



***Selected Readings on
Child Abuse Prosecution***

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 **Arthur D. Little, Inc.**
Washington, D.C.

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U.S. Department of Justice
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Child Abuse Prosecution

This project was supported by Contract Number J-LEAA-005-82, awarded to Arthur D. Little, Inc., Washington, D.C., by the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

April 2, 1984

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INTRODUCTION

On December 8 and 9, 1983, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) sponsored a Juvenile Prosecutors Forum. Arthur D. Little Inc., (ADL), under its technical assistance project with OJJDP, prepared and conducted the Forum. The purpose of this Forum was to identify and prioritize problems and concerns of juvenile prosecutors and to identify technical assistance to address these issues. Seventeen juvenile prosecutors from urban, rural and suburban jurisdictions attended the Forum. This representation allowed for a free exchange of information and comparison of problems nationwide.

Forty-five problem areas were generated by the prosecutors during the Forum and categorized into ten main issues. Child abuse and neglect proved to be the most important issue regardless of geographic location. The prosecutors expressed a need for information on current, nationwide child abuse and neglect prosecution procedures, nationwide statistics, interagency cooperative efforts, and innovative programs. This document is in response to that need. It is a compilation and synopsis of current, relevant research and literature in the area of child abuse and neglect relative to prosecutors.

In preparing this document, ADL contacted Federal and regional agencies to determine: a) what information was readily available for prosecutors in the areas of child abuse and neglect; b) what information was soon to be published; and c) which topics required further in-depth research. Because of the information readily available and pending research efforts, ADL focused its information gathering on the following areas: current prosecution practices in child abuse and neglect cases; interagency cooperative programs for identification, investigation, and prosecution of such cases; and innovative programs dealing with prosecution in which child/family rehabilitation is the ultimate goal.

The sources contacted during this effort included the National Center on Child Abuse and Neglect, Child Welfare League, National Criminal Justice Reference Service, and Children's Defense Fund. The National District Attorney's Association (NDAA), and the American Bar Association (ABA): National Legal Resource Center for Child Advocacy and Protections surfaced as most familiar and knowledgeable of prosecution proceedings in child abuse and neglect.

NDAA will be conducting a study in child abuse and neglect prosecution proceedings, beginning with a poll of member district attorneys to determine which have the greatest experience in child abuse and neglect proceedings. The ABA National Legal Resource Center for Child Advocacy and Protection, in an effort to increase professional awareness and legal/social service competency in child welfare issues, has developed two particularly informative texts -- Innovations in the Prosecution of Child Sexual Abuse Cases, a survey

and discussion of special prosecution approaches, and Child Sexual Abuse and the Law, a detailed state survey and analysis of laws and legal issues related to intrafamily child sexual abuse. Within 1984, ABA also intends to publish a desk manual of child abuse and neglect prosecution guidelines for attorneys and police.

The information presented on the following pages deals specifically with processes and practices in child abuse and neglect prosecution. Nine major sources of information are highlighted and summarized. Photocopies of some of these excerpts are provided in the Appendix. Additionally, a list of national organizations and regional resource centers concerned with child abuse and neglect and the publications list from the ABA National Legal Resource Center for Child Advocacy and Protection are included in the Appendix.

This information represents pertinent materials developed to date on child abuse and neglect prosecution and is not intended to be all inclusive. Rather, it is hoped that this document, combined with the pending efforts of organizations such as NDAA and ABA, will provide the necessary tools and information to assist prosecutors in child abuse and neglect proceedings. Through these and continuing efforts, it is hoped that prosecutors will be better equipped to deal with the problems of child abuse.

- I. Innovations in the Prosecution of the Child Sexual Abuse Cases, American Bar Association, National Legal Resource Center for Child Advocacy and Protection, Josephine Bulkley, June, 1982. To obtain a copy write to: National Legal Resource Center for Child Advocacy and Protection, American Bar Association, 1800 M. Street, N.W. S-200, Washington, D.C. 20036.

This document represents a nine month ABA effort to canvass prosecution policies and procedures relating to child sexual abuse cases throughout the country. This publication provides the most comprehensive and extensive amount of written material available on prosecution processes and procedures to date. Part I describes general survey findings on issues such as vertical prosecution, special prosecution units, charging decisions, differences in handling nonfamily versus intrafamily cases, and alternative therapeutic disposition. Part II defines the use of pre-trial diversion as an alternative form of prosecution, with the primary goal of offender and family treatment and rehabilitation. Part II also clarifies legal and societal issues relating to pretrial diversion. Part III, the report's core, provides detailed descriptions of innovative programs, providing treatment either as a condition of pre-trial diversion or as a post conviction incarceration alternative. Some program descriptions include appendices to help readers develop similar procedures for their communities.

The following is a detailed description of this document.

A. General Survey Findings

Questionnaires were distributed to 287 prosecuting attorneys, prosecutors' offices, and sexual abuse treatment programs nationwide. A 25% return rate resulted in findings not intended to represent national statistics but only responding jurisdictions. General findings of this survey include:

- Organization of office

Within some states, prosecutors' offices house special child abuse units to handle child abuse and neglect cases. Half the respondents use vertical prosecution, where one prosecutor handles the case throughout the proceedings. Prosecutors work closely with social services agencies, that protect victims' emotional and social needs.

- Decision to prosecute

Factors leading to non-prosecution in intrafamily cases include incompetence of child witnesses and lack of corroboration. Lack of child witness credibility, the child retracting the story, insufficient physical evidence, better handling by juvenile court, and family pressure to dismiss the case were rarely indicated by prosecutors as reasons to not prosecute.

- Caseload and offense charges

Of those jurisdictions who responded, caseload statistics were rarely maintained, but approximations range from two to nine hundred during the 12 months prior to the survey. One third of respondents prosecuted fewer than ten cases in 1980, with an even distribution of charges under incest, assault and battery, and sexual offense statutes.

- Pretrial issues

One third of respondents stated defendants sometimes or rarely waived rights to preliminary hearings. However, most respondents indicated defendants rarely waived rights to grand jury indictments. When not held in detention, clients undergo pre-trial release conditions such as vacating the home, having no contact with the child, stopping the abuse, and obtaining counseling.

- Pleas and trials

Approximately two thirds of defendants plead guilty in intrafamily cases, a figure slightly higher than for all child sex offense cases, possibly due to alternative sentencing programs for intrafamily offenders. These programs usually secure a guilty plea in exchange for a recommendation to the court of either a work-release jail sentence or probation conditioned upon treatment. Once the prosecutor decides to go to trial, the average conviction rate is 70%, which, according to the text, may reflect the fact that prosecutors usually go to trial only when there is strong evidence.

- Disposition

Probation with treatment is most often imposed in intrafamily cases, with the goal of rehabilitation and preservation of family unity.

- Sexual psychopath statutes

Five of the respondent states have laws to commit sex offenders to mental institutions instead of prison, half of the states using the statutes for all child sex offenders and slightly more than half for intrafamily cases.

- Special approaches for dealing with the child victim

Thirty percent of respondents have guidelines for interviewing children to minimize potential trauma of the court system upon the child. These procedures include joint interviews among professionals, one-way mirrors, child play rooms, anatomically correct dolls, and interviewing courses for professionals.

- Inter-court, inter-office, and inter-disciplinary coordination

One half of respondents stated use of informal coordination between juvenile court and prosecutors' officers. One half participate in multi-disciplinary teams, composed of a prosecutor and other relevant professionals, to provide adequate treatment plans for abused children by bridging communication and orientation differences among agencies.

B. Pre-Trial Diversion

1. Authority for Diversion

Pre-trial diversion, (also termed pre-trial intervention and deferred prosecution) an alternative form of criminal prosecution, is defined as follows: "based upon certain eligibility guidelines, offenders are diverted from the traditional criminal justice process, either before or after charges are filed, but prior to conviction or entry of judgement." Criminal proceedings suspension is based upon performance of specified obligations by the defendant. With successful compliance the case is dismissed. If terms of diversion are violated, the client is subject to further prosecution and criminal sanctions. One third of respondent jurisdictions have statutes, rules, policies, or procedures for diversion in intrafamily cases. When offenders are usually not a threat to society, are amenable to specialized treatment, and are compliant with other pre-trial diversion regulations, this alternative is often instigated.

2. Juvenile/Criminal Court Coordination

Child sexual abuse cases are routinely subject to both criminal and juvenile court action. Several jurisdictions have developed special approaches to collaboration in these areas, of which Madison, Wisconsin seems to be most formalized. Based on the premise that inappropriate intervention can do more harm than good within the family, the district attorney developed the following procedures:

- Case investigation by police, child protective agencies;
- Joint conference between police, child protective service worker, deputy district attorney for criminal cases, deputy district attorney for juvenile cases, and victim/witness assistance program representative to decide what legal action to take;
- Filing of juvenile court petition (all cases);
- Agreement for treatment in exchange for deferred criminal prosecution, within juvenile court (75% cases); and
- Resumption of prosecution, if diversion obligations are violated.

C. Innovative Programs

The bulk of Innovations in the Prosecution of Child Sexual Abuse Cases contains detailed descriptions of innovative programs which provide treatment either as a condition of pre-trial diversion or as a post-conviction incarceration alternative. Some program descriptions provide information to enable other communities to develop similar programs. The following programs are contained in this section:

- Santa Clara County Child Sexual Abuse Treatment Program, Parents United, Daughters and Sons United, and Adults Molested as Children United, San Jose, California.
- Johnson County Child Sexual Abuse Treatment Program: A Pre-Trial Diversion Model, Olathe, Kansas.
- Polk County Intrafamily Sexual Abuse Program, Des Moines, Iowa.
- The Baltimore Network for Intervention, Prosecution and Treatment of Intrafamily Child Sexual Abuse Cases, Baltimore, Maryland.
- Incest Diversion Program, Dayton, Ohio.
- King County's Approach to Child Sexual Abuse, Seattle, Washington.
- Boulder County Child Sexual Abuse Treatment Program: A Community-Based Approach to Intervention and Treatment With Incestuous Families, Boulder, Colorado.
- Sexual Assault Services, Hennepin County Attorney's Office, Minneapolis, Minnesota.

II. Child Sexual Abuse and the Law, American Bar Association, National Legal Resource Center for Child Advocacy and Protection, Josephine Bulkley, July, 1981. To obtain a copy write to: National Legal Resource Center for Child Advocacy and Protection, American Bar Association, 1800 M Street, N.W. S-200, Washington, D.C. 20036

Primarily designed as a resource guide to members of the legal profession, including legislators, prosecutors, defense counsel, guardians ad litem, parents' attorneys, and judges, this document surveys and analyzes state laws and legal issues which may come into play in the report of suspected child sexual abuse.

The text includes analyses of Federal and state criminal child sex offense statutes, civil child protection statutes dealing with sexual abuse, and other relevant child sexual abuse statutes such as domestic violence and sexual psychopath laws. Also researched are: corroboration of sexual victimization of children; marital privilege in child sexual abuse cases; expert testimony on the dynamics of intrafamily child sexual abuse and principles of child development; and procedural reforms to protect child victim/witnesses in sex offense proceedings. Two particularly informative readings are discussed below: a) competency of children as witnesses; and b) evidentiary theories for admitting a child's out-of-court statement of sexual abuse at trial.

A. Competency of Children as Witnesses, Gary Melton, Josephine Bulkley, Donna Wulkan

This article discusses competency legal standards and child development psychological issues contributing to determination of a child's competency. Most courts measure a child's testimonial competency based upon four factors: veracity, intelligence, memory, and verbal capacity. The available research suggests that liberal use of the child's testimony is well founded. But, it also suggests that research into the competency of children would be more scientifically valid if conducted under stress situations similar to that of court room interrogation.

B. Evidentiary Theories for Admitting a Child's Out-Of-Court Statement of Sexual Abuse at Trial, Josephine Bulkley

The two principles under which sex offense complaints may be received into evidence as exceptions to the hearsay rule are: 1) complaint of rape, which admits a rape complaint as corroboration to rebut a presumption of silence inconsistent with the occurrence of the act; and 2) excited utterances, which include spontaneous remarks occurring in the event of a startling incident.

The excited utterance exception has been liberally applied in many jurisdictions, with more strict requirements than under the complaint of rape exception. This is due to the admissibility of statement details, whereas the complaint of rape is used only as corroborative evidence. Two requirements of an excited utterance include:

- A sufficiently startling experience suspending reflective thought; and
- A spontaneous reaction not resulting from reflection or fabrication.

Courts allow widely varying time lapses between the startling event and the utterances, based upon whether or not the declarant was still under the event's influence.

III. Child Abuse and Neglect Litigation: A Manual for Judges, American Bar Association, National Legal Resource Center for Children Advocacy and Protection, Howard A. Davidson & Robert M. Horowitz, March, 1981. To obtain a copy write to: National Legal Resource Center for Child Advocacy and Protection, 1800 M Street, N.W. S-200, Washington, D.C. 20036.

Annually, family, juvenile, probate, and general jurisdiction courts hear over 200,000 child abuse and neglect cases. Every judge confronts difficult questions:

- Did abuse and neglect occur?
- Where will the child live?
- What services will the family receive?
- When can state intervention cease?
- Should parental rights be terminated?

Since each case is unique, the judge must understand child abuse and neglect, as well as appropriate responses of treatment agencies and the judicial system. These include causative factors, state and professional roles/responsibilities, and court contributions to child abuse prevention and treatment.

This text includes a number of sections which deal with the multiple facets of child abuse and neglect litigation. These facets include:

- Abuse and neglect, the child protective system, and role of courts
- Intake and initiation of court action
- Representation of the child
- Court hearings
- Legal rights of involved parents
- Privacy of records
- Criminal prosecution of abusing parents
- Collection of evidence and information
- Improving social worker and expert testimony
- Coping with the media and hysteria
- Negotiated settlements and consent stipulations
- Court ordered home supervision
- Removal from home and termination of parental rights

Each section of the text contains a set of Support Readings, from proposed professional standards, law review articles, books, court rules, social worker and attorney guides, and other written aids used in individual jurisdictions. Some of the most relevant information is found in the section titled "Criminal Prosecution of Abusing Parents," described below.

Criminal Prosecution of Abusing Parents

The need for criminal/juvenile court coordination and prosecution/child protective agency cooperation occurs in prosecution cases, since criminal proceedings greatly impinge upon juvenile court actions. Arguments for criminal prosecution include:

- Offender rehabilitation
- Deterrence of defendant and other child abusers
- Removal of offender from society
- Retribution
- Coercion into accepting services

Arguments against prosecution include:

- Prosecution difficulty due to evidentiary problems, standard of proof required and prohibition against self-recrimination;
- Less cooperative parent in remedial procedures once prosecuted;
- Less likely deterrence of child abuse (by prosecution) than other criminal acts;
- Lack of power (criminal court) to order treatment for non-defendant family members; and
- Lack of support services (criminal court) to implement effective supervision and treatment.

Cases of sexual abuse, severe injury or death, and abuse by non parents are more likely to result in criminal prosecution. The effects of prosecution on the juvenile court are numerous. Some of them include: 1) a considerable delay in juvenile proceedings due to criminal court prosecution; 2) parents' testimony becomes affected in child protective hearing (i.e. less candid and silent under self-incrimination privilege); 3) children are coerced not to testify; 4) and there may be hindered attempts to improve the child's care and family life resulting from prosecution and jail sentence.

This section also includes a description of steps taken towards coordination of civil and criminal functions, including: coordination between child protective agencies, police, and prosecutors; coordinating prosecutor and child protective agency remedial efforts when criminal prosecution is or may be initiated; and coordination between juvenile and criminal courts.

IV. Manual on Child Abuse, New Jersey State Bar Association, American Bar Association, James B. Boskey, March, 1980. To obtain a copy write to: New Jersey State Bar Association, 172 West State Street, Trenton, New Jersey 08608.

