledge or consent of D.M.

10. By letter dated July 12, 1996, D.M. demanded that Respondent [Dr. Grossman] discontinue any meetings or evaluations with his daughter without his consent and advised Respondent [Dr. Grossman] that he did not have consent to evaluate his daughter, L.M.

11. On or about July 14, 1996, which was a Sunday evening, Respondent [Dr. Grossman] again met with L.M. in a Chinese restaurant at the request of *752 B.P. without the knowledge or consent of D.M.

12. At the time B.P. requested that Respondent [Dr. Grossman] see her daughter, she was in the midst of a custody battle with L.M.'s father, D.M.

13. During the course of the meetings on July 9 and 14, 1996, Respondent [Dr. Grossman] not only spoke to L.M. but also viewed her physical appearance by holding her hands and smelling her because B.P. had alleged that D.M. failed to bathe L.M. and/or engage in appropriate hygiene care with respect to L.M.

14. On July 16, 1996 in the Court of Common Pleas of Montgomery County, Respondent [Dr. Grossman] provided expert testimony on behalf of B.P. in the custody matter of L.M.

15. Respondent [Dr. Grossman], who is also a licensed practicing attorney, never consulted with D.M. or his attorney with respect to consent to meet with, treat and/or evaluate L.M.

16. Based upon the foregoing Factual Allegations, the Board is authorized to suspend or revoke, or otherwise restrict Respondent's [Dr. Grossman] license, or impose a civil penalty under 63 P.S. § 1208(a)(9) [FN2] as well as the Board's Regulations at 49 Pa.Code § 41.61, Ethical Principle 3(e) [FN3], because Respondent [Dr. Grossman] has deviated from the American Psychological Association standards and guidelines when he conducted a psychological evaluation and/or met with L.M. without the knowledge or consent of her father, D.M.

FN2. Section 8(a)(9) of the Professional Psychologists Practice Act (Act), Act of March 23, 1972, P.L. 136, *as amended*, 63 P.S. § 1208(a)(9), provides:

(a) The board may refuse to issue a license or may suspend, revoke, limit or restrict a licensee or reprimand a licensee for any of the following reasons:

....

(9) Violating a lawful regulation promulgated by the board, including, but not limited to, ethical regulations, or violating a lawful order of the board previously entered in a disciplinary proceeding.

FN3. Principle 3(e) of the Board's Code of Ethics (Principle 3(e)), 49 Pa.Code § 41.61(3)(e), provides:

As practitioners and researchers, psychologists act in accord with American Psychological Association standards and guidelines related to practice and to the conduct of research with human beings and animals. In the ordinary course of events, psychologists adhere to relevant governmental laws and institutional regulations. Whenever the laws, regulations or standards are in conflict, psychologists make known their commitment to a resolution of the conflict. Both practitioners and researchers are concerned with the development of laws and regulations which best serve the public interest.

Notice and Order to Show Cause, February 14, 2000, Paragraphs 9-16 at 2-3; R.R. at 3a-4a. In Count II, the Commonwealth alleged that Dr. Grossman violated Section 8(a)(11) of the Act, 63 P.S. § 1208(a)(11) [FN4], because his psychological evaluation and/or meeting with L.M. with respect to a custody proceeding without the knowledge or consent of D.M., constituted unprofessional conduct.

FN4. Section 8(a)(11) of the Act, 63 P.S. § 1208(a)(11), provides:

(a) The board may refuse to issue a license or may suspend, revoke, limit or restrict a licensee or reprimand a licensee for any of

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> the following reasons:
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> ....
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> (11) Committing immoral or unprofessional conduct. Unprofessional conduct shall include any departure from, or failure to conform to, the standards of acceptable and prevailing psychological practice. Actual injury to a client need not be established.

On March 17, 2000, Dr. Grossman moved to dismiss the order to show cause because the order failed to set forth the material facts and/or statute upon which *753 the cause of action was based, failed to set forth with specificity the grounds on which it is alleged that Dr. Grossman violated the Act and Principle 3(e). The Pennsylvania Psychological Association (PPA) filed a brief for amicus curiae in support of Dr. Grossman's motion to dismiss. On July 25, 2000, the Board denied the motion to dismiss.

On October 6, 2000, the Commonwealth presented a motion in limine in the nature of a motion to limit expert testimony because Dr. Grossman indicated in his prehearing statement that he planned to call three expert witnesses: Alvin L. Gerstein, Ph.D. (Dr. Gerstein), Sam Knapp, Ed.D. (Dr. Knapp), and Barry Bricklin, Ph.D. (Dr. Bricklin) and that the experts were scheduled to testify with respect to the same issues. The Commonwealth requested that the Board prohibit Dr. Grossman from calling all three expert witnesses. On October 19, 2000, the Board granted the motion in part and excluded the testimony of Dr. Gerstein.

On October 23, 2000, the Board conducted a formal hearing. D.M. testified that he spoke to Dr. Grossman on July 12, 1996, after Dr. Grossman met with L.M. on July 9, 1996. D.M. testified that he read a letter to Dr. Grossman over the telephone that advised him not to see L.M. again. Notes of Testimony, October 23, 2000, (N.T. 10/23/00) at 28, 34-35; R.R. at 75a. D.M. further testified that he was never asked to participate in a custody evaluation of L.M. with Dr. Grossman. N.T. 10/23/00 at 36; R.R. at 76a.

The Commonwealth called Dr. Grossman as a witness. Dr. Grossman admitted that he never obtained the written or verbal consent of D.M. to become involved in the custody case. N.T. 10/23/00 at 116; R.R. at 79a. Dr. Grossman testified that he never accused D.M. of having a caffeine addiction but that Dr. Cook had an obligation to investigate this issue because B.P. raised it and it was not included in Dr. Cook's report. N.T. 10/23/00 at 139; R.R. at 101a. Dr. Grossman explained that he did not perform a comprehensive custody evaluation of L.M. but instead performed a limited review of Dr. Cook's procedures. N.T. 10/23/00 at 147; R.R. at 109a. Dr. Grossman explained that he informed Attorney Shemtob "the only way I'll undertake this case is if you tell the other side what I'm doing and she agreed to do it. As it turns out from later correspondence, it turns out she didn't." N.T. 10/23/00 at 151; R.R. at 112a. On cross-examination, Dr. Grossman denied that D.M. read anything to him over the telephone or that he was told not to see L.M. N.T. 10/23/00 at 164; R.R. at 115a.

Kirk Heilbrun, Ph.D. (Dr. Heilbrun), a professor of psychology and chair of the Department of Clinical and Health Psychology at MCP Hahnemann University, testified as the Commonwealth's expert. Dr. Heilbrun reviewed the records and documents in the case. Dr. Heilbrun testified that Dr. Grossman played the role of evaluator in that he did more than just critique Dr. Cook's evaluations. Dr. Heilbrun reported:

> When he moved to evaluating LM, meeting with LM herself, then he moved from evaluating existing data to creating his own data. And in my mind, that was what made the difference between his critiquing the evaluation of another mental health professional, and performing a version of his own evaluation.

N.T. 10/23/00 at 220; R.R. at 141a. Dr. Heilbrun determined that Dr. Grossman functioned as an evaluator because he saw L.M. twice and developed some of his own data and because he testified about custodial aspects of the father-child relationship. N.T. 10/23/00 at 231. Dr. Heilbrun testified that the standard of conduct in *754 July 1996 and January 1997 for a custody evaluator required the permission and consent of both parents. N.T. 10/23/00 at 238; R.R. at 148a. Dr. Heilbrun also testified that it is not appropriate for a psychologist to delegate the responsibility of obtaining consent to attorneys. N.T. 10/23/00 at 241.

After the Commonwealth rested, Dr. Grossman's attorney moved to dismiss as the Commonwealth

admitted that the Board had no written policy regarding consent in a custody evaluation. The Board denied the motion. Dr. Bricklin, a clinical psychologist and a professor at the Institute for Graduate Clinical Psychology at Widener University and an expert in custody, testified that there is no standard with respect to obtaining consent from both parents where there is shared legal custody. N.T. 10/23/00 at 365; R.R. at 180a. Dr. Bricklin testified that there was nothing in the Guidelines for Child Custody Evaluations in Divorce Proceedings (Guidelines) that would prevent a psychologist from critiquing the assessment methodology of someone else or conducting a limited evaluation of a child alone. N.T. 10/23/00 at 374; R.R. at 189a.

Dr. Grossman explained his conduct with respect to L.M.:

> And I thought, up until I got my Prosecution letter, that as a psychologist based on the guidelines and the APA ethical principles, I had discretion. The discretion I used in this case was I felt it was very important, given what I had read in Dr. Cooke's report, for the Court to be informed that this child either did or did not have the ability to contribute to her own evaluation and express her own needs. And because I felt that it was important, because .I made that clinical decision, I went forward notifying the father in the way that I felt was the best and most efficient way.

