

A Powerful Tool: Court Ordered Psychological Testing in
Child Custody and Visitation Cases.
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Court ordered psychological and mental testing imposes an invasion on the subject of the order, and the same applies when that subject is a minor child. To obtain an order for psychological or mental testing in a child custody or visitation case, the movant must establish there is good cause for such an invasion into the health care of the parties' and their minor children. The Ohio Rules of Civil Procedure balance this invasion with the requirement placed on the movant to establish good cause. When seeking an order in either a child custody or visitation case, the moving party can find guidance in the Ohio Rules for Civil Procedure and the evolution of case law.

Ohio Civil Rule 35(A) controls an order from the court for a psychological examination. This rule states:

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination or to produce for such examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Ohio Civil Rule 35(A) is very similar to Federal Rule of Civil Procedure 35. The case of *Schlagenhauf v Holder*, 379 U. S. 104 (1964) examines the requirements set forth under the Federal Rules for court ordered psychological and mental examinations. The movant is required to make an affirmative showing that a condition is in controversy when attempting to place the condition of another as an issue in controversy. *Schlagenhauf*, 379 U.S. 104 at 119. The movant also carries the burden to establish good cause. Neither "mere conclusory allegations of the pleadings" or relevance to the case would satisfy the good cause requirement of Federal Rule 35. *Id* at 118. However, the ability of the movant to obtain the desired information by other means is relevant. *Id*. A movant does not need to prove the case on the merits to establish good cause and an evidentiary hearing is not always necessary. *Id* at 119. However a movant does need to "produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the rule". *Id*. Affidavits are given as an example of how this can be accomplished. While the facts in *Schlagenhauf* apply to a negligence case, the analysis used to apply Federal Rule of Civil Procedure 35 is relevant to Ohio cases as the rules themselves are similar.

The mental or physical condition of an incompetent is inherently in controversy in a guardianship case, but the movant still must establish good cause for an evaluation. *In re Guardianship of Johnson*, 519 N.E.2d 655 (10th District Oh 1987). Again, as in *Schlagenhauf*, the court in *Johnson* determined good cause must be affirmatively shown and the movant cannot rely on statements in application and arguments *in camera* as the basis of establishing good cause. *Johnson*, 519 N.E. 2d 655 at 659.

The application of Ohio Civil Rule 35 is similar for minors as to that of an incompetent in that the mental condition of a party is in controversy by virtue of the factors to be considered when determining the child's best interests as listed in R. C. 3109.04. Since the physical and mental conditions of the children and the parties "is a relevant factor in determining what is the best interests of the children", the remaining determination is whether or not good cause is shown. *Brossia v Brossia*, 583 N.E.2d 978 at 980 citing *In Re Guardianship of Johnson* (1987) 35 ohio App. 3d 41, 519 N.E. 2d 655. Good cause must still be established as well as the specific time and manner of evaluation. According to Baldwin's Ohio Practice Civil Practice good cause is shown if

The mental or physical condition of that person or party is in controversy, meaning the case may turn on or be directly affected by that condition

Information obtained from the evaluation cannot be obtained by other means
2 Baldwin's Oh. Civ. Prac. §35:9 (2009).

Finally, the motion for physical or mental evaluation should be very specific in the time, place, manner, condition, and scope of the evaluation to provide the court with the necessary information to grant the order. See Ohio R. Civ. P 35(A). For example in the *Brossia* case the order was remanded for failing to establish good cause, but also for the lack of specificity in the court order for evaluation. The order in *Brossia* only indicated the name of the doctor who was to perform the evaluation and provisions for the costs, which was not enough to satisfy the rule.

Nonetheless, with proper reasoning from the court, Ohio Civil Rule 35 can both be rather invasive and quite powerful. The good cause burden on the movant, not only serves as the initial gatekeeper to such an examination, but also forces the parties to more fully examine this often overlooked aspect of the litigation. Should a party be able to demonstrate good cause, the litigation itself may ultimately turn on the conclusions of the examination. Accordingly, counsel is well advised to fully evaluate this possibility early in the litigation so as to anticipate any relevant mental health issues and how they may effect the elements of the litigation.