This Manual is comprised of material selected from a variety of sources on the nature of child abuse and the role of the Bar and the courts in dealing with this problem. The contents of this document include:

- Nature and Scope of Child Abuse and Neglect with focus on:
 - Children's Rights
 - Medical Recognition of the Problem
 - Contributions to the Study of Child Abuse
 - American Concept of Child Abuse and Neglect
- Legal Intervention in Child Abuse and Neglect
- Summary and Commentary on Laws Governing Child Abuse and Neglect
- Litigation of Child Abuse and Neglect Cases including:
 - Public Defenders Manual, relating to law guardians role
 - Division of Youth and Family Services Manual, including forms of pleadings for cases under Title IX
- Termination of Parental Rights and Adoption Actions
- Social Service Function in Child Abuse

A particularly informative excerpt is Child Abuse in America: A De Facto Legislative System, by Brian Fraser, J.D., Executive Director of the National Committee for Prevention of Child Abuse. This paper discusses child abuse legislative history in America, its evolution, the present relationship between legislation and state child abuse systems, and future expectations.

According to the article, child abuse legislation historically has been reactive, not preventative. With growth in child abuse knowledge, the definition increased to include four separate elements: non-accidental physical injury, sexual molestation, neglect, and mental injury. Constitutionally, successful resolution of child abuse cases remains the state's responsibility. Although definitions vary within the states, procedures are handled similarly. Three procedural steps include:

1. Identification of a suspected victim and report to appropriate state agency;
2. Investigation by receiving agency to determine if child abuse or neglect actually occurred; and
3. Treatment to the child and family.

Every state has enacted its own mandatory reporting statutes. These statutes contain, as a minimum, child abuse definition, those persons mandated to report, state-wide agency to receive the report, immunity from civil and/or criminal liability if report made in good faith, and penalty for failure to report (most states have this clause).

Additionally, there are specific guidelines for investigations, which include:

- Prompt initiation;
- Nature, extent, and cause of reported injury;
- Name of person responsible for such injuries;
- Names and conditions of all other children in the same home;
- Condition of home environment;
- Relationship between child and parents;
- Psychological/psychiatric evaluations of parents;
- Medical examination of child;
- Color photographs and xrays;
- State-wide central registry--a repository of past reports of suspected child abuse;
- Temporary protective custody without parental permission and court consent;
- Child protection team; and
- Multi-disciplinary experts to resolve issues of diagnosis, prognosis, and treatment plans.

Intervention can take two forms: 1) voluntary--agreement between parents and Department of Social Services, or 2) involuntary--initiated and monitored through juvenile court. Two potential problems may, however, arise at this stage: first, if court proceedings are necessary to implement treatment, the case often proves difficult to establish; second, treatment programs and services may not exist in most communities.

As identification of child abuse and neglect becomes more thorough and efficient, the treatment system will overload. According to the author, America if it is to be successful in dealing with the problems of child abuse must develop a new and different perspective. The perspective is prevention. To do anything less is to worship at the altar of futility.

- V. Federal Standards for Child Abuse and Neglect Prevention and Treatment Programs and Projects, Federal Advisory Board on Child Abuse and Neglect, and the National Center of Child Abuse and Neglect, U.S. Department of Health, Education, and Welfare, March, 1978. To obtain a copy write to: National Center on Child Abuse and Neglect, Office of Human Development Services, U.S. Department of Health, Education and Welfare, P.O. Box 1182, 400 6th Street, S.W., Washington, D.C. 20013.

This document contains indepth guidelines and commentaries of Federal standards in child abuse and neglect, which are presented in eleven separate sections for easy reference. The sections on State Laws, Legal Rights, and Research and Evaluation are applicable to all service systems; whereas, State Authority, Local Authority, Local Authority, Physical Health, Education, Courts, Law Enforcement, and Prevention and Correction of Institutional Child Abuse and Neglect are self contained units, directed to persons within indicated roles. The standards presented are based on the following three assumptions, which are emphasized throughout the document:

- Prevention efforts are equally important as assessment and treatment.
- Service systems must coordinate efforts on state and local levels to effectively prevent and treat child abuse and neglect.
- Continuous efforts to improve knowledge about prevention and treatment must be made through research and program innovation.

VI. Child Protection: The Role of the Courts, U.S. Department of Health and Hum. Services, National Center on Child Abuse and Neglect, (Report No: OHDS 80-30256). Nora Lee Kalb, May, 1980. To obtain a copy write to: U.S. Government Printing Office, Department 76, Washington, D.C. 20401.

To better serve maltreated children and their families, this manual intends to improve professional/court relationships by providing a clear picture of court processes in hearing child abuse and neglect cases. Professionals in contact with the juvenile court should refer to state statutes for specific jurisdictional procedures, as this manual only describes the general court framework. Two informative excerpts from this document are cited below.

A. Standard of Proof

Standard of proof required in child abuse and neglect hearings is usually either "clear and convincing evidence" (the intermediate test) or "preponderance of the evidence" (normally applied in civil proceedings). However, in rare cases, the "beyond a reasonable doubt" standard is employed.

B. Types of Dispositions

This excerpt describes various dispositional alternatives and their implications. Dispositional possibilities in child abuse and neglect cases, which vary from state to state, include:

- Dismissal due to insufficient evidence;
- Adjournment in contemplation of dismissal if parties agree to treatment;
- Suspended judgement after presentation of evidence in adjudicatory hearings, allowing parties to comply with court ordered conditions;
- Order of protection permitting child to live with parents, relatives, or others while under supervision of protective agency;
- Placement, removal of child from parents; and
- Termination of parental rights, freeing child for adoption.

VII. WE CAN HELP: A Curriculum on Child Abuse and Neglect, U.S. Department of Health, Education, and Welfare, National Center on Child Abuse and Neglect, (DHEW Publication No: OHDS 79-30220) James A. Harrell, September, 1979. To obtain a copy write to: U..S. Department of Health and Human Services, National Center on Child Abuse and Neglect, Washington, D.C. 20201.

The WE CAN HELP Leader's Manual and companion volume WE CAN HELP Resource Materials (participants' textbook also contained in the Leader's Manual) are excellent training materials for personnel engaged in prevention, identification, and treatment of child abuse and neglect. The purpose of this multidisciplinary curriculum is to develop knowledgeable community child protection networks -- incorporating relevant public and private agencies from social service, education, health, law enforcement and mental health. The basic curriculum contains the following units:

- Introduction: Understanding Child Abuse and Neglect
- Physical Abuse of Children
- Child Neglect
- Emotional Maltreatment of Children
- Child Sexual Abuse
- Child Protective Intervention
- The Role of the Court in Child Abuse and Neglect
- Community Planning and Coordination to Prevent and Treat Child Abuse and Neglect

Audiovisual materials, including seven filmstrips/cassette recordings and six 16mm. films accompany the Leader's Manual and Resource Materials.

VIII. Interdisciplinary Glossary on Child Abuse and Neglect: Legal, Medical, Social Work Terms, U.S. Department of Health and Human Services, National Center of Child Abuse and Neglect, April, 1980. To obtain a copy write to U.S. Government Printing Office, Washington, D.C. 20402 - Stock No: 017-000-00206-6.

Compiled by the Midwest Parent-Child Welfare Resource Center at the University of Wisconsin-Milwaukee, this Interdisciplinary Glossary presents terms in a concise and accessible format to facilitate cross-disciplinary understanding of child abuse and neglect. The glossary is directed to attorneys, day care personnel, family life educators, health care administrators, homemaker personnel, judges, law enforcement personnel, legislators, nurses, parent aides, physicians, psychologists, social planners, social workers, school administrators, teachers, students, volunteer child and family advocates, and concerned citizens. Entries include:

- Terms which are unique to child abuse and neglect;
- Terms used with respect to child abuse and neglect which also have wider application;
- Acronyms used commonly in professional practice.

An additional matrix details the indicators of child abuse and neglect, viewed by the child's appearance, child's behavior and caretaker's behavior, in all four categories--physical abuse, neglect, sexual abuse, and emotional maltreatment.

IX. Cooperative Approaches to Child Protection: A Community Guide, Minnesota State Department of Public Welfare, Mary Urzi, September, 1980. To obtain a copy write to: Minnesota State Child Abuse and Neglect Coordinator, Division of Social Services, Minnesota State Department of Public Welfare, Centennial Office Building, St. Paul, Minnesota 55155.

This handbook, based on the premise that child abuse and neglect is a community problem as well as a family problem, defines the multi-disciplinary approach to delivery of preventative and rehabilitative services. Since no one agency can adequately address the multifaceted problems of abused children and their families, communication and collaboration among professions are essential. This text includes:

- Rational and goals of the multidisciplinary approach;
- Vehicle for attaining and guidelines for implementing a coordinated community program;
- Obstacles to cooperation and suggestions to overcome them; and
- Roles and responsibilities of involved professions:
 - Welfare
 - Health
 - Law enforcement
 - Court system
 - Mental health
 - Education
 - Child care.

SUMMARY

These nine documents represent some of the most pertinent and extensive materials developed to date on prosecution proceedings in child abuse and neglect. It is hoped that this material will stimulate thinking and assist prosecutors and others in combatting child abuse and neglect. Appendices included are:

- List of National Organizations and Regional Resource Centers Concerned with Child Abuse and Neglect
- American Bar Association: National Legal Resource Center for Child Advocacy and Protection Publications List
- Child Sexual Abuse and the Law
 - Competency of Children as Witnesses
 - Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial
- Child Abuse and Neglect Litigation: A Manual for Judges
 - Criminal Prosecution of Abusing Parents
- Manual on Child Abuse
 - Child Abuse in America: A De Facto Legislative System
- Child Protection: The Role of the Courts
 - Standard of Proof
 - Types of Dispositions

APPENDICES

List of National Organizations and Regional
Resources Centers Concerned with Child
Abuse and Neglect

National Organizations Concerned with Child Abuse and Neglect

National Center on Child Abuse and Neglect
Administration for Children, Youth and Families
Office of Human Development Services
U.S. Department of Health and Human Services
P.O. Box 1182
Washington, D.C. 20013

National Legal Resource Center for Child Advocacy and Protection
American Bar Association
1800 M Street, N.W.
Washington, D.C. 20036
(202) 331-2250
Howard A. Davidson, Director

National Association of Counsel for Children
1205 Oneida
Denver, CO 80220
(303) 321-3963
Donald Bross, Executive Director

National Center for Youth Law
3701 Lindel Boulevard
St. Louis, MO 63108
(314) 533-8868
David Howard, Managing Attorney

National Center for Youth Law
1663 Mission Street, Fifth Floor
San Francisco, CA 94103
(415) 543-3307
Peter Bull, Director

American Civil Liberties Union
Children's Rights Project
22 East 40th Street
New York, NY 10016
(212) 944-9500
Marcia R. Lowry, Director

Children's Defense Fund
1520 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 483-1470
Marian Wright Edelman, Director

The American Humane Association, Children's Division
5351 Squath Roslyn Street
Englewood, Colorado 80110
(Newsletter and Other Publications)

Child Welfare League of America, Inc.
67 Irving Place
New York, New York 10003
(Newsletter and Publications)

National Center for the Prevention and Treatment of Child Abuse and Neglect
1205 Oneida Street
Denver, Colorado 80220
(Publications)

National Committee for Prevention of Child Abuse
Suite 1250
332 South Michigan
Chicago, Illinois 60604
(Newsletter: Caring, Publications)

Parents Anonymous, Inc.
2810 Artesia Boulevard
Redondo Beach, California 90278
(Publications and Help in Starting a Local Chapter)

National Alliance for the Prevention and Treatment of Child Abuse and Maltreatment
41 - 27 169th Street
Flushing, New York 11258

Child Abuse and Neglect Regional Resource Centers

Ten regional resource centers on child abuse and neglect exist in each of the ten HHS Federal Regions. The primary purpose of the resource centers listed below is to support state and local efforts to prevent and treat child abuse and neglect.

Reg. I CA/N Resource Cntr.
Judge Baker Guidance Cntr.
295 Longwood Avenue
Boston, Mass. 02115
Steven Lorch, Director
(CT, ME, MA, RI, VT, NH)

Reg. II CA/N Resource Cntr.
College of Human Ecology
Cornell University
MVR Hall

Ithaca, NY 14853
John Doris, Director
(NJ, NY, PR, VI)

Reg. III CA/N Resource Cntr.
Howard Univ. Inst. for Urban Affairs and Research
PO Box 191
Washington, DC 20059
Ms. Vanette Graham, Director
(DC, DE, MD, PA, VA, WV)

Reg. IV CA/N Resource Cntr.
Regional Inst. for Social Welfare Research
PO Box 152
Athens, GA 30601
Dr. Clara Johnson, Director
(AL, FL, GA, KY, MS, NC, SC, TN)

Reg. V CA, N Resource Cntr.
Grad. School of Social Work
Univ. of Wisc.-Milwaukee
Milwaukee, WI 53201
Ms. Adrienne Hauser, Director
(IL, IN, MI, MN, OH, WI)

Reg. VI CA/N Resource Cntr.
Grad. School of Social Work
Univ. of Texas at Austin
Austin, Texas 78712
Ms. Rosalie Anderson, Director
(AR, LA, NM, OK, TX)

Reg. VII CA, N Resource Cntr.
Institute of Child Behavior and Development
Univ. of Iowa-Oakdale
Oakdale, Iowa 52319
Dr. Gerald Solomons, Director
(IA, KS, MO, NE)

Reg. VIII CA, N Resource Cntr.
Nat. Cntr. for the Prevention and Treatment of CA, N
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Child Sexual Abuse and the Law

- Competency of Children as Witnesses

COMPETENCY OF CHILDREN AS WITNESSES*

Gary Melton
Josephine Bulkley
Donna Wulkan

I. Introduction

This chapter will examine the competency of a child victim to testify in a sexual abuse case. If a child is a victim of a crime committed by a parent or other adult, that child may be drawn into the criminal and juvenile justice systems. Since the victim is usually the only witness in a child sexual abuse case, she is the prosecution's most valuable resource.¹ The first major issue, then, in pursuing a child sexual assault case is establishing the competency of the child to testify at trial. Prosecutors recognize that a child who can be found competent may be a very effective witness since children are more likely to tell the truth than a falsehood.²

This article is broken down into a discussion of the legal standards of competency and the psychological issues of child development which contribute to a determination of a child's competency.

Although recognizing that children may be less likely than adults to give reliable testimony, courts and legislatures have been reluctant to say that children below a designated age are per se incompetent to testify. Therefore, there is generally no precise age at which children will be excluded from testifying.³ Thus, the competency of a child witness of any age must be established on a case-by-case determination of whether the child's testimony will enhance justice.⁴ The above principles have been established in Anglo-American law since the 18th century. The leading English case of Rex. v. Brasier⁵ recognized that children could be competent witnesses in criminal trials. The court stated:

[T]hat an infant, though under age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath...for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court; but if they are found incompetent to take an oath, their testimony cannot be received....⁶

*This article is an adaptation of the original version from G. Melton, Children's Competency to Testify 5 Law and Human Behavior 73 (Copyright 1981). The original article is protected by copyright and the original portions are reprinted here by permission of the publisher.

The American courts adopted this rule in the mid-19th century as reflected in the United States Supreme Court's 1895 decision in Wheeler v. United States.⁷ In that case, the court held that the 5½ year old son of a murder victim properly was qualified as a witness in a criminal trial for murder:

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well -- as his understanding of the obligation of an oath.⁸

While there is no fixed age of competency for children, states nevertheless consider age as one factor in determining a child's competency. The way in which age is considered in most states is to establish an age above which a child is presumed to be competent; most designate either age 14 or 10. Below these ages, variations of the criteria set forth in the Wheeler decision must be met to qualify a child as a witness. Twelve states⁹ and the District of Columbia maintain the common law rule that a child 14 years of age or older is presumed to be competent as a witness. With a child under 14, the court must inquire into the child's maturity or mental capacity as well as his or her appreciation of the duty to tell the truth.¹⁰ Similarly, ten states¹¹ and Puerto Rico have enacted "ten year statutes," which provide that "children under 10 years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"¹² are incompetent to testify. This type of statute does not presumptively hold a child under 10 incompetent to testify; instead, if the child has the capacity to receive just impressions and communicate them truthfully, then the determination of competency is left to the sound discretion of the court.