Notes of Testimony, October 24, 2000, (N.T. 10/24/00) at 424; R.R. at 217a.

Dr. Knapp, deputy executive officer and director of professional affairs with the PPA, testified that in 1996, there was no requirement that Dr. Grossman obtain D.M.'s consent for the review of Dr. Cook's report and there was no requirement that he notify or obtain consent from D.M. prior to meeting with L.M. N.T. 10/24/00 at 537; R.R. at 246a.

On December 3, 2001, the Board determined that Dr. Grossman violated Principle 3(e) and Section 8(a)(9) of the Act and issued a reprimand. The Board also determined that Dr. Grossman violated Section 8(a)(11) of the Act and assessed a $1,000 civil penalty. The Board sustained both Count 1 and Count 2 in the Order to Show Cause. The Board made the following relevant findings of fact:

> 17. The father called Respondent [Dr. Grossman] in the afternoon of July 12, 1996, instructed him not to meet with his daughter again and informed him that he would be sending the Respondent a fax following the conversation.
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> 18. Respondent [Dr. Grossman] learned for the first time that the father did not give his consent to Respondent's evaluation of L.M.
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> 19. Respondent [Dr. Grossman] did not advise the father at any time during that conversation that he was scheduled to meet with L.M. again two days later.
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> 20. During the conversation, Respondent [Dr. Grossman] did not attempt to obtain the father's consent to meet with L.M. on July 14, 1996.
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> 21. The father followed up his telephone call by sending the Respondent a letter by fax and certified mail reiterating his prohibition against the Respondent seeing L.M. again.
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> 22. Respondent did not receive the fax until July 15, 1996. (NT 165, 480)
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> *755 23. As was previously arranged, Respondent met L.M. at a Chinese restaurant on July 14, 1996, to see if the mother's claim that L.M. returned from visits with her [sic] the father in a 'dirty and slovenly condition' were accurate.
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> 28. Respondent testified at the custody proceeding the father had a caffeine addiction and as an insurance salesman would be required to work at night, both of which would affect his ability to care for L.M.
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> ....
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> 31. Respondent conducted a custody evaluation.

State Board of Psychology, Adjudication and Order, December 3, 2001, (Adjudication) Findings of Fact Nos. 17-23, 28, 31 at 6-8; R.R. at 346a-348a.

The Board concluded that Dr. Grossman conducted a psychological evaluation of, and met with, L.M. without the knowledge or consent of D.M., in violation of Sections 8(a)(9) of the Act and Principle 3(e) and raised questions about D.M.'s parenting ability without having talked to D.M. in violation of Section 8(a)(11) of the Act. The Board also determined that Dr. Grossman had sufficient notice that he was required to obtain consent because the Board amended its Code of Ethics on June 17, 1989. Included in the amendment was Principle 3(e) which required adherence to the standards and guidelines of the American Psychological Association [APA] related to practice. In July 1994, the APA published Guideline # 9 of the Guidelines which provided:

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> The psychologist obtains informed consent from all adult participants and, as appropriate, informs child participants. In undertaking child custody evaluations, the psychologist ensures that each adult participant is aware of (a) the purpose, nature, and method of the evaluation; (b) who has requested the psychologist's services; and (c) who will be paying the fees. The psychologist informs adult participants about the nature of the assessment instruments and techniques and informs those participants about the possible disposition of data collected. The psychologist provides this information, as appropriate to children, to the extent that they are able to understand.

Guidelines for Child Custody Evaluations in Divorce Proceedings, *American Psychologist*, July 1994, at 679; R.R. at 413a.

[1] Dr. Grossman contends that the Board failed to give proper notice to him of its use, enforcement and interpretation of the Guidelines and its standards for notice and consent in child custody situations, that the Board committed errors of law, that the Board committed a gross abuse of discretion when it did not allow him to present a witness, and that the Board's finding that the Commonwealth had met its burden of proof was a gross abuse of discretion and against the weight of the evidence presented. Dr. Grossman also contends that he did not violate Section 8(a)(9) of the Act because the Commonwealth did not meet its burden of proof, or because Principle 3(e) is defective, and/or because the Board misapplied one of its own cases. Dr. Grossman also contends that Section 8(a)(11) of the Act is unconstitutionally vague and/or the application of the section constitutes a result so excessively punitive so as to constitute a gross abuse of discretion on the part of the Board. [FN5]

> FN5. An adjudication made by the Board must be affirmed on appeal unless constitutional rights have been violated, an error of law has been made, rules of administrative procedure have been violated or a finding of fact necessary to support the adjudication is not supported by substantial evidence. *Batoff v. State Board of Psychology*, 561 Pa. 419, 750 A.2d 835 (2000).

*756 Dr. Grossman asserts that he did not need to obtain D.M.'s consent before either of his meetings with L.M. He also asserts that even if the Board required him to obtain consent, the Board failed to provide him with adequate notice of the requirement. Dr. Grossman also argues that the Board failed to inform him in the Notice and Order to Show Cause that he could be cited for immoral and unprofessional conduct under Section 8(a)(11) of the Act for his testimony at the custody trial rather than for his evaluation of L.M. without D.M.'s consent. As a consequence, Dr. Grossman could not adequately prepare a defense because he did not know that his testimony at the custody trial was at issue.

I. COUNT I.
A. Notice.

Dr. Grossman contends that the Board failed to provide proper notice of its use, enforcement, and interpretation of the Guidelines and its standards for notice and consent in child custody situations. Dr. Grossman notes that he was found guilty of violating Principle 3(e) because he did not follow Guideline # 9 which was published in 1994.

First, Dr. Grossman asserts that Principle 3(e) fails to delineate what a "standard or guideline" is. However, Guideline # 9 is clearly identified as a "guideline" of the APA. On this basis, this Court does not believe that Dr. Grossman could not ascertain that Guideline # 9 was a "guideline".

[2][3] Second, Dr. Grossman asserts that Principle 3(e) did not provide any notice or clarification as to what would happen if an APA guideline or standard was updated, such that the Board did not inform Dr. Grossman or other psychologists between July 1994, when the APA published the Guidelines that they applied to Principle 3(e). This Court does not accept Dr. Grossman's argument. If the Board's principle states that it will adhere to the Standards and Guidelines of the APA and the APA issues a new set of guidelines, it stands to reason that the new guidelines apply to psychologists licensed in the Commonwealth of Pennsylvania. Although Dr. Grossman argues that Principle 3(e) is unconstitutionally vague and fails to contain reasonable standards to guide conduct to satisfy the requirements of due process, *See Watkins v. State Board of Dentistry*, 740 A.2d 760 (Pa.Cmwlth.1999), this Court does not agree. Principle 3(e) requires

adherence to the standards and guidelines of the APA. Guideline # 9 of the Guidelines is a guideline of the APA. The principle is clear.

Next, Dr. Grossman asserts that the Board improperly delegated its rulemaking authority to the APA. Section 3.2(2) of the Act, 63 P.S. § 1203.2(2), requires the Board to establish standards of practice and a code of ethics. The Board complied with the General Assembly's statutory directive.

Dr. Grossman also asserts that a reliance on APA standards and guidelines could result in some guidelines or standards that are in conflict with Pennsylvania law. However, he does not indicate that was the case here.

[4] Dr. Grossman next asserts that even if he concedes that the Board legally incorporated the Guidelines into Principle 3(e) that the Guidelines are inapplicable because they are merely aspirational. The introduction to the Guidelines provides:

> *757 These Guidelines build upon the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct (APA, 1992) and are aspirational in intent. As guidelines, they are not intended to be either mandatory or exhaustive. The goal of the guidelines is to promote proficiency in using psychological expertise in conducting child custody evaluations.

Guidelines at 677; R.R. at 411a. Dr. Grossman argues that because the Guidelines are aspirational and not mandatory, they cannot be applied to regulate conduct of psychologists in Pennsylvania. While Dr. Grossman is correct that the APA describes the Guidelines as aspirational and not mandatory, the Board made the Guidelines mandatory when it required compliance with the standards and guidelines of the APA.

As part of this same argument, Dr. Grossman asserts that the Board applied an unconstitutionally vague term, "higher standard", in reaching its decision. The Board stated:

> Regardless of whether the APA intended their Guidelines to be aspirational for association members, the inclusion of APA standards and guidelines in Principle 3(e) of the Board's Code of Ethics, 49 Pa.Code § 41.61, Principle 3(e), established a mandatory requirement for licensees in this Commonwealth. As the Board explained in its Preamble to the amended regulations, '[t]he primary objective of this amendment is to hold licensed psychologists to a *higher standard of ethical practice* ... in their relationships with their clients, their colleagues, their research subjects and the general public.' 19 *Pa. B.* 2555 (Emphasis in original).

Adjudication at 15; R.R. at 355a.

