

LITIGATING HIGH CONFLICT MATTERS

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Divorce litigation is complex and emotionally charged in even the most straightforward of cases. When one party suffers from substance abuse or mental health disorders, the stakes of the final income and complications dealing with the client and the adversary regarding such ailments, rise exponentially. Perhaps no sector of family law is more sensitive and disturbing than allegations of mental health issues and substance abuse, as these issues can deeply impact both the economic and custodial issues involving the family.

Just as an alcoholic parent may need mental health support before exercising parenting time, a spouse under the throes of bipolar disorder may risk losing their employment and, accordingly, be unable to pay their support obligations. While the inability to pay support is clearly detrimental to the obligor, issues can arise for the obligee as well, who may suddenly be unable to meet their own obligations and the status quo for this family, due to no longer receiving support.

This article explores the critical legal and tactical considerations in litigating divorce cases where one spouse presents with substance abuse or mental health concerns, considering both the potential financial and custodial outcomes.

A. Evidence and Documentation.

Whether defending against or asserting allegations of mental health issues or substance abuse, gathering persuasive evidence is essential:

- **Medical records and psychological evaluations:** These provide insight into the diagnosis, prognosis, and treatment history.

- **Substance use and abuse history and test results:** Drug/alcohol test results, rehab attendance records, and arrest records (e.g., DUI) are significantly relevant – present or absent.
- **Witness testimony:** Family members, therapists, teachers, and childcare providers can testify to the parties' behavior and its effect on the children or financial stability.
- **Expert evaluations:** Courts often appoint custody evaluators or Guardians *ad litem* to assess the situation objectively.

B. The Best Interests of the Child.

Custody decisions in New Jersey are guided by the “best interests of the child” standard. When a parent suffers from a mental health disorder or substance abuse issue, courts must assess how that condition affects the parent’s ability to provide a safe, stable, and nurturing environment. Key factors include:

- The severity and nature of the disorder;
- Whether the parent is seeking treatment or is in denial;
- Evidence of relapse or ongoing impairment;
- Impact on the child’s emotional and physical well-being.

When an attorney represents the client alleging the other has a mental health issue, the attorney should investigate such a claim before presenting it to the Court, in order to preserve the credibility of the client. Conversely, when representing the client accused of a substance abuse or mental health issues, the attorney should be certain that any allegations are true before advising an extreme treatment plan. By way of example, if a party submits to inpatient rehabilitative treatment, opposing counsel may successfully argue that that, itself, is evidence of the high degree of substance abuse issues, whether or not a less intensive treatment plan was better advised.

Notwithstanding that issue, it is typically best to be proactive in litigating any allegations of mental health issues or substance abuse. Oftentimes, requests for suspension or supervision of parenting time will be made before discovery has concluded, and, thus, attorneys offering allegations should be proactive in their investigation. Attorneys should plan to request police records and evidence of such issues from their own client immediately upon any allegation being made. A consideration of whether the client should voluntarily agree to be tested or to take tests on their own to submit to the adversary is a serious discussion and potential strategy to negate and/or prove each party's position.

Meanwhile, attorneys defending their clients against such allegations should immediately request medical records or hair follicle testing from their own clients, in order to determine the best course of action. If facing a meritorious allegation of a mental health issue, attorneys will need to show the Court that their clients remain treatment compliant, and capable of caring for the best needs of the child. When facing allegations of a substance abuse issue, counsel may, in appropriate cases, submit negative tests rebutting these allegations; conversely, when facing a meritorious substance abuse allegation, it may be best advised to direct the client to sit for a substance abuse evaluation, and comply with any treatment plan, in order to expedite recovery and removal of any parenting time limitations.

C. Supervised or Restricted Parenting Time.

Courts may order supervised visitation if the parent poses a risk to the child and the other parent can prove it. Just saying the other parent is a risk or poses a risk is not enough to persuade a Judge to order that parenting time should be supervised and/or restricted. This can be a temporary measure while the parent undergoes treatment or long-term if the risks persist. Parenting plans and perhaps provisions in the marital settlement agreement may include conditions such as:

- Abstaining from substances 24–48 hours prior to visitation;
- Submitting to regular drug testing;
- Attending therapy or 12-step programs;
- Requiring third-party supervision during visits paid by the afflicted party;
- Periodic written proof of compliance with mental health treatment.

By directing clients to proactively seek treatment, as noted above, attorneys can shorten the time in which clients will be able to resume their parenting time without restriction. Courts are often cautious in lifting restrictions on a party's parenting time as a result of their duty to act as *parens patriae* in the child's best interest.

D. Ancillary Issues.

(a) Expert Witnesses

In order to minimize costs for the client, attorneys should be considerate of choosing the appropriate evaluator, assuming there are funds to retain one. In high conflict custody cases, the matter may be unresolvable without the use of a Best Interests Evaluator to prepare a report addressing the child's best needs. In other cases, the only dispute may be whether a parent has a substance abuse issue, and, thus, the parties' funds may be better used towards a forensic substance abuse evaluation. Similarly, if the parties agree that the only obstacle to parenting time is mental health treatment compliance, the testimony of a party's care provider (therapists, psychologist, et cetera) may suffice to resolve a matter without proceeding to trial.

(b) Settlement and Alternative Dispute Resolution.

When possible, practitioners should consider mediation or collaborative divorce models to resolve these custody matters. If a party's mental health or substance abuse issue is heavily litigated, irreversible damage may be done to the co-parenting relationship, to the detriment of the

children. However, whether mediation is viable depends heavily on the impaired party's commitment to treatment and honest disclosure. Before entering into any negotiated settlement, attorneys should ensure they have official proof of treatment compliance to protect both the children, and their clients' best interests.

E. Conclusion.

Divorce is difficult under any circumstances, but when mental health issues or substance abuse are involved, it becomes even more complex and emotionally charged. These cases require more than just legal expertise – they call for empathy, patience, and a thoughtful approach that puts the well-being of children, and the long-term stability of both parties at the forefront. For the party struggling with these challenges, the legal process can feel overwhelming, and practitioners need to have the emotional intelligence to guide their clients towards the appropriate treatment, while maintaining an open and honesty relationship with the client. Similarly, while litigation can be deeply stressful to the person suffering from a mental health illness, practitioners should be mindful of the more stable spouse, who will be understandably concerned for their children's well-being. A conversation with the treating therapist may be helpful in understanding the afflicted party's condition, ability to participate in the litigation and/or the reality that their circumstances can be remedied and/or ameliorated with the right treatment protocol.

Ultimately, these cases benefit from a legal strategy that is knowledgeable, firm and compassionate. By combining strong advocacy with emotional intelligence, understanding the mental and/or physical limitations your client may be undergoing, should likely assist to reach outcomes that are not only legally sound but also support healing and a healthier path forward for everyone involved.