Three states, Indiana, Louisiana, and New York, also designate ages above which child witnesses are presumed competent; but for children below the designated age, the requirement of the duty to tell the truth is phrased in terms of "understanding the nature or obligation of an oath."¹³ However, New York's law also provides that if the child does not understand the nature of the oath, "the child may be permitted to give unsworn evidence if the court is satisfied the child possesses sufficient intelligence and capacity to justify reception thereof. However, the defendant may not be convicted solely on the unsworn evidence of a child less than 12."¹⁴ In five states,¹⁵ no age is specified, although both the intelligence¹⁶ and the understanding of the oath tests applied to all children.¹⁷

Another type of statute found in seven states¹⁸ and the Virgin Islands also specifies no age, but does not mention children at all. These laws apply to children the test for competency of witnesses generally. Thus, the same standards of "sufficient intelligence" and "a sense of obligation to tell the truth" are required for any person, child or adult.¹⁹ Finally, thirteen states have adopted by statute, the General Rule of Competency, Rule 601 of the Federal Rules of Evidence, which states that "every person is competent to be a witness except as otherwise provided in these rules."²⁰ The effect of this rule is to abolish all grounds of incompetency, including children (as well as religious belief, conviction of crime or mental incapacity). These jurisdictions represent the liberal view of allowing children to testify without qualifying them before-hand and permitting the trier of fact to determine the weight and credibility of the testimony.

III. Standards for a Child's Testimonial Competency

A majority of courts measure the testimonial capacity of a child on the basis of a combination of the following four factors:

- (1) Present understanding of the difference between truth and falsity and an appreciation of the obligation or responsibility to speak the truth;
- (2) Mental capacity at the time of the occurrence in question to observe or receive accurate impressions of the occurrence;
- (3) Memory sufficient to retain an independent recollection of the observations;
- (4) Capacity truly to communicate or translate into words the memory of such observation and the capacity to understand simple questions about the occurrence,²¹

In short, the essential elements may be stated as a child's veracity, intelligence, memory, and verbal capacity.²² When all these elements are present, the child is a competent witness.

The obligation of truthfulness has been variably defined as "a sense of moral responsibility" or "an appreciation and consciousness of the duty to speak the truth".²³ Of all the factors, courts place primary emphasis on the child's ability to differentiate truth from falsehood. This inquiry has often followed a line of questions on voir dire (a legal term for the preliminary examination which the court may make of one presented as a witness or juror, where his competency, bias, interest, etc. is objected to) directed toward ascertaining a child's understanding of the duty to tell the truth. The voir dire in Wheeler was exemplary:

The boy said among other things that he knew the difference between the truth and a lie; that if he told a lie the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied they would put him in jail. He also said that his mother had told him that morning to 'tell no lie,' and in response to a question as to what the clerk said to him, when he held up his hand, he answered, 'don't you tell no story.'²⁴

One commentator suggests that an assessment of a child's competency should include "questions about his attendance at church or Sunday School, including his frequency of attendance, names of his teachers, pastor and location of his church."²⁵ Besides raising a constitutional issue, some argue that these questions are probably of little probative value today in view of changing norms regarding religion and are not likely to shed light on the child's ability to apply moral principles. Questions about church attendance are nonetheless still commonly used.²⁶

An adult's understanding of the moral duty to speak the truth while testifying is generally exhibited by his or her swearing of a formal oath to tell the truth. The abstract nature of an oath, however, is frequently beyond the conceptual ability of a child. Some legal scholars favor liberalization of the oath requirement for children, because children may have no compulsion to speak truthfully by being subjected to an oath they do not understand. A number of courts have held that "a child that has an adequate sense of the impropriety of falsehoods, does understand the nature of an oath in the proper sense of the term even though [the child] may not know the meaning of the word oath and may never have heard

that word used before."²⁷ For example, in Posey v. U.S.,²⁸ a ten year old indecent assault victim admitted he did not know the meaning of an oath or the difference between right and wrong, but was held competent to testify based on the entire examination of the child, including the court's observation of the witness' demeanor.

In some jurisdictions, a judge may instruct the child on the definition and procedure of an oath and allow the child to be formally sworn. In others, the judge may merely allow the child to take an oath after sufficient questioning of his moral understanding.²⁹ But, some jurisdictions, such as New York and Michigan,³⁰ reflect the modern trend that if, on preliminary examination, the child appears capable of presenting pertinent information he should be permitted to testify without taking an oath which he may be unable to understand or to define. In Michigan, Minnesota and Hawaii,³¹ the trial judge may utilize any ceremonies which are meaningful for the child and which represent his affirmation to tell the truth.³²

The second factor of competency requires a showing that the child possesses cognitive skills adequate to comprehend the event he or she witnessed. To test the cognitive development of the child, simple questioning usually is utilized to ascertain the child's level of understanding. The court, for example, may ask the child's name, age, address, grade in school, teacher's names, and ability to count or recite the alphabet. The age of the child will of course reflect the complexity of the preliminary questions. Thus, although it is well established that competency must be determined as of the time the child's testimony is offered, the child must have had the mental capacity at the time of the event "to receive just impressions of the facts."³³

The third and fourth factors in determining a child's competency must be considered with the second. Thus, a child must have the ability to remember and to communicate what was observed. One potential problem with a child's competency in terms of these three factors arises when the child is somewhat older at the time of trial than at the time of the event. One court noted a situation in which a seven year old witness was called upon to testify to what she had seen when she was four years of age:³⁴

It is obvious that had she been called as a witness at the time of this occurrence, when she was 4 years of age, she would have been incompetent....Her memory of the event and its details did not, indeed it could not, improve as time went on. The only thing that did improve was her capacity to communicate in terms of words. But that capacity is meaningless unless supported by the capacity to note the occurrence at the time it happened and the ability to remember it.³⁵

With respect to the memory issue, there also may be other factors which affect the child's ability to accurately and independently remember what happened. First, the child must be able to organize the experience cognitively and to differentiate it from his or her other thoughts and fantasies. There may be "a danger that a child will intermingle imagination with memory...."³⁶ As indicated in chapter 5 on corroboration, young children do fantasize "with imaginary playmates, imaginary dramas such as playing house, and fanciful explanations of events." However, a child's fantasies are based on what he or she has learned from observing or hearing real events in his or her life.³⁷

Perhaps a more troublesome issue relating to a child's memory of the event is the child's level of suggestibility. A court in California stated:

The force of suggestion, always strong, is particularly potent with the impressionable and plastic mind of childhood and without intending any such result, the repetition of supposed facts in the presence of a child often creates a mental impression or conception that has no objective reality in any existing fact.³⁸

Thus, it often has been stated that a child must possess an independent recollection of the occurrence. Suggestibility is a particularly salient factor when the defendant is a parent or other significant adult in the child's life. A child must be able to maintain an accurate perception of what happened often under circumstances of psychological stress as well as family pressure, real or perceived, to shape his or her responses in a particular way.

The fourth factor for determining competency concerns the child's verbal abilities to communicate his or her understanding of the occurrence. A child must be able to "understand simple questions put to him and to formulate intelligent and understandable responses."³⁹...

Finally, additional special competencies may be required for particular kinds of testimony. Most notably, testimony by children on sexual abuse may require verification of the child's comprehension of the meanings of sexual terms and behavior. However, as noted later, the child's language should be utilized in the questions regarding the sexual molestation.⁴⁰

IV. Process for Qualification

The four factors for qualifying a child as a competent witness and the judicial application of them are, in practice, fairly simple and flexible process. A voir dire examination of the child usually is conducted by the judge (and by the attorneys if the judge so permits) in court. It is a preliminary undertaking which will determine whether the child should be allowed to testify at all; the weight, credibility, or significance of his or her testimony are not at issue at this stage of the proceedings.⁴¹

As mentioned above, the child's responses to questions alone do not determine competency; the child's demeanor, maturity, and general presence also enter into the decision. The judge, in his or her objective role, is usually the person to assess these subjective factors.

It generally is held that a determination of competency rests largely in the sound discretion of the trial judge whose decision will not be disturbed in the absence of clear abuse.⁴² But when children of competent qualifications are called to testify, the trial court does not have within its discretion the right to refuse to permit the child to testify. The trial court's power, then, is not a discretion without bounds. It is a sound judicial discretion subject to appellate review. The trial court is under an affirmative duty to conduct a proper examination of the child and failure to do so will result in reversal.⁴³ One court indicated "the voir dire examination must be sufficiently extensive and detailed to realistically determine the child's ability to testify."⁴⁴ Another court pointed out that

[i]f counsel believes voir dire is inadequate, he/she has an obligation to propose certain voir dire questions to the court, to request the right to conduct independent examination relating thereto, or to object to the adequacy of the court's exam, just as counsel is required to act in challenging the qualification and competency of jurors.⁴⁵

A 1978 Delaware case⁴⁶ illustrates an interesting method of eliciting information for qualifying a child witness. In that case, the child was never questioned by the judge. Instead, the trial judge questioned a psychologist, who had carefully examined the child about the child's awareness of the importance of telling the truth. The psychologist then testified to the child's ability to perceive, recall, and communicate the events. His testimony covered each of the four factors outlined above to determine competency and the child met each of them. The trial judge was able to observe the child's demeanor and conduct in court. Thus, this

case held that a trial judge in every non-jury criminal action is not required to interrogate a child witness in the course of conducting a pre-trial competency hearing.⁴⁷ These procedures were left to the sound discretion of the judge. This case raises the possibility of utilizing professionals to interrogate children for competency qualification outside of the intimidating and unfamiliar atmosphere of the courtroom. Allowing this sort of alternative would help resolve the conflict between the emotional needs of a young victim of sexual assault and the requirements for prosecution of a case. As the following discussion indicates, there is an obligation to adjust the requirements of the legal system to conform to the special needs and abilities of children.⁴⁸

The manner in which the child is questioned is an extremely important aspect of the qualification process. Simple, direct questions should be asked which are easily answerable with affirmatives and negatives. A question which may seem simple to an adult may be confusing or meaningless to a child.⁴⁹ Thus, the interrogator should employ language which is appropriate for the child's level of understanding and should avoid use of technical, legal terminology.⁵⁰ As noted earlier, questions to a child regarding sexual abuse should use the child's words for particular parts of the body (e.g. children may refer to a penis as a "thing" or "pee pee") or for particular experiences. Further, asking a child if the defendant "ejaculated" probably would not be understood; instead, he or she should be asked in terms of whether "anything came out of the penis."

If misunderstanding occurs between the questioner and child, the questions should be rephrased or substituted to clarify the confusion.⁵¹ One is unlikely to determine competency based upon an answer to a simple question.⁵² Moreover, each child differs in age, sophistication, and personality, and questions should be tailored to the individual involved.⁵³ Finally, conversational questions, phrased partially as statements, such as "It's a nice day, isn't it?", are easier for children to respond to.

Much of the concern regarding a child's credibility or competency relates more to the approach taken by the judge or lawyers than to the child's abilities. Some children may be deemed incompetent based on the examiner's lack of a basic understanding of child developmental stages.⁵⁴ If, for example, a child does not understand a question, he or she may respond incompletely, or indeed, incorrectly. Further, the child may withdraw or refuse to answer more questions if he or she becomes intimidated or frustrated. Thus, for example, questions to a four-year old about the exact time or date he or she was sexually abused would be inappropriate.

Finally, it is essential that the questioning be conducted in a friendly way⁵⁵ and that the questioner put the child at ease. It must be remembered that a child is being subjected to an unfamiliar and intimidating experience on the witness stand in a courtroom full of adults using strange vocabulary⁵⁶. Thus, the initial questioning should be of a general nature and designed to establish a rapport with and interest in the child.⁵⁷ Again, failure to help the child feel relaxed will affect the questioner's ability to elicit the necessary information from an otherwise competent child. The following is an example of informal preliminary questioning designed to put the child at ease:

- Q: What is your name?
A: Katherine Anne Craig.
Q: How are you feeling today, Katherine?
A: Fine.
Q: What are the names of your mother and father?
A: - - -
Q: Do you have any brothers and sisters?
Q: What are their names?
Q: Do they live at home?
Q: By the way, how do you spell your name?
Q: How old are you, Katherine?
Q: When is your birthday?
Q: How did you get here today?
Q: Do you know what building you are in now?
Q: What town are you in now?
Q: Where do you live?
Q: What school do you go to?
Q: How far do you live from school?⁵⁸

V. Suggested Legal Reforms Regarding a Child Witness' Competency

The implication of the above discussion is that in most jurisdictions, assessment of a child's competency to testify may require a rather extensive voir dire to assess the child's cognitive, moral, and emotional capacities. Professors Wigmore and McCormick both suggest abolition of the requirement that a child's competency be established before he or she testifies. Both would simply allow any age child to testify; as with any other evidence, the jury can determine the weight and credibility of the testimony, especially with cautionary instructions.⁵⁹ Further, the testimony would be subject to judicial review for sufficiency of the evidence.⁶⁰

One reason cited for continuing the practice of qualifying a child witness is that judges doubt juries' ability to objectively evaluate a child's testimony.⁶¹ However, despite the jury's deficiencies, "the remedy of excluding such a witness, who may be the only person who knows the facts, seems inept and primitive (emphasis added)."⁶² This is particularly true in a child sexual abuse case where excluding a child's testimony may mean the difference between successful prosecution and dismissal. Thus, as Wigmore states:

A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure a priori the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire some degree of credibility, is futile and unprofitable.... Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let the story come out for what it may be worth.⁶³

As indicated earlier, the thirteen states which have abolished competency tests for children (as well as others) indicate a desirable trend toward permitting children to testify and letting the judge or jury decide the weight and credibility of the testimony. Although very young children (two or three years old) may not have sufficient perception, memory or narration abilities, such deficiencies simply affect the credibility of the child's testimony. Indeed, for this reason, children under four years normally would not be called as witnesses.

VI. Psychological Research Relating to Competency Requirements for Children

The following discussion focuses on some of the psychological studies in the areas which relate to a child's competency. Some of the research challenges commonly-held assumptions regarding children and is thus important in dispelling myths or erroneous perceptions that children cannot be competent witnesses.

A. Memory

There has been little research directly related to children's behavior on tasks like courtroom testimony. The most germane study was a recent investigation comparing children's and adults' performance on eyewitness tasks.⁶⁴ In that study, students aged 5 to 22 were placed in a situation in which a confederate of the experimenter interrupted a session to complain angrily about the experimenter's using a room supposedly already scheduled. Subjects were questioned about the incident after a brief interval (10-30 minutes) and after two weeks. Memory was assessed using free recall, objective questions (including one leading question), and photo identification. Older subjects were superior only on the free narrative task. Older subjects also produced much more material on free recall (mean number of descriptive statements: kindergarten and first grade, 1.42; third and fourth grades, 3.75; seventh and eighth grades, 6.50; college students, 8.25). However, the youngest subjects were significantly more likely to recall correctly those items which they did produce (only 3% incorrect). It was suggested that the results supported the use of young children as witnesses in court, particularly given that the use of objective questions in the experiment most closely paralleled the trial situation:

This additional finding [of accuracy on free recall] lends...further support to the conclusion that even young children can be credible eyewitnesses, particularly when combined with the other findings that children are as capable as adults of answering direct objective questions and are no more easily swayed into incorrect answers by leading questions. It appears that children are no more likely than are adults to fabricate incorrect responses, and that when their testimony is elicited through the use of appropriate cues, it is no less credible than that of adults.⁶⁵

These findings are consistent with earlier laboratory studies suggesting that children as young as age four or five perform as well as adults on recognition memory tasks,⁶⁶ but that there are marked developmental trends in free recall ability. The trends appear related to developmental differences in retrieval strategy. That is, young children require direct cues, such as specific, direct questions, to stimulate recall.⁶⁷

In sum, the available data suggests that, given simple, supportive questions, even young children generally have sufficient memory skills to respond to the recall demands of testimony. However, two qualifiers must be added to this conclusion. First, while some studies used lengthy recall intervals⁶⁸, available research has not tested possible developmental differences in recall over periods of months, as is a common demand in the legal system. Second, available studies have not involved recall under stress or in situations of great personal involvement.