Dr. Grossman asserts that the term "higher standard" is unconstitutionally vague because it is unclear as to what or whom the standard is higher. Dr. Grossman believes that it is unclear whether the standard is higher than that for licensed physicians, chiropractors, podiatrists, cosmetologists or whether the standard is higher than the APA's standard or the standard of psychology boards in other states. However, Dr. Grossman answered his own question in his brief when he acknowledged that the preamble to the proposed 1989 Ethical Code explained that the new Code had a higher standard than the previous Code. [FN6]

> FN6. With respect to this same issue, Dr. Grossman argues that it was improper for the Board to cite him for "immoral and unprofessional" conduct because he was compelled to adhere to a higher standard, the aspirational APA Guideline. Dr. Grossman was cited for "immoral and unprofessional" conduct in Count II which will be discussed below.

[5] Dr. Grossman next argues that convicting him of "immoral and unprofessional" conduct was a gross abuse of discretion because Principle 3(e) must be strictly construed and any ambiguities resolved in his favor. *See Commonwealth v. Lassiter*, 554 Pa. 586, 722 A.2d 657 (1998). This argument, however, goes to the underlying merits of Dr. Grossman's case and not to the issue of whether he received notice. Arguments raised in the argument section of a brief but not in the Statement of Questions Involved are waived. *See Pa.R.A.P.* 2116(a). [FN7]

> FN7. Dr. Grossman further argues that a brief summary of one of the Board's decisions in the State Board of Psychology Spring 1993 Newsletter was insufficient to apprise him of the necessity to obtain the

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consent of both parents before a custody evaluation. The summary of *Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs v. Rosenblum*, Docket No. 436-MISC-91, File No. 86-63-01749, in the State Board of Psychology Spring 1993 Newsletter stated: "The Board's action against Rosenblum was based upon his admission to having failed to value objectivity, engaged in a dual relationship, and committed unprofessional conduct in five child-custody cases." State Board of Psychology Newsletter, Spring 1993, at 8; R.R. at 580a.

The Board referred to *Rosenblum* in Footnote # 17 of the Adjudication at the conclusion of its discussion of *Hill* and *Wesley* and its determination that in light of Guideline # 9, dual consent of both parents must be provided:

Applying these principles regarding dual consent, as early as 1991, the Board reprimanded and assessed a civil penalty against a psychologist for, amongst other violations, violating Principle 3 for failing to obtain the consent of both parents who had shared legal custody. Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs v. Rosenbloom [sic], Docket No. 436-MISC-91, File No. 86-63-01749, p. 6. Notice of the Rosenbloom [sic] Consent Agreement was published in the Board's Spring 1993 newsletter which was mailed to all licensees.

Adjudication, n. 17 at 16-17; R.R. at 357a-358a.

This Court agrees with Dr. Grossman that this squib in a newsletter did not constitute sufficient notice to Dr. Grossman. Further, neither the Board in its opinion nor the Commonwealth in its brief to this Court cites any case law, rule, or regulation that a brief summary constitutes notice. Even though the Board's reliance on the mention of this case in the newsletter is misplaced, this Court agrees with the Board that Principle 3(e) and the Guidelines constituted sufficient notice.

*758 *B. Errors of Law.*

Dr. Grossman contends that the Board committed errors of law. First, Dr. Grossman contends that the Board erred when it referred to two cases, *In re: Wesley J.K.*, 299 Pa.Super. 504, 445 A.2d 1243 (1982) [FN8] and *Hill v. Hill*, 422 Pa.Super. 533, 619 A.2d 1086 (1993) [FN9]. The Board stated:

> FN8. In *Wesley*, our Pennsylvania Superior Court set forth the basis under which parents may be awarded shared custody of a child. The Superior Court referred to Section 3 of the Custody and Grandparents Visitation Act, Act of November 5, 1981, P.L. 115, 23 P.S. § 1003, which defined Legal Custody as the "legal right to make major decisions affecting the best interests of a minor child, including but not limited to, medical, religious and educational decisions." Under a shared custody arrangement, legal and/or physical custody of a child is shared.

> FN9. In *Hill*, our Pennsylvania Superior Court reversed the order of the Court of Common Pleas of Philadelphia County that awarded parents shared legal custody but allowed the mother to make the decision if a conflict arose. The Superior Court determined that the trial court's order effectively granted the mother sole legal custody and reasoned, "[i]t is abundantly clear ... that the concept of shared legal custody does not contain the principle of giving one parent final authority in the case of a dispute." *Hill*, 619 A.2d at 1089.

Respondent's [Dr. Grossman] actions should also have been guided by the decisions of the Superior Court in Hill and Wesley involving shared or joint custody. 'Legal custody' is defined by statute as 'the legal right to make decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions.' 23 Pa.C.S.A. § 5302. In the Board's opinion, decisions involving psychological evaluations are encompassed within this definition.... Unlike sole custody, in shared or joint custody, legal custody is shared while physical custody is alternated by the agreement of the parties. *Wesley*, 445 A.2d at 1247. 'The philosophic premise of shared

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custody is the awarding to both parents of *responsibility* for decisions and care of the child.... Shared custody allows both parents input into major decisions in the child's life.' *Hill*, 619 A.2d at 1088 (emphasis added [by the Board] and *Wesley*, 445 A.2d at 1247). Given that both parents' input is required, and in light of Guideline # 9, dual consent of both parents *759 must be provided. (Footnote omitted).

Adjudication at 16; R.R. at 356a.

Dr. Grossman attacks the Board's reliance on *Hill* and *Wesley* from different angles. First, he asserts that the Board did not find his intervention or evaluation of L.M. to be a major decision [FN10] therefore dual consent was not required. Second, he asserts that because neither *Hill* nor *Wesley* mentions health professionals of any sort there is no affirmative duty for a psychologist to legally interpret a joint custody order and abide by the order by withholding professional service absent joint consent.

FN10. Section 5302 of the Domestic Relations Code, 23 Pa.C.S. § 5302, gave legal custodians the legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions. This section was the same as the section cited in *Wesley*. Since *Wesley*, the domestic relations statutes have been consolidated.

[6] Although the Board did not explicitly make a finding that the decision to pursue a second evaluation of L.M. was "major", this Court infers that the Board in the promulgation of its regulations and Code of Ethics regarded a custody evaluation to be a major decision, and, second, while *Hill* and *Wesley* do not mention health care professionals or psychologists, that was not the thrust of the opinions. *Hill* and *Wesley* addressed the concept of shared legal custody in Pennsylvania. The result is that when both parents share legal custody of a child, then the consent of both parents is needed with respect to major decisions.

Dr. Grossman also alleges that he met with L.M. a second time to investigate B.P.'s allegation that D.M. did not properly care for L.M. because she returned to B.P. in a "slovenly and unkempt" condition. Dr. Grossman argues that he was investigating possible child abuse and, consequently, did not have to obtain the consent of D.M. before he met with L.M. on July 14, 1996. The Board noted that where there is a "bona fide emergency" a psychologist need not obtain the consent of both parents in the performance of a custody evaluation. The Board cited allegations of sexual abuse or a child's threat of suicide as examples. Adjudication at 13, n. 11; R.R. at 353a. This Court agrees with the Board that Dr. Grossman was not excused from obtaining D.M.'s consent because L.M. was returned to B.P. not freshly bathed and coiffured.

C. Refusal to Allow Dr. Gerstein to Testify.

[7] Dr. Grossman next contends that the Board committed an abuse of discretion when it did not permit the testimony of Dr. Gerstein. Dr. Grossman asserts that Dr. Gerstein, a member of the Board from 1992-1997 when Dr. Grossman's alleged offenses occurred, would in his testimony address whether Dr. Grossman's conduct was in any way forbidden by a Board policy, rule, and/or adjudication. Prior to the commencement of the hearing, the Board granted the Commonwealth's motion in limine to exclude Dr. Gerstein's testimony. The Board determined that Dr. Gerstein was not permitted to testify because Dr. Grossman informed the Board that Dr. Gerstein would have testified that while he was a member of the Board Dr. Grossman's actions in conducting a custody evaluation would not have been a violation of the Act or the regulations. The Board determined that Dr. Gerstein's view of how the Board would have interpreted the Act or the regulations were not relevant or probative. Dr. Grossman argues that the Board committed an abuse of *760 discretion because Dr. Gerstein would not have testified with respect to his interpretation of the Guidelines but would have discussed whether the Guidelines served as rules for the Board in 1996.

In *Allegheny County Institution District v. Department of Public Welfare*, 668 A.2d 252 (Pa.Cmwlth.1995), *petition for allowance of appeal denied*, 547 Pa. 757, 692 A.2d 567 (1997), this Court affirmed a decision of a hearing examiner of the Department of Public Welfare that refused permission to allow Allegheny County Institution District to introduce the testimony of Speaker of the

Pennsylvania House of Representatives, K. Leroy Irvis, with respect to the General Assembly's intent when it passed a certain act. This Court stated that it "is not bound by the arguments of a single legislator made on the floor in debate of the issue, much less the post-Act expression of opinion by a single legislator made on the floor in debate of the issue, much less the post-Act expression of opinion by a single legislator." *Allegheny County Institution District*, 668 A.2d at 257 n. 13.