B. Cognitive Development

Even if children have sufficient recall ability to testify, such testimony would be of dubious value if the memories were based on erroneous impressions. Consequently, a child's ability to conceptualize complex events and to order them in space and time are of importance. Young children have difficulty in understanding time independent of distance and speed and may have difficulty in describing the chronology of events. For example, a four year old who does not yet perceive time in a logical, sequential order need not be asked about dates and times of abusive events.⁶⁹ Further, a young child may be unable to deal with multiple stimulus characteristics, and relationships may affect the child's ability to recite facts accurately. Consequently, given the realities of the courtroom situation, cognitive developmental factors remain a problem for evaluating children's testimony.

Nonetheless, young children's immaturity of conceptualization may have less import for the reliability of their testimony than appears at first glance. First, the question at hand is whether children's testimony is so unreliable that jurors would be unduly influenced by it. Specifically, in the present context, can jurors accurately perceive what the objective reality was from an account of the subjective reality of the child? If so, the child's cognitive immaturity would be of less significance.

Second, children's lack of ability to comprehend a situation fully may not be so severe as to render them incapable of the level of observation required by the law. For example, understanding of sexuality and reproduction requires an understanding of physical causality and social identity. An accurate concept of the origin of babies is not reached typically until about age 12.⁷⁰ On the other hand, there is evidence that by age four, most children are quite aware of sex differences and willing to speak freely about them.⁷¹ Thus, in cases of sexual abuse, children can be expected to give an accurate description of what happened, provided that questions are direct and in language familiar to the child. As stated previously, children will appear incompetent if the examiner uses technical vocabulary rather than slang or dolls or drawings. Monge, Dusek, and Lawless⁷² found that even ninth graders are often unfamiliar with "proper" terms for sexual anatomy and physiology:

Only 38.4% of the students knew the meaning of the word menstruation; 13.1% knew the definition of scrotum; 14.1% knew what coitus means; 30.3% knew that Fallopian tubes were part of the female reproductive system, and 54.5% knew that seminal vesicles were part of the male reproductive system: the meaning of menopause was known by 27.3% of the students.⁷³

C. Moral Development

If in fact children can relate their experiences adequately, then the principal concern is whether they will do so truthfully. While the courts have been particularly concerned with this problem in assessing competency to testify, the concern here seems misplaced. There is in fact little correlation between age and honesty.⁷⁴ Indeed, police experience with child victims confirms the research experience in other settings. From 1969 to 1974, Michigan police referred to a polygraph examiner 147 children whose veracity about allegations of sexual abuse was questioned. Only one child was judged to be lying.⁷⁵

Where there is a developmental trend, however, is in the reasons which children give to justify behavior. As children grow older, they become increasingly more sociocentric and oriented toward respect for other persons.⁷⁶ Several points are noteworthy in this context.

First, the law is less interested in the witness' attitude toward the truth and conceptualization of the truth than in his behavior. Justice will be served if the witness tells the truth regardless of his reason for doing so. Therefore, such inquiry probably is superfluous.⁷⁷

Second, even if there is some reason to ascertain a child's conceptualization of the duty to tell the truth, the yes/no and definition questions commonly used on voir dire are inadequate measures. One of the philosophical underpinnings of current cognitive-developmental theories of moral development is that a given behavior may be motivated by vastly different levels of moral reasoning.⁷⁸ Similarly, asking a child to tell the meaning of "truth," "oath," or "God" probably tells more about his or her intellectual development than about the child's propensity to tell the truth.⁷⁹

Third, understanding of the oath is likely to be unimportant: indeed, it probably has little effect on adult behavior. Assuming that the oath does not have an effect, it would be on a primitive level of moral development common among young children: reification of rules⁸⁰ and avoidance of punishment.⁸¹

Where immature moral development may be a factor is in suggestibility. Young children tend to perceive rules as "morally absolute," unchangeable, and bestowed by authority.⁸² Therefore, they may confuse the suggestions of an adult authority figure with the truth. This hypothesis will be considered next.

D. Suggestibility

One of the problems which has been noted generally in eyewitness testimony is witnesses' frequent vulnerability to suggestion by opposing attorneys in leading questions.⁸³ That is, even in average adults, suggestibility is a real problem in credibility and competence of witnesses. Given the greater suggestibility which is frequently assumed to occur in children,⁸⁴ children's testimony might be so unreliable that in those instances, courts would not want to take the risk of unreliability which inheres in any testimony. In addition to the cognitive-developmental factors described in the preceding section, it might be expected on the basis of simple learning theory that children's behavior would be shaped by their perceptions of adults' expectations for their testimony (and hence the kind of testimony which will be rewarded or punished), particularly given young children's essentially dependent status.

One of the more reassuring findings of a recent investigation⁸⁵ was that young children were no less affected by a leading question than were adults. This finding, however, needs to be further investigated. There was only one leading question used in this study, and the interviewer probably had less authority in the eyes of a child than would an attorney asking what seem to be threatening, challenging questions in the imposing setting of a courtroom.⁸⁶

What is directly germane to the legal situation is research on adult influence on children. There is not a simple relationship between age and conformity. In research involving first, fourth, seventh, and tenth graders,⁸⁷ adult influence on children's judgments was observed to decrease sharply from first to fourth grade and then to increase

slightly in tenth grade. This result was consistent across several forms of judgments: "visual" (judgment of length of line), "opinion" (e.g., "kittens make good pets"), and "delay of gratification" (e.g., "I would rather have 50¢ today than \$1 tomorrow"). Such a finding is consistent with the moral development and legal socialization literature in terms of young children's inflated perception of the power of authority.⁸⁸ There is the obvious related problem of coaching or threat (real or perceived) of punishment for unfavorable testimony when parents or other adults important to the child are involved in the legal action.

More directly on point, another researcher⁸⁹ found that children who yielded to the suggestions of an adult interviewer tended to score lower on assessments of level of moral judgment than children who resisted such suggestions. Given the prevalence of low-level moral judgment among young children,⁹⁰ there is some confirmation of the cognitive-developmental prediction of high vulnerability to adult influence among young children.

It should also be noted that young children's need for cues to stimulate recollection may exacerbate the problem of suggestibility in testimony.⁹¹ Even if children are no more swayed by leading questions than adults, that they are exposed to more of them means that their testimony may be less credible. In short, while more research is needed, there is some reason to be concerned about the suggestibility of young children (perhaps up to age seven). This might be evaluated on voir dire through the use of leading questions on matters not related to the case.

E. Conclusion

While there are some gaps in the relevant literature, the available research in sum suggests that liberal use of children's testimony is well founded, to the extent that the primary consideration is the child's competency to testify.⁹² Memory appears to be no more of a problem than in adult eyewitnesses when recollection is stimulated with direct questions. Children also are no more prone to lying than adults. Data on suggestibility is less clear, but seems to indicate fewer age differences than might be suspected, a finding which needs to be further investigated. Young children's ability to conceptualize complex events is more problematic, although it is possible that, with skillful examination, jurors can sufficiently evaluate their testimony. That hypothesis is worthy of investigation, particularly given that the task of weighing children's competency is currently strictly within the province of the judge.

The conclusions described here could be made more confidently if they were based on children's functioning outside the laboratory. Only one investigation involved a courtroom-like task; even that investigation involved interrogation under low stress.⁹³ There are obvious ethical problems in inducing such stress. As an alternative, recall, conceptual and other skills might be evaluated in situations of naturally occurring

stress, such as hospitalization. Experimentation might also be attempted in simulations of trials in courtrooms or simulated courtrooms.

Research is also needed on children's perception of the trial setting. No such data are available for young children.⁹⁴ In the present context, such research would help to define the psychological demands of courtroom environments and possible effects on children's competency to testify. Such research might also be useful in preparing children for testimony, both to enhance the quality and probative value of their testimony and to reduce the stress which the legal process may induce in child witnesses.

Child Sexual Abuse and the Law

- Evidentiary Theories for Admitting
a Child's Out-of-Court Statement
of Sexual Abuse at Trial

Chapter 8

EVIDENTIARY THEORIES FOR ADMITTING A CHILD'S OUT-OF-COURT STATEMENT OF SEXUAL ABUSE AT TRIAL

Josephine Bulkley

I. Introduction

This chapter explores evidentiary theories for allowing a child victim's out-of-court statements of sexual abuse to be admitted into evidence at trial. Normally, such statements would be considered inadmissible hearsay. Under traditional rules of evidence, hearsay is any out-of-court statement offered to prove the truth of the statement. The two fundamental objections to hearsay are: (1) no opportunity to cross-examine the declarant whose statement is offered by the witness; (2) the statement was not made under oath.¹ There are, however, basically two principles under which statements involving sex offense complaints may be received into evidence as exceptions to the hearsay rule. The first is called the "complaint of rape" theory, which permits admission of a rape complaint as corroboration (not independent proof of the rape) to rebut a presumption of silence inconsistent with the occurrence of the act. The second exception is called "excited utterances" (within the broader category of res gestae or spontaneous declarations), which include spontaneous statements made while under the influence of a startling occurrence. --

As explained later, the excited utterances exception has been liberally applied in many jurisdictions in cases involving sexual assault of children. Both of these exceptions provide a means of admitting proof of child sexual abuse which may constitute the strongest evidence in the case. As noted in other chapters, in most cases of intra-family child sexual abuse, there is no eyewitness or medical evidence, and much of the evidence may be circumstantial or hearsay. It is therefore critical that evidentiary rules be relaxed or modified to allow a child's statements regarding the abuse to be admitted into evidence. It will be demonstrated later that such statements should often be considered admissible proof because they possess reliable guarantees of trustworthiness and are necessary to reach a proper and just determination.²

II. Complaint of Rape

This theory allows rape complaints to be admitted as evidence to corroborate the victim's testimony in order to negate an inference of silence inconsistent with the victim's story.³ The idea is that if the victim remained silent, it may be assumed that the rape never happened. As one court stated, "[i]t is in anticipation of these inferences that she may rebut the same on direct examination by giving in evidence the fact of her complaint...."⁴ Moreover, under this same principle, if the victim was silent, the silence may be explained away as the result of fear or shame.⁵

In some jurisdictions, the rape complaint theory does not allow the details of the complaint or the identity of the perpetrator into evidence, although exceptions have been made in cases involving children.⁶ This is because only the fact of the complaint is necessary to show there was not silence.

To admit the complaint, it must have been recently or promptly made.⁷ However, there is usually no specific length of time required; a complaint made without unexplained delay normally is admissible.⁸ Prof. Wigmore suggests that a complaint made at any time should be allowed and delay only would affect the weight the statement should be given.⁹

The complaint of rape theory generally has been applied in forcible rape cases, as well as some other sex offense cases.¹⁰ However, in statutory rape or other sex offenses against children where force is not an element of the crime, some jurisdictions have refused to admit either the failure to make complaint or the fact of complaint.¹¹ In forcible rape cases, the issue of whether the victim complains relates to whether she "consented to the act." Some courts have enunciated a rule that because the issue of consent cannot legally arise in a statutory rape case, the child's complaint or failure to complain is immaterial, and thus inadmissible.¹²

Other courts however, have admitted a child's complaint or lack of complaint. In Missouri, for example, the basis for admitting the child's complaint was explained as follows:

[In a rape case, the] evidence [of complaint] is not admitted as independent proof of the crime, but only in corroboration of the prosecutrix by negating consent (emphasis added) And while non-consent is not legally essential in prosecutions for rape of a female under the statutory age of consent...and therefore evidence of such complaints is held immaterial in some jurisdictions, yet in this state the testimony is admitted where there is further evidence that the ravishment was in fact accomplished by force...¹³

The court went on to say that while no physical force was used, the rape was "accomplished under the compulsion of long continued parental duress (emphasis added), which constructively amounted to force."¹⁴

The complaint of rape rule should be applied to all sex offenses against children based upon the theory espoused in the above Missouri decision. However, this may also mean a child's failure to complain could be admitted.¹⁵ Some convincing might argue that this would be an unfair or improper result, since children who have been sexually abused by a parent over a long period of time often do not report the abuse for a variety of reasons, including fear of reprisals, of splitting up the family, and of sending their parent to jail. However, as stated earlier, it can be shown that there were reasons, such as fear or embarrassment, for the failure to complain which should sufficiently explain the child's silence.

Lastly, in most jurisdictions, the fact that questions to a child elicited the complaint generally does not justify the exclusion of the complaint.¹⁶

III. Excited Utterances

Under the excited utterances exception to the hearsay rule, a young child's statement of sexual abuse is also admissible if it meets the requirements of the exception. The requirements for excited utterances are generally stricter than under the complaint of rape rule. In large part, this is due to the fact that the details of the statement are admissible to prove the truth of what was said, while the complaint of rape is admissible only as corroboration of the victim's testimony.

The two essential requirements of an excited utterance are: (1) a sufficiently startling experience suspending reflective thought, and (2) a spontaneous reaction not one resulting from reflection or fabrication.¹⁷ Further, unlike some other hearsay exceptions, the declarant need not be unavailable as a witness in order to admit the statement.

The rationale for the excited utterances exception is that the stress of nervous excitement suspends or stills powers of reflection, and thus the statement represents the "real belief of the speaker as to the facts just observed by him."¹⁸

The requirement of spontaneity is often measured in terms of the time lapse between the startling event and the statement. Under English common law, the statement must have been made contemporaneously with the event.¹⁹ Although some courts adhere to this position, the modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement.²⁰ Thus, courts have allowed widely varying time periods, basing their determinations upon whether the declarant was still under the influence of the startling occurrence.²¹

In some cases, it has been held that an excited utterance may only be admitted if other, independent proof exists that the event occurred.²² The theory is that "a declaration cannot possibly be admitted 'as part of the *res gestae*' of an event of which it is itself the only evidence."²³ However, some suggest the prevailing view is to admit the utterance despite absence of other evidence.²⁴ This issue is highly pertinent in child sexual abuse cases, where little or no other evidence may be available.

Many jurisdictions have specifically relaxed the spontaneity requirement involving excited utterances of children.²⁵ Generally, the child must be of "tender years", that is, usually younger than a teenager.²⁶ Moreover, a majority of these cases relaxing the excited utterances requirements for children's statements involve sexual assault.²⁷ While many jurisdictions allow statements made from one to three hours after the assault, one Michigan court decision permitted a lapse of three months time.²⁸

In allowing a wider length of time, courts have indicated that a young child may not make immediate complaint because of threats, fear of reprisals, admonishments of secrecy, or other pressures not to disclose.²⁹ This is particularly true where the offender has a close relationship with the child. A second reason courts have liberalized the spontaneity requirement is that "children of tender years are generally not adept at reasoned reflection and at concoction of false stories under such circumstances."³⁰

One court enunciated a public policy and necessity rationale for liberal construction of the exception, saying that "because of the weakness or youth of the victims of rape, 'the possibility of miscarriages of justice assumes the character of a public danger, and...avoidance [of the rule] that of a legal necessity.'"³¹ The Wisconsin Supreme Court also justified relaxing the requirement on necessity grounds relating to the special needs and limitations of children. The court stated:

A young child may be unable or unwilling to remember (as here) all the specific details of the assault by the time the case is brought to trial; or be unwilling to testify, or at least inhibited in doing so from a feeling of fear or shame, or as a result of the strangeness of the courtroom surroundings, particularly with a jury and perhaps members of the general public present. The desirability of avoiding the necessity of forcing a young child to testify to such matters at all has been noted particularly when the defendant is (as here) a parent or occupies some other close relationship to the child.³²

Further, where young children are involved, the fact that the statement is made in response to inquiries also has been held not to affect its spontaneity, and thus its admissibility.³³ A number of jurisdictions have also allowed a child's statements into evidence under the excited utterances rule even where the child is not competent to testify because he or she is too young.³⁴ An opinion in Pennsylvania stated that excluding the details of the complaint "cannot but put a premium upon the commission of the offense against those least able to protect themselves at the time and unable to take the stand afterwards to prove by their oaths what was done to them and who did it."³⁵ In one state, a court admitted a child's statement even where she was competent, but refused to testify.³⁶ However, under the old common law rule that statements of one incompetent to testify are inadmissible,³⁷ courts have not admitted statements even though they qualify as excited utterances.