Similarly, the Board would not be bound by the opinion of a single Board member of the Board's intentions regarding the Board's rules and policies in 1996. The rules and policies speak for themselves and the underlying intent was subject to administrative review by the Board. This Court agrees with the Board that Dr. Gerstein's opinion as a former Board member was not relevant or probative, and the Board did not abuse its discretion when it chose not to permit the testimony of Dr. Gerstein.

D. Burden of Proof.

[8] Dr. Grossman next contends that the Board's finding that the Commonwealth met its burden of proof was a gross abuse of discretion and was against the weight of the evidence. Dr. Grossman asserts that he along with Dr. Knapp, Dr. Bricklin, and the PPA, believed that dual parental consent was unnecessary. Further, Dr. Grossman asserts that he did not perform a custody evaluation but that upon the request of B.P. he evaluated L.M. and critiqued the assumptions and methodology of Dr. Cooke's assessment.

With respect to this issue, the Board determined:

> Lastly, Respondent [Dr. Grossman] asserted that he was not required to obtain the father's consent because he did not perform a custody evaluation. Respondent [Dr. Grossman] maintained that he was simply providing a custody related evaluation, which does not require the consent of both parents.... He insists that within the gamut of this review he was permitted to review Dr. Cook's report and also conduct a brief assessment of the child.... Conversely, the Commonwealth insisted that Respondent served as a custody evaluator, thereby requiring dual consent.
>
> Drs. Bricklin, Knapp and Heilbrun all testified that a 'records review' is limited to a review of the documents of record including the custody report, raw testing data, and background information. It does not involve any personal contact with the parties.... Dr. Knapp further testified that *any* direct evaluation of the child or the parent may be construed as a custody evaluation.... Again, all three experts agreed that in this type of evaluation dual consent is required....
>
> Specifically, in this case, Dr. Heilbrun opined that the Respondent [Dr. Grossman] exceeded the scope of a records review and acted more like a custody evaluator because he met with L.M. on two occasions. The Board agrees. (Citations and footnote omitted).

*761 Adjudication at 17-18; R.R. at 357a-358a. This Court finds that the Board had the authority to make such findings of fact and conclusions of law.

Dr. Grossman also asserts that he did not violate Guideline # 9 because he was not required to obtain consent from D.M. because D.M. was a litigant. Dr. Grossman argues that D.M. was not a participant because he was not going to be examined.

The Board disagreed with Dr. Grossman:

> Respondent [Dr. Grossman] argues that even if Guideline # 9 is mandatory it did not require him to obtain the father's consent because it uses the language 'adult participants' rather than 'litigants.'... In Respondent's [Dr. Grossman] opinion, the father was a 'litigant' and therefore, was not required to provide consent.... Reading the Guideline as a whole, the Board simply cannot interpret it as requiring anything less than the consent of both the mother and the father. The Guideline requires that 'each' participant understand who has requested the services and who is paying the fee. Given this specific language, it would be illogical to suggest that the adult participants are limited to the parties hiring the psychologist since they are well aware of the scope of the engagement and the fee. (Footnote and citations omitted).

Adjudication at 15-16; R.R. at 356a-357a. Again, this Court must conclude that the Board had the authority to make these findings and conclusions and committed no error.

[9] Essentially, Dr. Grossman next asks this Court to reweigh the testimony of his witnesses, Dr. Bricklin and Dr. Knapp, that Dr. Grossman did not have a duty to obtain D.M.'s consent. Dr. Grossman also asserts that the Commonwealth's expert, Dr.

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Heilbrun, came to the same conclusion. A review of Dr. Heilbrun's testimony does not support Dr. Grossman's assertion. Dr. Heilbrun testified that, in his opinion, Dr. Grossman conducted a custody evaluation which required the consent of both parents. The Board accepted Dr. Heilbrun's testimony over the testimony of Dr. Knapp and Dr. Bricklin. It is not this Court's function to judge the weight and credibility of evidence before an administrative agency. *Makris v. State Bureau of Professional and Occupational Affairs, State Board of Psychology*, 143 Pa.Cmwlth. 456, 599 A.2d 279 (1991). Dr. Grossman's argument must fail. [FN11]

FN11. Dr. Grossman next contends that the Commonwealth did not meet its burden of proof and/or Principle 3(e) was defective and/or the Board misapplied *Rosenblum* and he was not in violation of Section 8(a)(9) of the Act. This Court has already determined that the Commonwealth met its burden of proof with respect to Principle 3(e) and that Principle 3(e) was not defective. With respect to *Rosenblum*, Dr. Grossman argues that he did not violate *Rosenblum*. Dr. Grossman mischaracterizes the Board's discussion. The Board did not refer to *Rosenblum* to indicate that it served as a basis upon which to cite Dr. Grossman. Rather, the Board cited its decision to show that it required dual parental consent in certain cases since 1991 well before the conduct at issue here. This Court reiterates that the Board did not err when it determined that Dr. Grossman violated Section 8(a)(9) of the Act.

II. COUNT II—SECTION 8(a)(11) OF THE ACT.

Finally, Dr. Grossman contends that Section 8(a)(11) of the Act is unconstitutionally vague and/or the application of this statute constituted a result so excessively punitive as to constitute a gross abuse of discretion by the Board. Dr. Grossman believes that the Order to Show Cause was *762 so vague that he was prevented from ascertaining that he was accused of a violation of Section 1208(a)(11) based on his testimony in the child custody hearing.

With respect to a violation as a result of Dr. Grossman's testimony, the Order to Show Cause provided:

> *COUNT TWO*
>
> 17. Paragraphs 1 through 15 are incorporated by reference.
>
> 18. Based upon the foregoing Factual Allegations, the Board is authorized to suspend or revoke, or otherwise restrict Respondent's [Dr. Grossman] license, or impose a civil penalty under 63 P.S. § 1208(a)(11) because Respondent's [Dr. Grossman] conduct of conducting a psychological evaluation and/or meeting with L.M. with respect to a custody proceeding without the knowledge or consent of her father, D.M., constituted unprofessional conduct in the practice of psychology.

Order to Show Cause, February 14, 2000, Paragraphs 17-18 at 3; R.R. at 4a.

In the "Violations and Sanctions" section of the Adjudication, the Board stated:

> The Respondent [Dr. Grossman] also engaged in unprofessional or immoral conduct, under Section 8(a)(11) of the Act, 63 P.S. § 1208. Even though Respondent [Dr. Grossman] did not meet with the father, the Respondent [Dr. Grossman] cast aspersions about the father's ability to parent L.M. Specifically, Respondent [Dr. Grossman] suggested that the father may have a caffeine addiction. (NT 139-142, 144, 272) While Respondent [Dr. Grossman] suggested that the mother also drinks coffee, Respondent [Dr. Grossman] only offered specific calculations about the father's consumption. Respondent [Dr. Grossman] also raised the issue of whether the father was able to care for L.M. because insurance salesmen often have to work at night. (N.T. 139-142, 144, 272) Both statements were specifically intended to call the father's fitness to parent into question. In that Respondent [Dr. Grossman] did not speak with the father about these issues, his speculation constitutes unprofessional conduct. The Board believes that a $1,000 civil penalty is appropriate for this violation.

Adjudication at 20; R.R. at 360a.

[10][11] In an administrative proceeding, the essential elements of due process are notice and an opportunity to be heard. *Wills v. State Board of Vehicle Manufacturers, Dealers and Salespersons*, 138 Pa.Cmwlth. 50, 588 A.2d 572 (1991). "Notice,

the most basic requirement of due process, must 'be reasonably calculated to inform interested parties of the pending action, and the information necessary to provide an opportunity to present objections....' " *Noetzel v. Glasgow, Inc.*, 338 Pa.Super. 458, 487 A.2d 1372, 1377 (1985) *cert. denied*, 475 U.S. 1109, 106 S.Ct. 1517, 89 L.Ed.2d 915 (1986), quoting *Pennsylvania Coal Mining Association v. Insurance Department*, 471 Pa. 437, 452-453, 370 A.2d 685, 692-693 (1977).

[12] Here, Count II of the Notice and Order to Show Cause incorporated all of the previous paragraphs. Count II stated that Dr. Grossman violated Section 8(a)(11) of the Act because he conducted a custody evaluation and/or met with L.M. without D.M.'s consent. The Notice and Order to Show Cause did not mention Dr. Grossman's testimony at the custody trial. This Court agrees with Dr. Grossman that the Notice and Order to Show Cause failed to afford Dr. Grossman adequate notice and the opportunity to sufficiently prepare a defense to the challenge to his testimony at the custody trial. Although the Board's conclusions of law referenced Dr. Grossman's failure to obtain consent from D.M. *763 before the custody evaluation with respect to Count II, it is apparent from the Violations and Sanctions section of the Adjudication that the Board found that Dr. Grossman *violated Count II as a result of his testimony at the custody trial, not just the custody evaluation itself.* This Court concludes Dr. Grossman did not receive adequate notice of this specific charge against him. As a result, this Court sustains Dr. Grossman's appeal as to Count II.

Accordingly, this Court affirms in part and reverses in part. This Court affirms the Board as to the reprimand for Count I. This Court reverses the Board as to the $1,000 fine for Count II.

ORDER

AND NOW, this 2nd day of June, 2003, the order of the State Board of Psychology in the above-captioned matter is affirmed in part and reversed in part. This Court affirms the State Board of Psychology's reprimand for Count I. This Court reverses the State Board of Psychology as to the $1,000 fine for Count II.

825 A.2d 748

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COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF STATE

BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

F I N A L M I N U T E S

MEETING OF:

STATE BOARD OF PSYCHOLOGY

TIME: 9:02 A.M.

BOARD ROOM C

One Penn Center

2601 North Third Street

Harrisburg, Pennsylvania 17110

December 2, 2019

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State Board of Psychology
December 2, 2019

BOARD MEMBERS:

Vito J. DonGiovanni, Psy.D., Chairman
K. Kalonji Johnson, Acting Commissioner, Bureau of Professional and Occupational Affairs
Catherine S. Spayd, Ph.D., Vice Chair
Katherine Bradley, Ph.D., Secretary
Steven K. Erickson, Ph.D.
Donald McAleer, Psy.D.
Richard F. Small, Ph.D.

BUREAU PERSONNEL:

Jackie Wiest Lutz, Esquire, Board Counsel
Bridget K. Guilfoyle, Esquire, Board Prosecution Liaison
Nathan C. Giunta, Esquire, Board Prosecution Liaison
Chris Stuckey, Board Administrator

Kimberly A. Mattis, Director, Bureau of Finance and Operations, Department of State
Julie Snader, Deputy Director, Bureau of Finance and Operations, Department of State

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is practical for us to use that.

DR. MCALEER:

Second.

CHAIRMAN DONGIOVANNI:

Dr. Small made the motion. Dr. McAleer seconded. All those in favor? Opposed?

[The motion carried unanimously.]

***

[Chairman DonGiovanni noted discussion regarding the Grossman decision in Executive Session.

Dr. Erickson expressed his opinion and understanding of the Grossman decision, stating that it was decided before the Minors' Consent Statute was amended. He noted the current version of the Minors' Consent Statute expressly authorizes a parent to provide consent for a minor to receive and evaluation or treatment, mental health treatment specifically.

Dr. Erickson stated the position of the Board in the past had been where there is an order of custody that both parents' consents are necessary for the treatment for a child, which is inconsistent with the Minors' Consent Statute.

Dr. Erickson noted there was no expressed language within the APA ethics code requiring both parents' consents in order for a child to receive

treatment. He commented that this was inconsistent with the Board's position in terms of a minor receiving treatment requiring both parents' consents if there is an order of custody.

Dr. Erickson stated APA Specialty Guidelines on child custody evaluations do not require both parents' consents. He commented, in terms of a child custody evaluation, it would be below the standard of care to perform a child custody evaluation without obtaining both parents' consents, which is different than assessment and treatment.

Dr. Small commented that the Board does not give advisory opinions and that is Dr. Erickson's take on Grossman and what kind of consent is required. He questioned whether there was some mechanism of communicating that, including just that the discussion was in the minutes.

Dr. Erickson mentioned that there is an attorney who frequently appears before the Board and is an avid reader of the minutes, which would help to alert this issue.

Acting Commissioner Johnson commented that a notification of this discussion in the minutes is a good start in terms of notifying the public about the Board and ensuring its decisions are consistent with

(sealed) 276 70

Pennsylvania law. He questioned if it would be advisable to have discussions at some point about possible regulatory changes in order to clarify the Board's scope of authority and discretion, that its authority is consistent with the scope of the Minors' Consent Act.

Dr. Erickson clarified that the Board adjudicates facts, and this would be an adjudication of law. He stated the amended statute abrogated the Grossman opinion as it applies to treatment and custody, and the reliance on the APA ethics code in terms of informed consent was misplaced because there is no requirement within the APA ethics code for both parents' consents for the treatment of minors. He saw no need to change the regulations, and if it were litigated, ultimately a court would decide.

Dr. Small commented that nobody disagreed with Dr. Erickson's interpretation and requested this statement be placed in the minutes.

Acting Commissioner Johnson clarified that the Grossman decision was a decision based on policy that was inconsistent with existing law.]

***

Correspondence

[Vito J. DonGiovanni, Psy.D., Chairman, referred to

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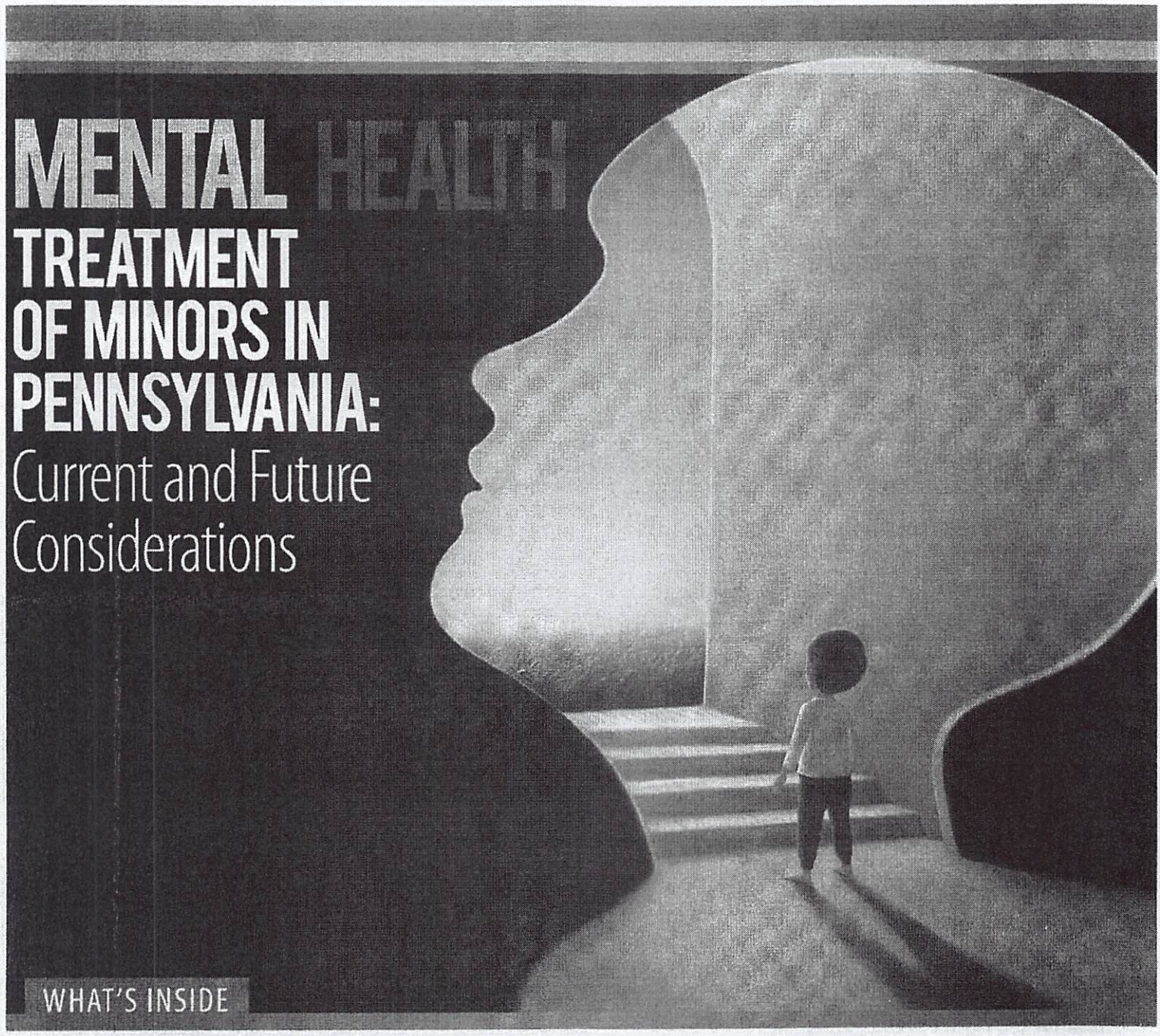

MENTAL HEALTH
TREATMENT OF MINORS IN PENNSYLVANIA: Current and Future Considerations