IV. Other Hearsay Exceptions

A child's statements of sexual abuse also may be admissible under other hearsay exceptions briefly noted here.

A. Declarations of Present Bodily Feelings, Symptoms and Conditions

Under this exception, statements made relating to bodily condition, including pain or other feelings, are admissible to prove their truth.³⁸ Such statements must describe a present condition and must be a spontaneous expression of the condition.³⁹ The statements may be made to anyone, although most jurisdictions more often admit statements made to a doctor.⁴⁰ Statements to a doctor are considered more reliable since the declarant is likely to be accurate to insure proper treatment.⁴¹

With respect to statements made to doctors, some courts allow statements concerning the cause of the condition, where the cause is related to diagnosis and treatment.⁴² As one commentator has stated, "[the] more liberal approach should prevail in child abuse cases since the child, although probably too young to know what is actually germane to his treatment, has no reason to fabricate and presumably will give the doctor a full account of the occurrence, simply as part of the story of his injury."⁴⁷

B. Present Sense Impressions

This is an exception gaining some acceptance which allows admission of unexcited statements of events made contemporaneously with observation of the event.⁴⁴ However, the Federal Rules of Evidence not only allow in such statements if made while the event is being perceived but also immediately afterwards.⁴⁵

V. A Residual Hearsay Exception to Allow An Abused Child's Statements Into Evidence

Under the Federal Rules of Evidence, there is a "residual" hearsay exception which would allow certain statements into evidence which do not fit into the established exceptions. The rule states as follows:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, has intention to offer the statement and the particulars of it, including the name and address of the declarant. (Emphasis added)

The reasons offered by the Senate Judiciary Committee for inclusion of this exception were several. First, without such a residual exception, the "specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed)."⁴⁶ Second, the listed exceptions may not cover every situation in which certain hearsay should be heard and considered.⁴⁷ Finally, the Committee indicated that a court may find evidence in exceptional circumstances to have or exceed the guarantees of trustworthiness within the specified exceptions, which if highly probative and necessary, should be admitted.⁴⁸

The Committee further indicated, however, that this exception should be used "rarely" and only in exceptional circumstances;⁴⁹ that it does not give broad license to judges to admit hearsay statements which do not fall into the listed categories;⁵⁰ that it does not authorize "major judicial revisions of the hearsay rule",⁵¹ and that the special circumstances indicating the high degree of trustworthiness and necessity should be stated in the record.⁵²

The 1971 Proposed Rules of Evidence (of the United States Judicial Conference) included a much broader residual exception, which would have allowed statements:

not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.⁵²

The Advisory Committee Notes to the Proposed Rules explained that by treating new and presently unanticipated situations which demonstrate a trustworthiness

within the spirit of the specifically stated exceptions [which include excited utterances and present sense impressions] within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102.⁵³

Rule 102 provides that the rules of evidence "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."⁵⁴

The reasons that the broader residual exception was not adopted were that it "could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules."⁵⁵

The above discussion seems to lead to the conclusion that those made by a child victim of sexual abuse would often meet the criteria of the Federal Rules' residual exception. Based on the previously mentioned reasoning which courts have cited for liberalizing the excited utterances exception, most statements of a sexually abused child possess "equivalent circumstantial guarantees of trustworthiness."

Such statements normally would satisfy the other requirements as well. First, a statement by a sexually abused child would be offered as "evidence of a material fact." Indeed, the statement would be offered to prove the litigated fact itself, namely, whether and by whom the abuse was committed. Second, the child's statement usually will be "more probative" than any other evidence which can reasonably be procured. This is because there often is no other direct or even competent circumstantial evidence in sexual abuse cases. As discussed earlier, courts also have emphasized the necessity for relaxing the excited utterances exception based upon the difficulty for a child to remember and to testify to sexual acts, particularly when perpetrated by a parent or someone close to the child.

Third, the purposes of the evidence rules and the "interests of justice will best be served by admission of the statement into evidence."⁵⁶ It has been demonstrated that a child's statement of sexual abuse may be the "best evidence" for achieving a proper and just determination.⁵⁷

Finally, liberalizing the excited utterances exception leads to a torturing of that exception. This is because statements made long after the abuse in reality lose the spontaneity which primarily justifies the excited utterance exception.

In Wisconsin, a series of cases have dealt with the issue of a child's statements relating to sexual abuse. An early line of cases appeared to carve out a new exception to the hearsay rule, although related to the res gestae rule, where the statement is made by a young child victim of sexual assault.⁵⁸ In a later decision, the Wisconsin Supreme Court also allowed such statements, but under the excited utterance or res gestae exception.⁵⁹ However, Wisconsin recently has adopted a residual hearsay exception for statements with strong circumstantial guarantees of trustworthiness comparable to those of the specific exceptions.⁶⁰ Indeed, the Judicial Council Committee Notes to the Wisconsin Rules suggest that the Bertrang case (involving a statement of a sexually abused child) may reflect an example of a judicially carved out special hearsay exception⁶¹ contemplated within the residual exception.

Perhaps the most liberal position has been adopted in New York's Family Court Act. A provision dealing with child protection proceedings specifically authorizes an admission of "previous neglect."⁶² However, before the court may make a finding of abuse or neglect in addition to the child's statement. This exception obviously does not require other evidence. Of course, this special hearsay exception only applies in family court proceedings, and not in criminal cases in which there is a higher standard of proof and possible criminal sanctions against the perpetrator. Nevertheless, this provision indicates legislative recognition of the need for this type of evidence in child abuse cases.

States should consider adopting residual hearsay exceptions which implicitly or explicitly cover a sexually abused child's statements. Perhaps there should be a separate exception designed just for such statements (as provided in the N.Y. Family Court Act). Either way, certain factors or circumstances should be considered in a court's determination of whether a statement is admissible. This would avoid "emasculating" the hearsay rule, a result leading to the exclusion of the broader residual hearsay exception in the Federal Rules. The Wisconsin Supreme Court listed such factors, which may serve as guidelines for other courts and legislatures. They include:

The age of the child, the nature of the assault, physical [or other] evidence of such assault, relationship of the child to the defendant, contemporaneity and spontaneity of the assertions in relation to the alleged assault, reliability of the assertions themselves, and the reliability of the testifying witness.⁶⁴

VI. Conclusion

There is a clear trend in state law to permit a child victim's out-of-court statements of sexual abuse to be admitted into evidence, primarily either as corroboration of the offense or as evidence within the hearsay exception of excited utterances.

However, in order to prevent "tortured" interpretations of these existing exceptions, a special hearsay exception should be adopted to allow in such statements, as long as guidelines for admissibility are clearly established within which courts can properly exercise their discretion. Only then will the intent of the rules of evidence be carried out, namely, that they be applied "to the end that the truth may be ascertained and proceedings justly determined."⁶⁵

Child Abuse and Neglect Litigation:
A Manual for Judges

- Criminal Prosecution of Abusing Parents

Section VII.

Criminal Prosecution of Abusing Parent

Although prosecution of parents takes place outside the juvenile courts, it can impinge seriously upon cases brought there. These effects, which comprise many of the arguments against prosecuting parents, will be examined. There is a need for correlation between criminal and juvenile courts and between the prosecutor and the child protective agency in cases where prosecution is, or may be, attempted.

A. Arguments For and Against Prosecution

1. Arguments for criminal prosecution include:

The goals of criminal prosecution in general apply to abuse and neglect cases. These goals are rehabilitation of the defendant, deterrence of both the defendant and other potential child abusers, removal of the defendant from society, and retribution. Retribution is exceptionally important in view of the public perception of child abuse as a heinous act.

Criminal sanctions against parents are available to coerce them into accepting services.

Police and district attorney investigations may be helpful in ferreting out all the facts in a particularly serious and complex case of abuse.

2. Reasons against prosecution include:

Criminal prosecutions in abuse and neglect cases are difficult because of evidentiary problems, the standard of proof required (beyond a reasonable doubt), and the prohibition against self-incrimination.

Criminal prosecution may make the parent less cooperative in remedial procedures.

Prosecution is less likely to deter child abuse than other criminal acts.

Criminal courts do not have power to order treatment for family members who are not defendants (particularly the spouse and child). They also often lack the necessary support services to implement effective supervision and treatment.

3. Most professionals in the child abuse and neglect field advise against prosecution except in unusual circumstances.

Prosecution is more likely in cases of sexual abuse, severe injury or death, and abuse by non-parents.

B. Effects of Prosecution on the Juvenile Court

1. Juvenile court proceedings are often suspended when there is criminal prosecution. The resulting delay can be considerable.

2. The possibility of prosecution may affect parents' testimony in the child protective hearing.

Parents may be less candid with the court.

If prosecution is actually threatened, the parents can remain silent under the self-incrimination privilege. Courts, however, can grant "use immunity" to the parents so that their testimony cannot be used against them in a criminal prosecution.

3. Fear of prosecution may lead parents to coerce their children not to testify about the parents' acts.

4. Prosecution and a resulting jail sentence can hinder attempts to improve the child's care and to provide better family life.

C. Steps Towards Coordination of Civil and Criminal Functions

1. Various means to coordinate activities of child protective agencies, police and prosecutors are:

Establishing guidelines for when child abuse and neglect reports should be referred for police investigation and possible prosecution.

Coordinating investigations by the police and child protective agencies.

Coordinating remedial efforts by the prosecutor and child protective agencies in cases where criminal prosecution is or may be initiated.

2. Suggestions for coordination between juvenile and criminal courts are:

Permitting prosecution only upon request of the juvenile court once a petition has been filed. (The juvenile court should request prosecution only if it believes prosecution will not harm the child or hinder remedial actions.)

Appointing a guardian *ad litem* to monitor and represent the child in criminal court actions.

Support Readings

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A. Arguments For and Against Prosecution

Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Projects, Standards Relating to Abuse and Neglect—Tentative Draft* (New York: Ballinger Publishing Co., 1977), 9.1. Reprinted with Permission.

Part IX: Criminal Liability for Parental Conduct

9.1 Limiting criminal prosecutions.

Criminal prosecution for conduct that is the subject of a petition for court jurisdiction filed pursuant to these standards should be authorized only if the court in which such petition has been filed certifies that such prosecution will not unduly harm the interests of the child named in the petition.

COMMENTARY

Under current law, two radically different kinds of sanctions can be invoked against a parent who harms his/her child: the parent can permanently lose custody of the child (or have some other response applied from the armamentarium of child protective laws); or the parent can be jailed (or have some other imposition from the penal laws). In these settings, the child protective and penal systems are both intended to serve two general goals—to protect children from harm by deterring or reforming misconduct, and to express community outrage at parental misconduct.

Child abuse is universally defined and punished as a crime under state laws. See Katz, "Child Neglect Laws in America," 9 *Fam. L. Q.* 1, 3, 4 (1975). Furthermore, the legislatures of four states (Arizona, Maryland, Mississippi, and Nevada) have created a new crime of "child abuse" or "cruelty to children," giving rise to criminal sanctions in addition to those already existing for assault, battery, and homicide. V. DeFrancis and C. Lucht, *Child Abuse Legislation in the 1970's*, 15, chart at 29 (1974). Sanctions for neglect, however, form a far less clear pattern among the several jurisdictions. Penalties for neglect are presently found in the criminal codes of thirteen jurisdictions, while civil penalties are included in the statutes of nineteen jurisdictions. Fines range from \$50 to \$1,000, and prison sentences from thirty days to five years for abandonment or resulting death. In most cases, both imposition of a fine and imprisonment are possible. See Katz, *supra* at 63.

Notwithstanding the almost universal existence of penal provisions supplementing the various dispositions possible under the child protective system, only the

purpose of protecting children from harm is straightforwardly expressed in the statutes. Katz, *supra* at 17-19.

It is difficult to document the general or specific deterrent impact of penal laws against parental misconduct—though perhaps no more difficult to establish than for the deterrent impact of most criminal law sanctions. There are, however, special circumstances that should lead toward greater skepticism of the worth of penal sanctions for child protective purposes. First of all, invocation of imprisonment against a parent clearly works against the child's psychological interest in many ways—by removing the parent's physical presence which, no matter how abusive the parent's conduct, always has some deleterious consequence for the child; by imposing an added burden of guilt on the child beyond the irrationally magnified burden already carried by most (particularly younger) children harmed by their parents; and by fanning the parent's already smoldering anger at the child.

The question posed by an imposition of jail for parental misconduct, in short, is whether that parent should continue to have custody of the harmed child following his/her imprisonment. And if this question is posed in necessary tandem with the question of imprisonment, a further issue is thus raised: why shouldn't continued custody be the sole question raised by parental misconduct toward children? Where the child has died as a result of parental misconduct, the question of continued custody would obviously be moot (though the special problems of surviving siblings will be discussed later). But where the harmed child is alive, the question must be considered whether all of the purposes served by penal sanctions would be satisfied (and more attentively to the long-range interests of the child) by permitting invocation of sanctions drawn from child protective laws.

The failure of existing laws to ask that question harms the best interest of needy children. The current, overlapping regime of child protective and penal laws itself has a particularly exacerbating quality: each system is controlled by different personnel with different perspectives, and each system too readily may be invoked, without attention to the consequences for the other. Students of child abuse, for example, have noted that criminal laws against parents are only rarely invoked by prosecutors and such invocation appears triggered mostly by the extent of the newspaper coverage, and consequent public turmoil, about individual cases. See Terr and Watson, "The Battered Child Rebrutalized: Ten Cases of Medical-Legal Confusion," 124 *Am. J. Psychiatry* 1432 (1969). But though invocation of criminal sanctions is rare, the possibility of that invocation hangs heavy in every case in the minds of parents and of therapeutically oriented per-

sonnel attempting to work with, and build a trusting relationship with, parents in the future interests of their children. The problem of coordination could likely be solved by mandating case-by-case collaboration between prosecutors and child protective personnel. Mandating such collaboration obscures, however, the more fundamental question of the necessity and desirability for dual systems of sanctions for protecting children in any event.

While acknowledging that overlap between the criminal and child protective laws for the same parental conduct could have harmful consequences, the standard nonetheless looks to a case-by-case mediation of this conflict. It is considered important to maintain on the books, and in application to selected cases, criminal sanctions against outrageous abuses of parents against children. Harm to children, resulting from application of criminal sanctions to parents, could be adequately prevented if such sanctions were only possible when the court charged with the child protective function authorized such prosecution.

It can be argued to the contrary, however, that the pressures on the child protective court for invocation of criminal sanctions would be too strong—particularly in cases which fortuitously attract newspaper attention—and that all of the various legitimate purposes of the criminal sanction would be equally accomplished by sanctions available under child protective laws and the child would be better protected thereby. This position can be supported by the following arguments: that deterrence of future parental misconduct (generally or specifically) would be as much accomplished by invoking the possibility of permanent loss of child custody as by jail; that rehabilitative possibilities would be at least equally well served under the regime of child protective laws, and likely better served since persons with special therapeutic skills and sympathies would be more likely attracted to work in a child protective agency aegis; and that community outrage should, it seems, be equally satisfied, and the desires for the last measure of vengefulness through penal sanctions should be tempered by a realization that temporary separation of the child from his/her parent by jailing the parent will redound only to the greater harm of the child. It is true that, where a child dies as a result of parental misconduct and siblings remain living, those siblings will be injured by invocation of imprisonment against their parent (however much they also might need protection against that parent). But unfortunately, children are always harmed by separation from their parents when parents are jailed for harming the interests of other persons. Though principles of mercy might ask it, principles of equal treatment do not demand that surviving siblings have special claim on their murdering parent's company.

One further question must be addressed: that is, the definition of "parent." The social reality, of course, is that the "parenting function" is carried out by persons in widely divergent statuses; paramours may, for example, be more "psychological parents" than the absent biologic parent in a particular family unit. But for purposes of identifying parental misconduct which is properly subject only to child protective laws, it seems right to restrict this

rubric only to "parents" who have a legally recognized right to custody of the child. The basic sanction under the child protective laws is the threat of loss of custody. Accordingly, other forms of adult-child relations must be subject to criminal law forums and sanctions, no matter how much out of step with the psychological reality of parent-child dynamic bonds in the individual case.

Urzi, *Cooperative Approaches to Child Protection, A Community Guide* (Minnesota Department of Public Welfare), 76-78.

Appropriateness of Criminal Prosecution for Child Abuse and Neglect

The use of the criminal courts in child abuse and neglect cases is controversial. Many professionals feel that child abuse and neglect is a psycho-social problem which should be handled by a social services approach. Others argue that an individual who abuses or neglects a child has committed a crime and should be treated as any other criminal, that is, prosecuted.

Some of the typical arguments given for and against criminal prosecution are provided below in the hope that this may more clearly delineate the dimensions of the issue.

Reasons Cited For Criminal Prosecution

Child abuse may constitute a criminal act and should be treated like all other alleged criminal acts.

Criminal prosecution and conviction of child abusers will deter the individual defendant and others from acts of abuse or neglect.

Criminal prosecution and conviction is necessary to bring about meaningful change in the behavior of the abuser, since the criminal court has the power to enforce its order by requiring the abuser to participate in social service programs.

Unless criminal prosecution is the result of police involvement in child abuse cases, the police will not be willing to act in such cases.

Criminal prosecution affords the defendant full due process rights and forces the state to prove abuse or neglect beyond a reasonable doubt. Because of this, the family's right of privacy is better protected than when the intervention into the family occurs through Juvenile Court or a social service agency.

Reasons Cited Against Criminal Prosecution

Child abuse and neglect are psycho-social problems which should be handled by a nonpunitive social service approach designed to preserve the family structure as well as to protect the child.

Child abusers often see themselves as victims, as people who are helpless and isolated from the social mainstream. Prosecution and conviction, especially if it leads to incarceration, may tend to reinforce these feelings and may lead to increased hostility and resentment. These feelings may in turn lead to further abusive acts.

Criminal prosecution and conviction is more likely to break up the family than are other approaches to the problem.

Because successful criminal prosecution of child abuse is very difficult (due to the high standard of proof required and the fact that there are often no witnesses other than the child victim who is too young to testify or too frightened to testify, especially in sexual abuse cases), many prosecutions result in dismissal or acquittal. Some professionals argue that in such instances, even though it may be clear that the child is receiving inadequate care, the exonerated defendant will be unwilling to participate in any social service programs.

In cases which involve both Juvenile and Criminal Court Proceedings it is possible that the decision of one court will undermine that of the other. To avoid this situation, the Juvenile Court may at times have a tendency to adopt a "wait and see" attitude, in which disposition of a child determined to be abused or neglected may be delayed until the criminal court case is concluded.

Criminal prosecution usually singles out one parent when abuse and neglect are family problems needing family treatment.

Criminal prosecution moves slowly extending the period of crisis and making treatment difficult.

Whatever the rationales, where criminal prosecution appears to be an issue, it is important to confront it, discuss it and negotiate an agreement among the concerned disciplines—usually welfare, law enforcement, and the county attorney. At the very least, a formal agreement should clearly delineate the criteria for referring and abuse or neglect case to the local law enforcement agency for criminal investigation and possible prosecution. Two sample agreements are included here as an illustration.

Suggested Criteria for Referring Child Abuse Cases to Law Enforcement for Investigation in St. Louis County (Minn.)

Suggestions for the criteria to be used are as follows:

1. Any sexual abuse matter.
2. Physical abuse which:
 - a. Results in death.
 - b. Results in fractures, concussions, burns, internal injuries, loss of use of organs, limbs or otherwise causes great bodily harm or places the child's life in serious jeopardy.
 - c. Represents a second or subsequent occurrence to the child or within the family or custodial unit.
 - d. Is believed to result from acts other than those of the natural parent (i.e.—boyfriend, girlfriend, foster parent, institutional or treatment center employee, etc.)
 - e. Being none of the above causes the social worker to believe that a more thorough investigation is required.
3. Physical neglect, which substantially endangers the child's life.

The appropriate law enforcement department should be orally contacted by the worker receiving the report of child abuse when the information tends to show that the abuse falls into the above category. The law enforcement department should be requested to maintain contact with the County Attorney's Office—Welfare/Juvenile Division

—even though a criminal prosecutor might later become involved. The worker should also inform the County Attorney's Office—Welfare/Juvenile Division—that a referral has been made to the appropriate law enforcement department.

Child abuse occurring within the city of Duluth would be referred to the Duluth Police Department—Juvenile Division and to the County Attorney's Office located in the Welfare Department. Those cases occurring in the southern half of the county but outside the city would be referred to the Sheriff's Office in Duluth and to the same office of the County Attorney. Those occurring in the northern half of the county but outside the municipalities would be referred to the Sheriff's Office in Virginia or Hibbing, whichever is appropriate and to the County Attorney's Office in Virginia. Matters arising in the various municipalities on the Iron Range would be referred to the local police department and to the County Attorney's Office in Virginia.

Suggestions For Conditions Which Lead to Immediate Referral to Police for Investigation and Intervention in Hennepin County

When any of the below-described conditions exist, an immediate referral will be made to the local Police Department for their investigation and possible action.

1. To obtain immediate removal of the child from the parents' home as a protection from imminent danger. Removal under a Police Hold would be obtained.

2. When Police investigation and intervention (but non-removal) is necessary to protect a child from further abuse.

3. When the family makes itself inaccessible to the social worker and there is not sufficient basis to obtain a hold order—there is no other way to investigate (and we have sufficient reason to fear for the possible danger to the child).

4. When we determine the presence of the Chronic Child Abuse Syndrome, and whenever there is a criminal physical assault and/or a sexual assault.

5. When there appears to be probable physical danger to the social worker in conducting an investigation.

Definitions

1. Chronic Child Abuse Syndrome—A medical, social or psychological condition, primarily of infants and young children, in which there is evidence of repeated injuries to the nervous, skin, skeletal or other biological or psychological systems.

2. Severe Physical Assault—The intentional, non-accidental use of physical force with a resultant extreme consequence upon the child, such as bone fracture, severe, penetrating body burns, violent rupture of large skin area, significant head trauma, etc.

3. Sexual Assault—Sexual attack upon the child which would fall under the definition of the Criminal Sexual Conduct Act of 1975.

5.53 The Role of the County Attorney

The county attorney is the intermediary between the courts (juvenile or criminal), on the one hand, and the

welfare and law enforcement agencies, on the other. This is a critical role in the child protection system.

In essence, it is the county attorney's job to present the child abuse or neglect case to either the juvenile or criminal court. This means that the county attorney will represent:

The *petitioner* (almost always the county welfare agency) if formal neglect or dependency proceedings are to be brought in the Juvenile Court;

The *complainant* (almost always a law enforcement officer) if criminal charges are to be brought against the abuser.

In either case, the county attorney must decide whether the facts alleged are supported by sufficient admissible evidence to cause the court to make a determination that abuse or neglect does, in fact, exist. If, in the judgment of the county attorney, there is not sufficient evidence to prove the allegations, he can decide not to institute a proceeding.

Because of this role, the county attorney must focus on available, detailed, factual information to prove the case. This concern for detail and for specific admissible evidence often creates resentment and misunderstanding between the county attorney, and the welfare agency and/or witnesses called to testify.

This problem is perhaps best addressed in the context of a multidisciplinary approach to child abuse and neglect. To begin with, the county attorney should be readily available to protective service workers and law enforcement officers for legal consultation and advice. In those communities where a child protection team exists, legal consultation and advice would be readily available to *all* involved professionals (health, mental health, education, etc.). In addition, the county attorney should thoroughly understand the court's expectations and be able to tell protective service workers and others specifically what kinds of evidence and documentation are needed. This also means that the county attorney could well provide training to various professionals in the gathering of legally competent evidence and the giving of testimony. Finally, those county attorneys serving on case consultation committees should aid in assessing cases for their legal implications and in determining which cases should be referred to the court and which might more properly be handled outside the court system.

Child Abuse and Neglect Procedure Manual for Hennepin County (1978), p.262.

C. County Attorney Trial Division of the Criminal Division

1. Role and Responsibility in a Child Abuse Case

The Trial Division of the Criminal Division is responsible for issuing criminal complaints if the evidence presented by a police officer shows that a crime has been committed and a particular individual may have committed the crime. The Division by law has authority to issue complaints for crimes that have been designated as gross misdemeanors or felonies.

An incident of child abuse may give rise to a prosecution for Aggravated Assault, Homicide, Criminal Sexual

Conduct, Incest, or Prostitution. If a child abuse or neglect case gives rise to criminal prosecution of the parent, guardian, custodian, or person responsible for the child's health and welfare, a proceeding generally is commenced in the Juvenile Division of District Court, as explained in the discussion of the Court Unit. Since the standard of proof in a criminal prosecution is "beyond a reasonable doubt" which is a more difficult standard of proof than that of Juvenile Court's "clear and convincing" standard, the Juvenile Court proceeding is generally continued until the criminal prosecution is complete. There are a number of reasons for such strategy:

a. Evidence adduced at the criminal proceeding would be admissible in the juvenile proceeding;

b. The District Court can tailor the sentence, whether the defendant pleaded guilty or was convicted at trial, so that the offender will be prompted to face his/her family and personal problems; and

c. The Juvenile Court has jurisdiction only over juveniles, so it must rely on a coordinated effort between the Assistant County Attorney of the Court Unit and the Assistant County Attorney of the Criminal Division to arrive at conditions of probation in the criminal prosecution and goals in the Juvenile Court proceedings that reflect the best interests of the child from both philosophies. Successful completion of treatment as part of probation or goals for behaviors such as chemical dependency, sexual deviancy, or violent personality may result in reuniting and strengthening the family which is part of the public policy of the Reporting of Maltreatment of Minors Act, Minn. Stat. § 626.556, Subd. 1. and the Juvenile Court Act.

Excerpts from *Sexual Abuse of Children-Effective Utilization of the Legal Systems* by Howard A. Davidson.

Use of Civil vs. Traditional Criminal System in Abuse and Neglect Cases

a. *Advantages of Civil System (Juvenile Court Child Protective Proceedings) over the Criminal Process:*

1. It can remove the child from home if necessary.
2. It can order agencies to provide treatment for the child. It is the court most likely to have access to support services necessary to implement effective supervision and treatment. It is also becoming more common for juvenile courts to provide long-term monitoring of the child's status and follow-up on the success of the "treatment plan."
3. A *Guardian Ad Litem* (or attorney) will be appointed for the child.
4. Parents may be more motivated to accept therapy and services (to keep from losing "their" child).
5. These cases can be sustained with a less rigorous (than criminal court) burden of proof (i.e., "preponderance of evidence" rather than "beyond a reasonable doubt").
6. The purpose of this system is generally considered to be progressive—to promote "family harmony" and "protect children". This system may also be the most flexible

and humane (e.g., a judge may be more willing to question the child in chambers and out of the presence of the parents. In a criminal proceeding this might deprive the abuser of his constitutional right to confront his accuser).

7. The juvenile court's ultimate concern is the "best interests of the child". It is treatment, not punitive-oriented. Its focus is to protect the child from further harm.

8. Involvement in this judicial forum may be less traumatic to the child than other systems. (The child may not have to testify and therefore there is less parental pressure on the child "not to testify". Parents often coerce their children against testifying when there is a fear of criminal prosecution.) Also, there are no long, drawn out jury trials in a child protective proceeding.

9. Where criminal processes often lead to the father's incarceration, splitting up the family may prevent truly long-term effective treatment and can lead to the child having "guilt feelings". Conversely, an "acquittal" after an emotional criminal case can be psychologically devastating to the child/accuser and subject him/her to fierce reprisals.

10. Parents are less likely to "contest" this type of case. Parents are also more likely to be candid with the judge (particularly where they are given "use immunity" so that their testimony can not be used against them in a criminal proceeding).

11. The lack of a criminal "conviction" may help keep the family together (i.e., it lessens the chance of a public stigma and loss of job).

b. Advantages of Traditional Criminal Court System:

1. It may be appropriate for the most serious cases of abuse or where the offender's behavior is compulsive, repeated, or "sociopathic".

2. It can assure the offender's prompt removal from the home (i.e., setting of high bail) and long-term removal if necessary (as a condition of probation or through use of incarceration).

3. It can be effective as a rehabilitative tool (a method for assuring that the "defendant" submits to treatment or accepts services).

4. Criminal prosecution is more visible to the community and coincides with a desire for "justice" to be done (in fact, "the people" are represented in such cases by a state's or district attorney).

5. Some experts believe that prosecution is a necessary expiatory factor in the treatment of the offender and his family.

6. Criminal cases are usually brought to a clear-cut end shortly after adjudication, whereas child protective cases may "drag on" for a prolonged period.

B. Effects of Prosecution on the Juvenile Courts

California Juvenile Court Rules, Chapter 5, Non-statutory Procedures, Rule 1342.

Rule 1342. Granting of immunity of witness

(a) [Privilege against self-incrimination] If a person is called as a witness in the juvenile court and it appears to

the court that the testimony or other evidence being sought may tend to incriminate the witness, the court shall advise the witness of his privilege against self-incrimination and of the possible consequences of testifying. The court shall also inform the witness of the right to representation by counsel and, if indigent, of the right to have counsel appointed.

(b) [Authority of judge to grant immunity] If in any juvenile court proceeding a witness refuses to answer a question or to produce evidence based upon a claim of the privilege against self-incrimination, a judge of the juvenile court may grant immunity to the witness under either subdivision (c) or (d), as appropriate, and order the question answered or the evidence produced.

(d) [Request for immunity—§ 300,601 proceedings] In proceedings under section 300 or 601, a request that the judge order a witness to answer a question or produce evidence may be made orally on the record or in writing by either the petitioner or prosecuting attorney, or by both acting jointly. If the request is made by either the petitioner or prosecuting attorney alone, the other shall be given the opportunity to show why immunity is not to be granted and the judge may then grant or deny the request as he deems appropriate. If jointly made, the request shall be granted unless the judge finds that to do so would be clearly contrary to the public interest. The terms of any grant of immunity shall be set forth in the record. After complying with the order and if, but for this rule, the witness would have been privileged to withhold the answer given or the evidence produced, any answer given, evidence produced, or any information derived therefrom shall not be used against the witness in any juvenile court or criminal proceeding.

ADVISORY COMMITTEE COMMENT

The juvenile court law is silent on the subject of granting immunity to witnesses in the context of juvenile court proceedings. Nevertheless, the issue is one which is raised with increasing frequency. In section 602 proceedings, for example, a coparticipant may refuse to testify through fear of prosecution. Similarly, in some section 300 proceedings, a parent called to testify may be subject to prosecution for criminal child abuse or child neglect. This rule recognizes the authority of juvenile court judges to grant immunity and to compel a witness to testify and sets forth the procedures to be followed.

Subdivision (a) provides that if a person is called as a witness in a juvenile court proceeding and it appears to the court that the testimony or other evidence being sought may tend to incriminate the witness, the court is to advise the witness of the privilege against self-incrimination, the possible consequences of testifying, and of the right to representation by counsel while testifying. (See *People v. Seastone* (1969) 3 Cal.App.3d 60, 68; *People v. Barker* (1965) 232 Cal.App.2d 178, 182.)

Subdivision (b) recognizes the inherent power of a trial court judge to grant immunity and to order a witness to answer a question or to produce evidence. A judge has the authority to do this under appropriate circumstances even in the absence of a specific legislative grant of

immunity to a witness. (*People v. Superior Court (Kaufmann)* (1974) 12 Cal.3d 421, 428.)