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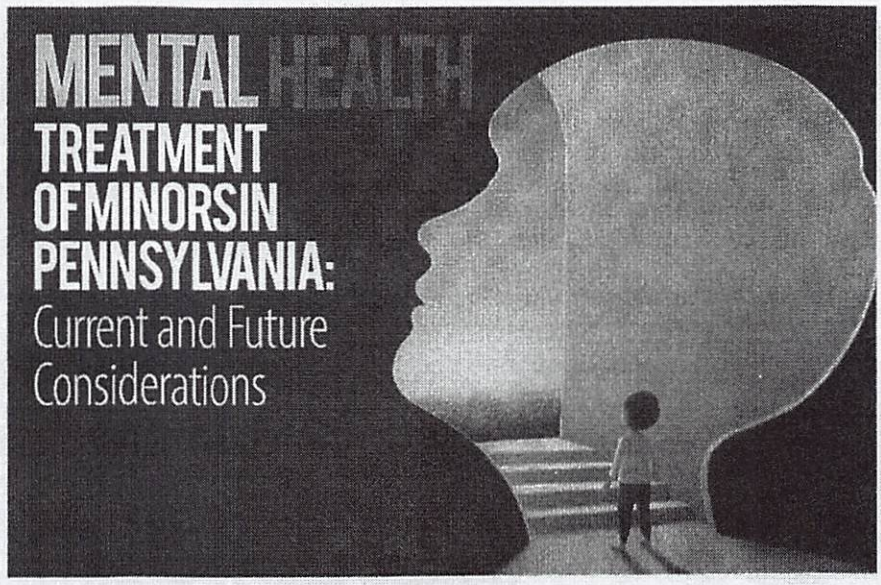

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MENTAL HEALTH TREATMENT OF MINORS IN PENNSYLVANIA: CURRENT AND FUTURE CONSIDERATIONS

ALLAN M. TEPPER, JD, PsyD *Private Practice of Law and Psychology, Philadelphia, PA*

The voluntary outpatient mental health examination and treatment of minors in Pennsylvania involves a combination of legal and clinical considerations. One of the issues related to the voluntary outpatient mental health examination and treatment of minors concerns the informed consent required to examine or treat a minor child.

This article reviews the Pennsylvania law associated with the informed consent necessary for the voluntary outpatient mental health examination and treatment of a minor, as well as the clinical issues associated with such interventions. This article also reviews a recent discussion by the Pennsylvania State Board of Psychology regarding this informed consent requirement, along with recent amendments to the Minors' Consent to Medical Care statute.

CURRENT LEGAL AND CLINICAL CONSIDERATIONS

In Pennsylvania, the age of majority is 18 (23 P.S. §5101). Prior to age 18, there are limitations concerning a minor's ability to make binding legal decisions.

The question arises, therefore, as to whose consent is required for the voluntary outpatient mental health examination or treatment of the less than 18-year-old minor. This issue generally is dependent upon the legal custody and the age of the minor.

Presently, there are a myriad of family constellations that include a minor child. For the purposes of this article, we will consider a family consisting of a mother, a father, and a minor child.

NON-CUSTODY ORDER SITUATIONS

In 1970, the Pennsylvania legislature adopted the Minors' Consent to Medical Care statute (35 P.S. §10101). This statute held that other than in a number of limited situations, such as if the minor is married, a high school graduate, or emancipated, parental or guardian consent is necessary to provide medical treatment to the less than 18-year-old minor. The statute was silent, however, as to the consent necessary to provide nonmedical mental health treatment to a minor.

In January 2005, the Minors' Consent to Medical Care statute was amended to address the voluntary outpatient mental health examination or treatment of a minor (35 P.S. §10101.1). On July 23, 2020, a number of additional amendments were made to the statute.

Pursuant to the Minors' Consent to Medical Care statute, *mental health treatment* is defined as follows:

> A course of treatment, including evaluation, diagnosis, therapy and rehabilitation designed and administered to alleviate an individual's pain and distress and to maximize the probability of recovery from mental illness. This term includes care and other services whichsupplement treatment and aid or promote recovery (35 P.S. §10101.l(a)(lO)(b)).

This definition, in essence, encompasses what psychologists generally refer to as a *psychological evaluation* or *ongoing psychotherapy*.

This Minors' Consent to Medical Care statute distinguishes between minors less than 14 years of age, and minors 14 to 17 years of age.

For minors less than 14 years of age, the consent of a parent is required prior to instituting the voluntary outpatient mental health examination or treatment of the less than 14-year-old minor (35 P.S. §10101.l(a)(l)). It should be noted that this statute does not state that such examination or treatment shall be instituted in these situations. Rather, the statute states that such examination or treatment of the less than 14-year-old minor may be instituted with the consent of a parent.

For minors 14 to 17 years of age, there are two possible avenues of consent.

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First, if the minor is capable of making mental health treatment decisions, the 14- to 17- year-old minor may consent to their own examination or treatment, absent any parental consent or permission (35 P.S. §10101.I(a)(2)). Second, a parent can consent to the examination or treatment of the 14- to 17- year-old minor, absent the consent of the minor

(35 P.S. §10101.I(a)(I)).

On July 23, 2020, a number of additional amendments were made to the Minors' Consent to Medical Care statute. One of these more recent 2020 amendments reads as follows:

> A minor or another parent or legal guardian may not abrogate consent provided by a parent or legal guardian on the minor's behalf to voluntary... outpatient treatment... (35 P.S. §10101.I(a)(3)).

The exact meaning of this particular 2020 amendment is unclear. That is, under the prior 2005 version of the statute, the consent of only one parent was required to consent to the voluntary outpatient mental health treatment of the minor child. It was the working assumption that the nonconsenting parent could not abrogate the consent of the consenting parent. Under the 2020 version of the statute, this assumption has been codified by more specific language.

Presently, the legislative intent underlying this particular amendment is unclear. More specifically, it is unclear whether this particular amendment was added to clarify the existing rule, or whether this particular amendment was added to grant more substantive rights to the consenting parent.

The more recent amendments to the Minors' Consent to Medical Care statute, however, do not state that mental health examination or treatment of the minor child shall be instituted following the consent of a parent. Rather, the statute continues to state that mental health examination or treatment of the minor child may be rendered following the consent of a parent.

For this reason, in addition to obtaining the requisite informed consent, the potential treatment provider, prior to instituting any clinical intervention, also must consider and balance the clinical issues associated with the case at hand.

That is, when providing mental health examination and treatment to minors of any age, it often is helpful to have the permission, involvement, and input of both parents, even with the older adolescent. Such commitment and input by both parents may be necessary to effectuate a positive clinical outcome in the case. In addition, it is necessary for the treatment provider to remain a neutral party and maintain professional boundaries, especially in cases that involve more contentious or high-conflict families.

It is for these reasons, therefore, that the legal ability to institute mental health examination or treatment of a minor child by the consent of a parent does not answer the clinical question as to whether examination or treatment should be instituted. Rather, this clinical question must be answered on a case-by-case basis.

CUSTODY ORDER SITUATIONS

Custody involves the physical custody and the legal custody of the minor child. The physical custody and legal custody of the minor child can be sole or shared between the parents.

The provisions of the physical custody and the legal custody of the minor child are contained in the written custody agreement or the custody court order. For this reason, it is vital to obtain and review the custody agreement or the custody court order prior to instituting any type of mental health examination or treatment of a minor child.

In Pennsylvania, there is a statutory definition of legal custody. *Legal custody* is defined as the right to make major decisions on behalf of the child, including, but not limited to, medical, religious, and educational decisions (23 Pa. C.S. §5322(a)).

Under 23 Pa.C.S. §5322(a), there is no further statutory definition as to what constitutes a major decision in a shared legal custody situation. The question arises, therefore, as to whether under 23 Pa.C.S. §5322(a), the decision to seek voluntary outpatient mental health examination or treatment of a minor child constitutes making a major decision concerning the child.

In February 2000, a Pennsylvania psychologist underwent a Pennsylvania State Board of Psychology licensing proceeding related to the issue of establishing a professional relationship with and providing psychological services to a minor child in a shared legal custody situation.

The proceeding involved interpretations of prior Board decisions, American Psychological Association Standards and Guidelines, Pennsylvania custody law, and Pennsylvania case law.

Following a Board finding that was adverse to the psychologist, the case was appealed to the Commonwealth Court of Pennsylvania, the Pennsylvania appeals court that reviews licensing board determinations. The Commonwealth Court appeal was decided on June 2, 2003 (*Jan C. Grossman v. State Board of Psychology, 825 A.2d 748).*

In *Grossman*, the psychologist was retained by a mother's attorney in a 1996 custody matter in which the mother and father shared legal custody of their minor child. The referral questions included, in part, a request to determine whether the minor child could verbally assess her needs, a request to determine whether the minor child could communicate realistically, a request to determine whether the minor child could describe her two home environments, and a request to evaluate a prior determination by another psychologist that the minor child was not a reliable witness.