Subdivision (d) sets forth the procedures for granting immunity in section 300 or 601 proceedings. In these proceedings, the probation officer (or social worker) would be the petitioner and a prosecuting attorney may or may not be participating in the proceedings. (See *Welf. & Inst. Code* §§ 351, 681.) The procedure set forth in subdivision (d) is therefore designed to insure that the prosecuting attorney be given an opportunity to show why immunity should not be granted in an individual case. Furthermore, it should be noted that the scope of immunity which may be granted in these proceedings is more limited than in section 602 proceedings. In the absence of a statutory basis for doing so, a court may only grant immunity from the "use" of the information or its fruits in connection with a juvenile proceeding or criminal prosecution against the witness. *People v. Superior Court (Kaufmann)* (1974) 12 Cal.3d 421, 428; *Byers v. Justice Court* (1969) 71 Cal.2d 1039, 1049 (vacated on other grounds in *California v. Byers* (1971) 402 U.S. 424.

Judge Homer B. Thompson, *California Juvenile Court Deskbook*, 2d ed. (San Francisco: California College of Trial Judges, 1978) 75. Reprinted with Permission.

One reason that appointing counsel is necessary for minors in §300 cases involving physical child abuse, incest, or sexual molestation (especially if criminal action is pending against the parent or stepparent) is that the family will often exert tremendous pressure upon the child to change his statement in order to protect the parent or stepparent from prosecution. Rule 1334(d) provides that if "the case has been petitioned under Section 300(d) and the minor appears at the detention hearing without counsel, the court shall appoint counsel for the minor. Whenever the parent or guardian, or any other person having care or custody of the minor or who resides in the home of the minor, is charged in a pending criminal prosecution based upon unlawful acts committed against the minor, the court may appoint the prosecuting attorney to represent the minor in the interest of the state." Visitation of the child in the shelter, in such cases, should be strictly supervised.

Los Angeles Superior Court, *Guardian ad Litem/Dependency Court Improvement Project, Grant Application* (1978), 24-27.

III. Objective—Coordination between the Dependency Court and the adult criminal departments and supporting agencies

Statement of the problem:

The need to minimize adverse impact on the minors of undue delay in the criminal proceedings and for coordination in program and treatment planning for the affected families.

ILLUSTRATION

Before the court lay a total disaster. The two girls, 16 and 14 years of age, would have been far better off if no intervention had been made on their behalf to protect them from the acts of sexual intercourse and sodomy that their stepfather had foisted upon them since each was the age of 10. The adult criminal proceedings had been delayed for nineteen months through clever maneuvering by the stepfather. Finally, he was convicted and sent to prison. However, as a result of the prolonged and constant pressure to change their testimony by the mother and the stepfather (who had bailed out pending trial) the girls were virtually destroyed. The 16 year old had to be placed in a mental institution and the 14 year old had deliberately become pregnant to be relieved from the intolerable situation.

The California law (Cal. Penal Code Sec. 10488) mandates that all criminal cases in which a victim is a minor must be given priority for trial over all other criminal cases. It mandates further that those cases must go to trial within 30 days from the date of filing the information unless, for good cause shown, the court extends the time. This provision has never been implemented in Los Angeles County. The above case taken from our files is one illustration of the tragic results from that failure. Moreover, delays in completing the adult criminal prosecution affects both the dependency court and DPSS in terms of completing the juvenile court proceedings, providing appropriate services to the victim children and their families, and developing a long-term case plan.

The following are additional problem areas created by the delay:

A. The parent-defendant may be advised by his attorney not to enter any type of plea to the allegations in juvenile court (i.e., admission, denial or no contest) because it might have some damaging effects upon his defense in criminal court.

B. Until the juvenile court makes a dispositional order, no treatment plan for the family can be fully developed. This includes activities related to reuniting the family, long-term placement plans for the child and referrals for adoption planning.

C. No treatment for the parent can be initiated because information provided by the parent to the therapist may also be admitted in criminal court. Lengthy delays in beginning treatment programs may diminish their effectiveness and conditions may worsen instead of improve.

D. Visitation between parents and children must be carefully monitored both for the child's protection as well as to protect the ability of the child to offer needed testimony in court. After the disposition of both the criminal and juvenile court cases, this type of caution is not as vital. This is extremely time consuming for the CSW and difficult for parents, children, and foster parents.

Moreover, there is no coordination today in Los Angeles County between the Dependency Court and the adult criminal court on an individual case level. In addition, the Los Angeles County Probation Department, a

separate administrative branch of the county, services the court with respect to recommendations for sentencing in the adult criminal court. As indicated previously, the DPSS, also a separate administrative branch of the county, services the Dependency Court as to disposition alternatives. There is minimal coordination between these two departments as to a family treatment plan or program where a minor who is supervised by the DPSS has a parent who is under the supervision of the probation department. In exploring the sentencing alternatives to recommend to the adult criminal court, the probation department does not explore with the DPSS their proposed plan for supervision of the minor who is before the court in the Dependency Court for disposition, and vice versa.

Project Impact

This problem must be resolved on two levels. The first level is administratively. Implementation of Penal Code Section 1048 is now being demanded by the Superior Court at the highest administrative level, both through the Inter-Agency Council for Child Abuse and Neglect (ICAN) and elsewhere.

However, once such implementation is achieved, an ongoing program must be maintained to insure that tragedies such as that of the case illustration do not re-occur. This can and should be done only through a viable and consistently maintained guardian ad litem program. It is proposed that such a program be a significant component of this demonstration project.

Guardian ad Litem Program Impact

Guardian ad litem appointed for the purpose of assisting the court in insuring implementation of Penal Code Section 1048 and in coordination of program planning for the children victims and their families should be attorneys who have also completed the same training component in the social sciences required of lay guardian ad litem under this program. (See Part V, *infra*.) They will be appointed from the volunteer panel at the arraignment hearing in the Dependency Court or at any other time when it is called to the court's attention that adult criminal proceedings are pending against the perpetrator of the crime against the minor. Their responsibility will be to alert and keep advised both the adult criminal court and the Dependency Court, by working through prosecuting attorneys and defense counsel in the criminal proceedings and by reporting directly to the court and to DPSS in the dependency proceedings, of the status of each proceeding. They will be responsible also for recommendations to the Dependency Court in matters relating to coordination of the two proceedings and of treatment programs. They must be sensitive in so doing to problems of insuring confidentiality where required by law and of the rights of the defendants in the criminal proceedings to due process of law.

Case Load Estimate

During fiscal year 1976-77, DPSS processed 1,284 new dependency cases involving non-accidental injuries to

children and 364 cases involving sexual molestation, or a total of 1,648 cases. It is estimated that 25% or approximately 412 of these cases involve felony prosecutions. These will be the target cases in which these guardian ad litem will be appointed to insure against undue delay and to assist in coordination of programming.

C. Steps Toward Coordination of Civil and Criminal Functions

National Center on Child Abuse and Neglect, *Model Child Protection Act with Commentary*, Section 16, *The Local Child Protective Service* (1977 draft).

(m) The child protective service shall give telephone notice and immediately forward a copy of reports which involve the death of a child to the appropriate district attorney [or other appropriate law enforcement agency] and medical examiner or coroner. In addition, upon the prior written request of the district attorney or if the local service otherwise deems it appropriate, a copy of any or all reports made pursuant to this Act which allege criminal conduct shall be forwarded immediately by the child protective service to the appropriate district attorney.

COMMENT

Although child abuse and neglect are crimes, the Model Act rejects a criminal law response to most cases. Instead, it adopts a non-criminal, treatment approach to these social problems. Nevertheless, the Act recognizes that non-criminal handling alone may not be sufficient for certain types of cases (particularly homicides and other severe cases). This subsection requires that district attorneys and medical examiners automatically receive immediate notification of cases which involve the death of a child so that they may perform their official duties and so that any other children in the same care may be protected. In addition, the district attorney is empowered to request copies of any other reports so that the suitability of criminal action can be determined and the child protective service is authorized to refer cases to the district attorney depending on the facts of individual cases and the prevailing mores of the community.

(n) If a law enforcement investigation is also contemplated or is in progress, the child protective service shall attempt to coordinate its efforts and concerns with those of the law enforcement agency.

COMMENT

This subsection is meant to ensure that, should a law enforcement investigation be contemplated or be in progress, evidentiary, protective and treatment concerns are coordinated.

Jeffrey E. Froelich, "Family Crisis Intervention," *Juvenile & Family Court Journal* (1978), 3-7.

Author's note: The author is quick to acknowledge the invaluable assistance of the following individuals in pre-

paring this article: Mr. James Stahler (SCAN Coordinator), Ms. Patricia Bradley (Victim/Witness Division director), Dr. Tom Rueth (Eastway Community Mental Health Center), Rita Hoog (Good Samaritan Community Mental Health Center), Ruth Summer and Bob Mullins (South Community Mental Health Center), Gail Johnson (Daymont West Community Mental Health Center, and James Burroughs (Assistant Montgomery County Prosecutor). In fact, it is these same people who have put the program which is described in the article as "proposed" into actual operation in Montgomery County today.

Statistics indicate that one girl out of every four in the United States will be sexually abused in some way before she reaches the age of eighteen;¹ further, that in a full seventy-five percent of the cases, the victim knows her assailant² and in thirty-four percent, the molestation takes place in her own home.³ In fact, about one in twenty women have had an incestuous experience.⁴

These are figures that shock us all, as human beings and as attorneys. The obvious question is, What can be done within the juvenile and family court system to deal with these very real problems?

The Existing System

Information regarding sexual abuse of children comes to the attention of the abuse unit of the Children's Services Board (CSB) or of a law enforcement agency. According to the county plan, CSB and police exchange reports so that CSB investigates and decides upon any action concerning intrafamily child abuse and the police agencies do likewise for extrafamily assaults occurring within their agency's geographic jurisdiction.

Civil Remedy

CSB has two general and not mutually exclusive courses it may pursue—civil and criminal. If the child is in such circumstances or condition that his or her continuance at home or in the care and custody of the parents presents imminent danger to the child, they may apply for an immediate emergency order from Juvenile Court (Juv. R. 13). This order is granted, *ex parte*, upon CSB's petition.

The court then notifies the parents and holds a shelter care hearing generally within twenty-four hours of its previous order (Juv. R. 7). This is technically an adversary hearing with CSB having to prove that there is sufficient evidence of abuse or neglect that they (CSB) should retain custody of the child until all the facts can be ascertained and dependency hearing can be held. The parent(s) may be represented by counsel and may present any evidence they have in opposition to CSB's petition. This is a completely civil proceeding and the formal rules of evidence need not be followed. It is filed in the Juvenile Division of the Common Pleas Court and is captioned, "In the matter of child _____". The court need only find whether a "state" or "status" of abuse or neglect exists since the petition does not accuse any specific persons(s) of any specific act(s).

Dependency hearings (Juv. R. 29) are currently scheduled approximately eight weeks after the shelter care

order. During this time, a guardian ad litem is appointed by the court to represent the unique and separable interests of the child. This appointment is generally made from a group of attorneys who have agreed in advance to take such assignment and are paid a nominal sum by the court. The dependency hearing is also an adversary proceeding with CSB (which has the burden) on one side, parent(s) on the other, and the guardian able to question both sides. At its conclusion, the court issues an order either (1) restoring custody to the parents, (2) granting permanent custody to CSB, or (3) granting temporary custody to CSB subject to periodic review and possible petition of the parent(s).

If CSB determines there is no need for such immediate court action, their role is that of providing protective services to the family to prevent further sexual abuse as well as to provide or monitor those services necessary to insure the child's well being.

Criminal Remedy

If CSB or the police (again, depending on whether the allegations involve intra or extra family sexual abuse) believe the facts appropriate, they may request criminal charges. If the suspected abuser is a juvenile, these charges must begin in juvenile court. In very aggravated cases and depending on age and record, the defendant may later be transferred to adult felony court for trial. Otherwise, the charge is delinquency (O.R.C. § 2151.02) in the trial of which the defendant has basically all the rights of an adult with the notable exception of the right to a speedy and public trial by a jury. If adjudicated a delinquent, the penalties available to the court include probation or incarceration until age twenty-one.

If the suspected abuser is an adult, charges may be initiated in any geographically appropriate municipal court, the adult felony common pleas court, or the juvenile court. If filed in a municipal court, the charge would be a misdemeanor (e.g. assault, O.R.C. § 2903.13) carrying a maximum penalty of six months in the Human Rehabilitation Center or one year probation. A felony (e.g. sexual battery, O.R.C. § 2907.03) could be filed in adult common pleas court or juvenile court (with required transfer to common pleas after preliminary hearing) and carries a penalty of up to ten years in prison or five years probation. A misdemeanor (e.g. child abuse O.R.C. § 2151.41) could also be filed in and handled entirely by juvenile court.

Although civil and criminal remedies may be pursued simultaneously, only one of the criminal forums may be selected. For example, non-forced sexual conduct (e.g. intercourse) between an adult parent and a child at least thirteen years of age is a felony (which may be initially filed in either the adult or juvenile division of common pleas court) and a misdemeanor (which may be filed in a municipal court or juvenile court). On any given set of facts, the choice of what charge and what court is entirely up to the agency seeking the filing.

Because the allegations are against an adult, the defendant is entitled to all statutory and constitutional rights (even if filed in juvenile court; Juv. R.1). If the charge is a misdemeanor, the defendant is immediately

brought before a judge for a plea setting of bail, and appointment of an attorney. There is no preliminary hearing or grand jury and trial must be held within ninety days (thirty if the defendant is in jail).

If charged with a felony, the defendant must be brought before a judge without unnecessary delay for the setting of bond and, if needed, appointment of counsel. He is entitled to preliminary hearing within fifteen days (five if he is incarcerated). If probable cause is found at the preliminary hearing, the defendant's case is presented to the grand jury. This is a non-adversary, secret proceeding at which the defendant is not present. The prosecutor may also take a case directly to the grand jury, bypassing the preliminary hearing, and thus avoiding public exposure and cross examination of the complainant. If the defendant is indicted, he is brought before a common pleas judge for plea, bond, and appointment of counsel.

Generally, trial must be held within 270 days (ninety if incarcerated) of arrest or the initial filing of charges. If the defendant is convicted, he may be continued on bond or incarcerated. Prior to sentencing, the county adult probation department does a presentence investigation (PSI) and reports to the judge. In most instances, this report is confidential (Crim. R. 32.2) to the judge who then, within the discretion allowed by statute, imposes a sentence of incarceration, probation, or a combination.

Proposed System

All potential criminal allegations involving sexual misconduct with a juvenile as either the perpetrator or victim would go only to the assistant Montgomery County Prosecuting Attorney assigned to juvenile court. The prosecutor has four choices: (1) to charge as a felony, (2) to charge as a misdemeanor, (3) to initiate clinical intervention, or (4) not to proceed with any official action.

"Sexual misconduct" is defined as statutorily prohibited "sexual activity" [O.R.C. §2907.01 (C)]. "Intrafamily" is a more amorphous term meant to include, for the purposes of intervention, not only the parents (natural, adoptive, *de facto*) or other persons responsible for the child's conduct, but also any individuals encompassing the family paradigm, legally as well as psychosocially.

If the facts fall into the pre-defined category of "extra-family", the prosecutor will decide whether to charge as a felony (sexual battery) or a misdemeanor (child abuse) solely on the basis of which offense he believes can be proved at trial. If the acts constitute an "intrafamily" offense, the prosecutor decides whether to charge or to initiate clinical intervention. This discretionary intervention is exercised by the prosecutor only after consultation with the police, CSB and, if needed, the mental health (liaison) professional and consideration of aggravation, criminal record, social history, effect of criminal prosecution, and so forth.