The psychologist reviewed background materials, met with the mother and the stepfather, and met individually with the minor child on two separate occasions. At the time of the two meetings with the minor child, the psychologist had obtained consent from the mother to meet with the minor child. At the time of the two meetings with the minor child, the psychologist had not obtained consent from the father to meet with the minor child.

The psychologist did not render a written report. The psychologist subsequently testified at a custody trial regarding his clinical findings.

In February 2000, a formal complaint was filed against the psychologist. Following an adverse finding against the psychologist, the case was appealed to the Commonwealth Court of Pennsylvania.

In its 2003 opinion, the Commonwealth Court found that the psychologist had conducted a psychological evaluation of a minor child in a shared legal custody situation without first obtaining the consent of the child's two legal custodians. The Commonwealth Court held that this professional psychological activity was in violation of the American Psychological Association standards and guidelines that are incorporated into the Pennsylvania Psychologists Practice Act.

In reaching this finding, the Commonwealth Court also based its opinion on Pennsylvania shared legal custody law and related Pennsylvania appellate decisions involving shared legal custody.

One of the bases of appeal in *Grossman* concerned the question as to whether a request that a minor child undergo a psychological evaluation, within the context of a shared legal custody situation, constitutes a major decision, thereby requiring the consent of both legal custodians. The Commonwealth Court answered this question in the affirmative. More specifically, the Commonwealth Court found that a decision to obtain a psychological evaluation of a minor child is a major decision that is encompassed within the statutory definition of legal custody.

The Commonwealth Court held, therefore, that the consent of all legal custodians is necessary prior to conducting a psychological evaluation of a minor child in a shared legal custody situation.

To date, there has been no Commonwealth Court case that has overturned this decision. Rather, this decision has been cited in subsequent cases in which psychologists have been found to have transgressed this rule (see, for example, *Laurie S. Pittman, Ph.D. v. Bureau of Professional and Occupational Affairs, State Board of Psychology*, unreported Commonwealth Court opinion, No. 1007 C.D. 2018, filed June 12, 2019).

In addition, since 2003, this decision has been interpreted and applied in situations involving the mental health treatment of a minor child.

As outlined above, on January 24, 2005, 2 years following the 2003 *Grossman* Commonwealth Court decision, the Pennsylvania state legislature amended the Minors, Consent to Medical Care statute. For the first time, the Pennsylvania legislature addressed what type of parental consent is necessary for the voluntary outpatient mental health examination or treatment of a minor child. On July 23, 2020, the Pennsylvania state legislature passed additional amendments to the Minors' Consent to Medical Care statute.

This Minors' Consent to Medical Care

statute raises a confounding legal question. That is, pursuant to the 2003 *Grossman* Commonwealth Court opinion, if a custody order contains a provision of shared legal custody, the consent of both parents is required prior

to conducting voluntary outpatient mental health examination or treatment of the minor child.

Pursuant to the Minors' Consent to Medical Care statute, however, the consent of only a parent is required prior to conducting voluntary outpatient mental health examination or treatment of a minor child. And, to confound things further, under the statute, no parental consent is necessary to conduct voluntary outpatient examination or treatment of the greater than 14-year-old minor child who is capable of providing their own informed consent to treatment.

In this regard, which rule applies: The court order containing a shared legal custody provision, or the Minors' Consent to Medical Care statute?

From 2003 through the current time, the prevailing rule has been that a court order that provides for shared legal custody of a minor takes precedence over the Minors' Consent to Medical Care statute.

This interpretation has been relied upon by the state attorneys who prosecute licensing board complaints, as well as by the Pennsylvania State Board of Psychology who have followed the principles contained in the *Grossman* Commonwealth Court decision in imposing discipline on psychologists. This interpretation has been applied to a psychological evaluation of a minor child in a shared custody situation, as well as to psychological treatment of a minor child in a shared custody situation.

DECEMBER 2, 2019 MEETING OF THE PENNSYLVANIA STATE BOARD OF PSYCHOLOGY

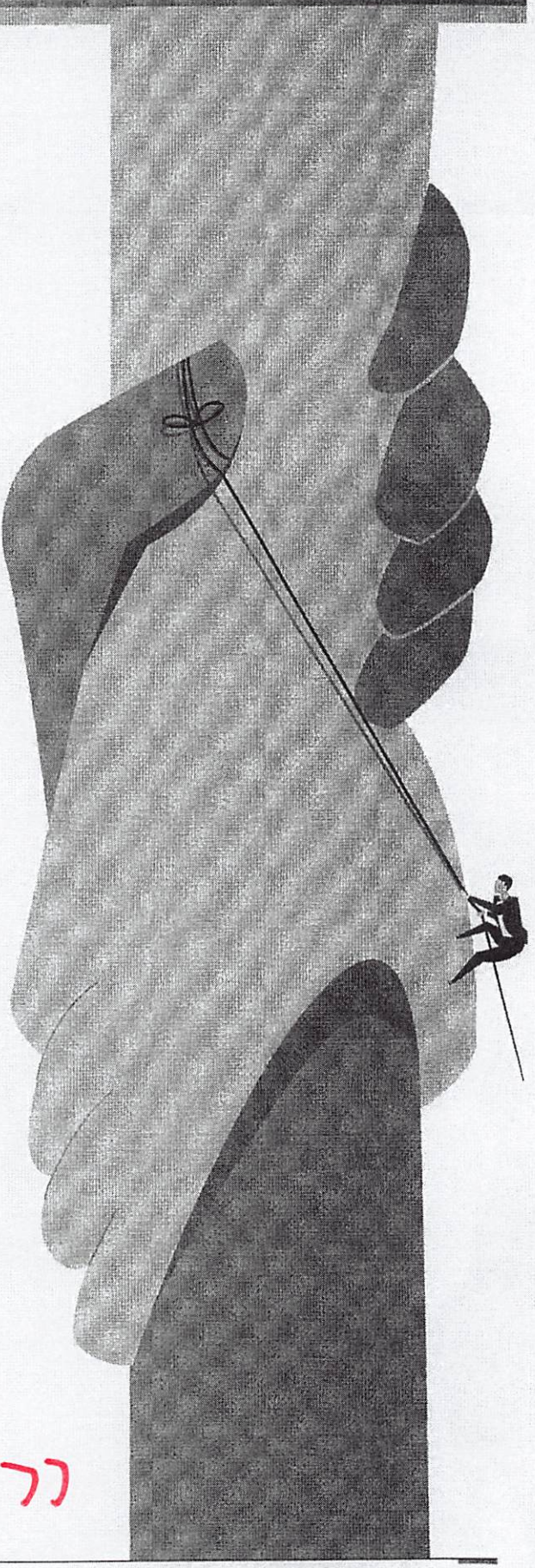
This issue of whether a court order containing a shared legal custody provision prevails over the Minors' Consent to Medical Care statute was discussed during the executive session portion of the Pennsylvania State Board of Psychology's December 2, 2019, meeting. Such executive session discussions are held outside the presence of the public.

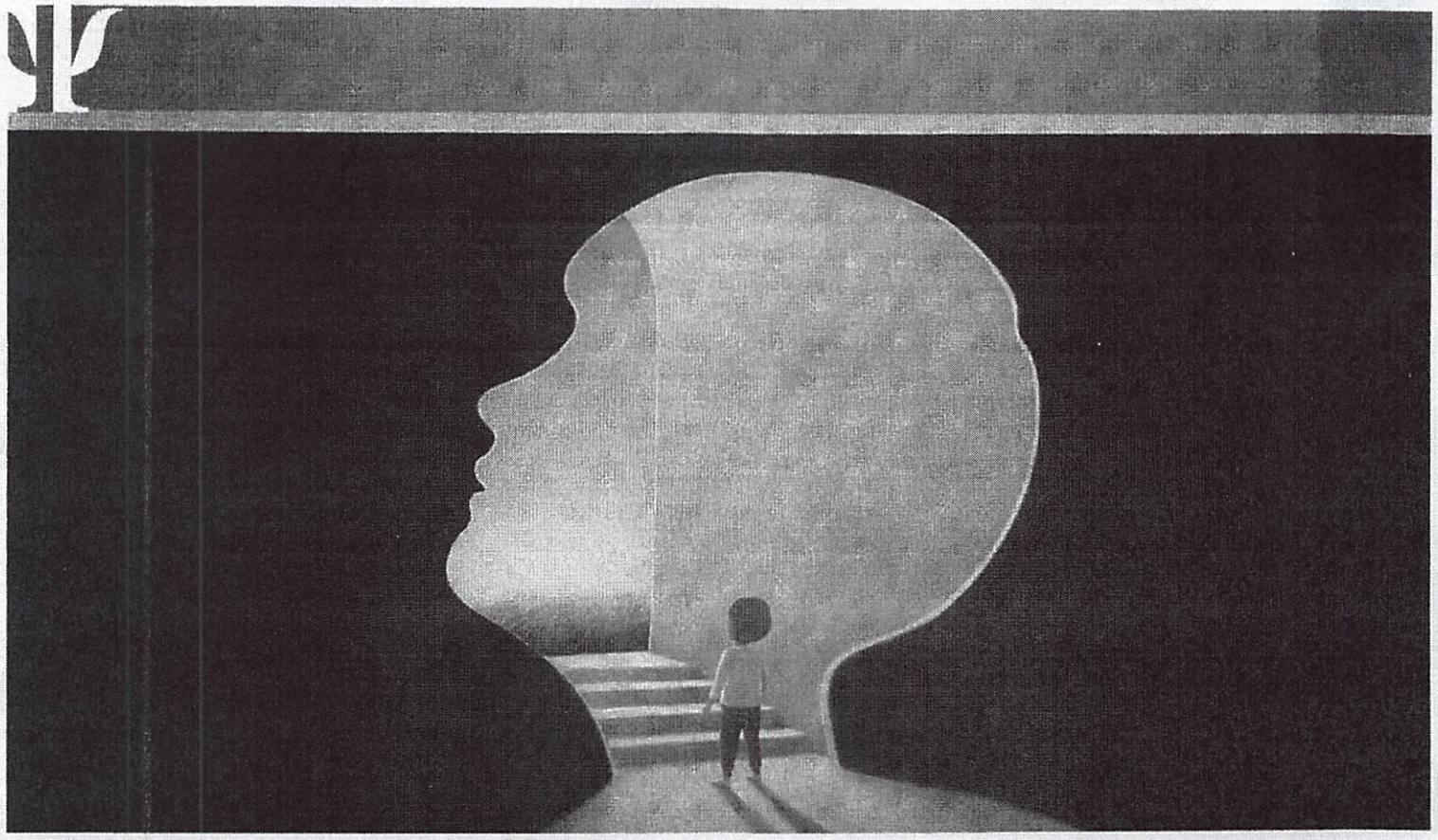
The Board discussed this issue further during the public portion of their meeting. This public discussion is contained in the Final Minutes of the Board's December 2, 2019, meeting (p 26-28). The Final Minutes of the Board's December 2, 2019, meeting can be found on the Pennsylvania State Board of Psychology website.

In the Final Minutes of the Board's December 2, 2019, meeting, there is a discussion as to whether the original 2005 amendments to the Minors' Consent to Medical Care statute abrogated the *Grossman* opinion as it applies to voluntary outpatient mental health examination and treatment of a minor child. This discussion included a comment that the *Grossman* decision was a decision based on policy that was inconsistent with existing law.

In the Final Minutes of its December 2, 2019, meeting, there is discussion that there is no expressed language within the American Psychological Ethics Code requiring both parents' consent for a child to receive treatment. The discussion noted that for this reason, the reliance on the American Psychological Association ethics code in terms of informed consent was misplaced in that there is no requirement within the American Psychological Association Ethics Code for both parents' consent for the treatment of minors.

The discussion noted further that the American Psychological Specialty Guidelines on Child Custody evaluations do not require both parents' consent,





although it would be below the standard of care to perform a child custody evaluation without obtaining both parents' consent, which is different than assessment and treatment.

The Board also discussed the fact that the Board does not provide advisory opinions. The Board discussed whether regulatory changes were in order to clarify the Board's scope of authority and discretion, as well as clarifying that the Board's authority is consistent with the scope of the Minors' Consent to Medical Care statute.

It was commented that the Board adjudicates facts, and thus further clarification would be an adjudication of law. It was commented further that there was no need to change the regulations, and if it were litigated, ultimately a court would decide.

It should be noted that when discussing the Minor's Consent to Medical Care statute during the course of its December 2, 2019, meeting, the Board did not reference the Pennsylvania legal custody statute or the Pennsylvania appellate shared legal custody cases that were relied on in the 2003 Commonwealth Court *Grossman* opinion.

In addition, this December 2, 2019, Board discussion occurred prior to the more recent July 23, 2020, amendments to the Minors' Consent to Medical Care statute.

FUTURE CONSIDERATIONS

In light of the December 2, 2019, discussion held by the Pennsylvania State Board of Psychology, coupled with the July 23, 2020 amendments to the Minors' Consent to Medical Care statute, the question arises as to whether there has been a change in the type of consent necessary to institute voluntary mental health examination or treatment of a minor child in a shared custody situation.

In general, the rules governing the practice of Pennsylvania psychologists emanate from Pennsylvania statutes, Pennsylvania State Board of Psychology Regulations, Pennsylvania State Board of Psychology decisions, and Pennsylvania caselaw. The minutes of a Board meeting are public in nature and they contain discussions regarding issues or questions that are being considered by the Board. Such discussions, however, generally do not constitute the type of legal authority required to alter an existing rule or requirement.

There also is the legal doctrine of *stare decisis*. This doctrine is a legal principle by which judges are expected to respect precedent that has been established by prior court decisions. As outlined above, there presently is no Pennsylvania appellate case that has overturned *Grossman*.

Based upon the discussion contained in the Final Minutes of the Board's December 2, 2019, meeting, it is appears that the State Board of Psychology is exploring the type of parental consent that is necessary to conduct a psychological evaluation of a minor child or to provide psychological treatment of a minor child in a shared legal custody situation. Presently, however, there have been no formal changes to the existing rules.

The July 23, 2020, amendments to the Minors' Consent to Medical Care statute state in more specific language that consent of a parent for the voluntary outpatient mental health examination or treatment of a minor child may not be abrogated by another parent. Since this rule was implicit in the prior version of the statute, it is unclear whether it was the intent of the Pennsylvania state legislature to clarify the existing rule, or whether it was the intent of the Pennsylvania state legislature to overrule the *Grossman*

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decision that requires joint consent in a shared custody situation.

In this regard, how should a Pennsylvania psychologist proceed?

For example, one parent in a shared legal custody situation requests and provides consent for a minor child to undergo a psychoeducational evaluation. Can (or should) the psychologist proceed with the evaluation?

One parent in a shared legal custody situation requests and provides consent for a minor child to undergo a psychological evaluation to address concerns regarding attention, concentration, and acting out behavior. Can (or should) the psychologist proceed with the evaluation?

One parent in a shared legal custody situation requests and provides consent for the minor child to undergo a psychological evaluation to explore a recent regression in social functioning? Can (or should) the psychologist proceed with the evaluation?

One parent in a shared legal custody situation requests and provides consent for the minor child to enter into treatment to help navigate the disruption of the family constellation. Can (or should) the psychologist proceed with the treatment?

One parent in a shared legal custody situation requests and provides consent for the minor child to enter into treatment to cope better with the demands of the physical custody arrangement. Can (or should) the psychologist proceed with treatment?

Once again, all of these situations involve what type of informed consent is required to proceed with the clinical intervention, as well as the clinical propriety of proceeding with the intervention absent the involvement and input of both parents.

In addition to these informed consent and clinical concerns, there is a question as to what, if any, legal jeopardy the psychologist may be placed when conducting an examination or treatment of a minor child pursuant to the consent of one parent in a shared legal custody situation. That is, will the Pennsylvania prosecuting attorneys who review and file licensing board complaints continue to file complaints based on the 2003 *Grossman* decision or will they alter their decisions based on the Minors' Consent to Medical Care statute and the Board's December 2, 2019 discussion?

If a formal board complaint is filed against a psychologist for conducting an assessment or instituting treatment of a minor child with the consent of only one parent in a shared legal custody situation, will the psychologist be able to present a successful defense to a *Grossman* violation based on the Minors' Consent to Medical Care statute and the Board's December 2, 2019, discussion?

If a malpractice action is filed against a psychologist that is predicated on a violation of Pennsylvania shared legal custody law and related shared custody case law, will the psychologist be able to present a successful defense based on the Minors' Consent to Medical Care statute and the Board's December 2, 2019, discussion and thereby shield themselves from civil liability and monetary damages?

Unfortunately, these questions remained unanswered. Each psychologist, therefore, will need to proceed in their own manner until there are more definitive answers to these outstanding issues.

More specifically, even in a situation where a psychologist determines that it would be clinically appropriate to conduct an assessment or institute treatment of a minor child with the consent of only one parent in a shared legal custody situation, the potential legal jeopardy of the psychologist remains unclear. As discussed by the Board during the course of its December 2, 2019, meeting, if such a case were litigated, ultimately a court would decide.

In this regard, one or more legal test cases may be necessary to answer these outstanding questions.

The practice of psychology should not be conducted in a defensive manner. The practice of psychology should not be conducted merely in a risk management fashion. Rather, the practice of psychology should strike a judicious balance between the mandated rules and the clinical needs of the case at hand.

Nonetheless, pending further legal clarification, guidance, and a possible test case, it may be prudent for psychologists to consider adhering to the joint consent requirements contained in the *Grossman* decision prior to instituting voluntary outpatient mental health examination and treatment of a minor child in a shared legal custody situation.

CLASSIFIEDS

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