In most cases the prosecutor will not request an arrest warrant because any immediate need to alter the family living arrangement will be coordinated with CSB. The prosecutor will call the mental health (liaison) professional in the catchment (geographic) area in which the family resides and set up a diversion conference to be held

at the prosecutor's office. The investigating police officer will personally deliver a written request to all members of the family to appear at the conference. (Appendix B)

Immediately prior to the conference, there is a brief meeting among the prosecutor, the mental health (liaison) professional (or actual therapist if available), and the CSB case-worker. At the beginning of the conference, the prosecutor reads to the suspected abuser and has him sign an agreement explaining the purpose of the conference. (Appendix C) After the agreement is signed, the prosecutor leaves and the mental health liaison and CSB worker meet with the family to assess the status of the family in terms of needs for emergency mental health and community services and to provide such services as indicated. The mental health representative will also advise the family of the option and availability of therapy from professionals not connected with the four community mental health centers. The prosecutor's decision whether to accept this alternative therapy will depend on his evaluation of its legitimacy and responsiveness to the procedures and goals of the family crisis intervention program. Following this assessment for possible crisis situations, an appointment will be made for the family to attend an initial counseling session at the appropriate community mental health center within seventy-two hours.

At the initial counseling session, the family will sign a release of information, giving the community mental health center permission to communicate to the courts, the Suspected Child Abuse & Neglect (SCAN) team, and Children Services Board the fact that the family is in treatment. In addition, the prosecutor and CSB will be given periodic reviews of the progress of the therapy (following the initial counseling session, thirty days after the initial counseling session, ninety days after the initial counseling sessions, and every ninety days thereafter).

As stated in the agreement, the information about the acts in question and any previous activities of a similar nature discovered in family therapy will not be communicated to the prosecutor. However, pursuant to statute (e.g. O.R.C. §2921.22) and agreement with the client, any new acts would be reported to law enforcement authorities. If in the process of therapy, the therapist feels a need to consult with agencies outside the community mental health center, for example Children Services Board or SCAN, additional releases of information will be obtained.

During this initial session, the guidelines for counseling will be spelled out. Much of the discussion will be focused on the clients' expectations and needs. An initial needs assessment of the family will be begun at this time.

Additional counseling sessions will proceed in the context of four main processes: family assessment, treatment planning, counseling, and evaluation. In family assessment, early counseling sessions will focus upon assessment of the family constellation in terms of the personal, situational and environmental factors contributing to its functioning. Assessment will also be made in terms of family interpersonal interaction patterns and the identification of those patterns leading to dysfunctioning in the family.

The success of the treatment will be evaluated in two ways:

1. For court purposes, a statement will be presented to the prosecutor relating to the family's efforts and work in counseling;

2. In terms of the specific family, movement towards goals they have identified in the treatment plan, the counselor, and the entire family will evaluate the progress of therapy at regular intervals.

The purpose of this evaluation is to gain valuable information which will direct the further course of treatment.

The community mental health center has the responsibility of reporting to the prosecutor whether the family is making progress towards achieving the treatment goals. The decision to terminate counseling, either because of success or breakdown, will be shared with the SCAN team prior to any recommendation to the prosecutor.

Problems with Current Approach and Rationale for Change

The current system promotes forum shopping and prevents consistency and objectivity in charging decisions. Moreover, there is no coordination between the civil and criminal courts or the criminal justice and child welfare systems. Adjudicatory distinctions (e.g. preponderance of evidence vs. beyond a reasonable doubt; guilt of specific individual for specific acts vs. determination of existing condition of victim) and, time and intermediary procedure differences (e.g. bail is only to insure defendant's appearance vs. orders to protect victim), among other potential conflicts, work against the best interests of the child and society.

The goals of the criminal justice system are rehabilitation, deterrence (of the defendant and of others), incapacitation and retribution. Acts requiring societal retribution and individuals requiring long-term removal and incapacitation should continue to be dealt with in the traditional manner.

Deterrence of incestual acts is not achieved by resort to the present system. Firstly, the act is either the product of sudden and extreme emotional distress, or, by definition, a thought process not answerable to or controlled by society's mores. Secondly, the percentages of reporting, apprehension, charging, conviction, and sentencing are

so infinitesimal on this type of crime as to make deterrence of others meaningless.

It is axiomatic that both deterrence and rehabilitation work much better if closely associated in time to the acts in question. Certainly rehabilitation of a sexual child abuser cannot be achieved by placing the offender in the workhouse or similar institution. Even if probation (with appropriate social services) is granted, delaying treatment and forcing the entire family through a win-lose procrustean process cannot do anything but aggravate the situation within the family much to the detriment of all the parties and society and manifestly inapposite to the objectives of the criminal justice, mental health, and social service systems.

There are situations which would not be subject to intervention by this program, but concerning which a very strong argument can be made that early intervention is preferable from both a law enforcement and mental health perspective to traditional prosecution. For example, prosecution of a juvenile neighbor who occasionally babysits is contemplated by the present program despite the fact that, with the possible exception of retribution, no goals of either system would be best achieved. Intervention in "extrafamily" incidents involves, by definition, some different considerations which will be addressed after the *family* crisis intervention program.

Summary

Currently, for numerous reasons, very few incest incidents result in a criminal conviction. If there is a conviction, a court will, after a thorough evaluation of the defendant, most often order treatment for the offender and a rearrangement of the family's relationships.

The proposed clinical intervention, by evaluating and treating the situation immediately after the allegation is made (1) achieves more successful treatment (i.e. rehabilitation and deterrence) of the offender, (2) safeguards past and future victims, (3) maintains and possibly improves the family unit, and (4) saves court and prosecutor time to deal with those individuals and offenses where they (the courts) can be truly effective.

In short, the proposed restructuring of the present system of handling an incest allegation has the exact same goals as the present system, but is more likely to achieve them.

Manual on Child Abuse

- Child Abuse in America: A De Facto Legislative System

CHILD ABUSE IN AMERICA: A DE FACTO LEGISLATIVE SYSTEM ¹

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INTRODUCTION.

Probably no other country in the world has spent so much time, effort, and resources in developing a statutory framework to deal with the problems of child abuse, as America. Child Abuse legislation is regarded by many in America as a panacea to the complex problems we face. It is not.

This paper will briefly discuss the history of child abuse legislation in America, its evolution, the present relationship between such legislation and the existing state child abuse systems, and what can be reasonably expected over the next decade.

The successful resolution of a suspected case of child abuse requires the completion of three separate, yet interrelated steps. Identification. Investigation. Intervention. Child abuse legislation, especially the mandatory reporting statute, was developed in the early 1960's to address the problems of identification. Over the next two decades this legislation began to pay increasing attention to investigation and intervention.

Historically, child abuse legislation in America may be characterized as being reactive in nature. Remedial solutions are often viewed as prudent solutions. They are not. Today, this form of legislation could best be described as standing on the threshold. It could continue to fine tune its reactive tenacles or it could begin to address the issues of planning, coordination, allocation of resources, and prevention. In a word it could begin to anticipate solutions, rather than react to problems.

FACTORS IMPACTING CHILD ABUSE LEGISLATION IN AMERICA.

A. THE EXTENT OF THE PROBLEM.

Child abuse was originally defined in 1962 as a non-accidental physical injury.² It was a simple and narrow definition. It reflected the extent of our knowledge at the time. In recent years, however, our knowledge of inflicted trauma has expanded substantially. As our knowledge increased, our definition of child abuse grew.

Today, child abuse is a generic term. It has four separate elements: Non-accidental physical injury. Sexual molestation. Neglect. Mental injury. Utilizing just the first three elements, it is estimated that 665,000 to 1,675,000 children are abused in America each year.³ Nationally, it is estimated that 2,000 to 5,000 children die each year as a direct result of child abuse.⁴

Child abuse legislation in America has had to constantly remain cognizant of the extent of the problem. In the future it will have to pragmatically

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weigh the sheer number of persons affected against the limited resources available and strike a prudent balance.

B. THE STATE CHILD ABUSE SYSTEM.

Constitutionally, the problem of child abuse is the responsibility of each individual state. Each state has developed its own system to accept reports, make an investigation and provide treatment. Although definitions and receiving agencies vary from state to state, procedurally each case is handled in an identical manner. The successful resolution of a suspected case of child abuse requires three steps. One: the child must be identified as a suspected victim of child abuse and reported to the appropriate state agency. Two: An investigation must be completed by the receiving agency to determine if this is truly a case of child abuse. Three: Treatment must be made available to the child and his family.

Although one million children are abused each year in America, only one-third of that number are properly identified and reported. Although every state has identified at least one agency to receive and investigate reports of suspected child abuse, these agencies are currently functioning at or over capacity. If every child who was abused was identified and reported, the system would collapse.

When the state agency has completed its investigation, it must resolve three issues. Is this truly a case of child abuse (diagnosis)? What are the chances for successful treatment (prognosis)? What treatment is available and what treatment can be offered to the family (treatment plan)? The actual implementation of the treatment plan is referred to as intervention. The feasibility of intervention in any case of child abuse rests upon one assumption. The assumption is that treatment services are available. In most communities, however, the assumption is erroneous.

Child abuse legislation in America has had and will have to constantly grapple with the fact that only one-third of the children who are abused are reported, that the mandated agencies are already working at or over capacity, and that treatment in most communities is simply not available.

C. THE FEDERAL GOVERNMENT.

On January 31, 1978, the President of the United States signed into law the Child Abuse Prevention and Treatment Act.⁵ Although this law was not binding on individual states, it did earmark a specific sum of money for state use. However, before any state was eligible to share in these funds, it was required to meet ten conditions.⁶ The ten conditions are:

1. A provision for the reporting of suspected cases of child abuse.
2. A provision for a prompt investigation of each report of suspected child abuse.
3. A demonstration that the state can effectively and efficiently deal with child abuse.
4. A provision of immunity from suit for persons reporting in good faith.
5. A provision to insure the confidentiality of reports of suspected child abuse.
6. A provision for cooperation between diverse agencies dealing with the problem.
7. A provision for a guardian ad litem appointed to represent the child's interest if the case results in a judicial proceeding.
8. A demonstration that state support for child abuse does not drop below the 1973 level.
9. The public dissemination of information about the problems of child abuse, and
10. A provision to insure that parental organizations dealing with child abuse receive preferential treatment.

Today, in America 36 states meet the requirements of Public Law 93-247 and share in Federal Funds.⁷

A QUICK HISTORY OF THE MANDATORY REPORTING STATUTE.

In the early 1960's there was a feeling that professionals, especially physicians, would not voluntarily report suspected cases of child abuse. It was from this anticipated hesitation of reporting that the concept of a mandatory reporting statute was first conceived.

The first model child abuse reporting statute was proposed by the Childrens Bureau of the Department of Health, Education, and Welfare in 1963.⁸ In 1965 two other model laws had been drafted and were offered to the general public.⁹ By 1964, 20 states had adopted a mandatory reporting statute¹⁰ and by 1974 every state, Washington D.C., Puerto Rico, and the Virgin Islands had enacted into law such a statute.¹¹

The first generation of reporting statutes had a rather simple focus. Their purpose was to mandate certain professionals to report suspected cases of child abuse. It was an identification function. At that time, it was believed that if a case of suspected child abuse was identified and funnelled into the existing system, appropriate relief would be provided. It was a naive assumption.

In response, a second generation of reporting statutes and model laws began to emerge.¹² The focus of these new statutes was identification and investigation. It was believed that if needs were clearly identified and if investigatory standards were clearly established existing agencies could provide adequate and appropriate relief. In a few years, that too, proved to be an erroneous assumption.

In response to this second failure, a third generation of model laws¹³ and reporting statutes began to emerge. The focus of these third generation statutes was identification, investigation, and intervention. These statutes began at least tangentially to address the complex issues of intervention. They began to address the needs of limited resources, limited expertise, lack of coordination, the role of the general public and a planning component. It is these issues and these needs that are now in a period of flux in America.

THE MANDATORY REPORTING STATUTE.

Today, every state in America has enacted into law a mandatory child abuse reporting statute. Unfortunately, every state has enacted its own law. As a result, there is little uniformity in the language between states. There are, however, common concepts and a common format. At an absolute minimum, every state defines child abuse, identifies a group of individuals who are mandated to report, identifies at least one state-wide agency to receive the report, and provides immunity from civil and/or criminal liability if the report is made in good faith.

A. DEFINITION

Every state defines child abuse to be a combination of one or more of the following four elements: non-accidental physical injury, neglect, sexual molestation, and mental injury. Today every state includes non-accidental physical injury in their definition. Forty-seven states include the element of neglect, forty-two states include the element of sexual molestation, and thirty-two states include the element of mental injury. While non-accidental physical injury and sexual abuse may be clearly identified and specifically defined, the elements of neglect and mental injury cannot. Neglect and mental injury are much more closely akin to acceptable standards of care and support. However, since America has never developed nor accepted such standards the actual parameters for neglect and mental injury are seriously lacking.¹⁵

B. WHO REPORTS.

The first generation of reporting statutes singled out the physician as the sole mandated reporter. It soon became apparent, however, that this narrow mandate was shortsighted. Experience demonstrated that the physician only had access to the child when the injuries had become severe. A more prudent approach dictated an earlier identification of the abuse. As a result, the base of mandated reporters has been substantially broadened in the last two decades. Today, the focal point is individuals who have constant access to young children and who can identify the inflicted injuries before they become severe.

C. WHEN IS A REPORT MADE?

The actual diagnosis of child abuse can be a complex and difficult task. In effect, it often requires the expertise of different professions. Since mandated reporters often lack this substantive expertise, a definitive diagnosis is not required before reporting. In every state, the obligation to report arises when the mandated individual "has reasonable cause to suspect or believe" that a child has been injured. The actual diagnosis of child abuse is made after an investigation has been completed.

D. TO WHOM AND HOW ARE REPORTS MADE.

Every state in America has identified at least one state-wide agency to receive and investigate suspected cases of child abuse. In almost every state that agency is the Department of Social Services. Almost every state requires that the mandated individual make an immediate oral report and forty-two states require that a written report be made within 48 hours of the oral report. The purpose of the oral report is to permit the receiving agency to take immediate protective action if necessary. The purpose of the written report is to provide a written record of the report and a foundation for the investigation.

E. IMMUNITY.

In an effort to encourage reporting, every state has included an immunity provision in the reporting statute. These provisions simply provide immunity from civil and criminal actions if the original report was made in good faith.

F. PENALTY PROVISION.

A majority of states now provide a specific penalty for the failure to make a required report. Penalty provisions like immunity provisions were originally drafted with the intent of encouraging reports. Immunity provisions were drafted to reassure hesitant reporters that they would not be held liable for good faith reports. Penalty provision, on the other hand, were drafted to insure hesitant reporters that they would be held liable if they failed to report. Today 36 states provide a criminal penalty for a failure to report, and five states provide a vehicle for civil suit for failure to report. 16

BROADENING THE IMPACT AND THE SCOPE: THE INVESTIGATION.

As America's experience with reporting statutes grew, it soon became apparent that a simple identification of abused children was not sufficient. The identification mechanism increased statistics but statistics by themselves had little impact on how a state would respond.

A. INVESTIGATION.

The first generation of reporting statutes simply required that an investigation be made once a report was received. No guidelines were provided for when, what, and how. Predictably, the results were tardy and tenuous at

best. As a result, almost every state has now developed specific guidelines for child abuse investigations. At a minimum, these guidelines require that the investigation be initiated immediately or promptly. They require a determination of the nature, extent, and cause of the reported injury, the name of the person responsible for such injuries, the names and conditions of all other children in the same home, the condition of the home environment, and the relationship between the child and his parents. Language such as this presumes that a thorough investigation can be mandated by statute. It cannot. The availability of trained staff, in adequate numbers with sufficient backup resources are all conditions precedent to a good investigation. In most states they are lacking.

B. PSYCHOLOGICAL/PSYCHIATRIC EVALUATIONS OF THE PARENTS.

Psychiatric/psychological evaluations of the child parents have been used rather routinely for the past ten years. These evaluations have been ordered after a finding of abuse has been made and before a final disposition is completed. Today, however, the reporting statute of seven states specifically permits a psychiatric/psychological evaluation of the parents before any finding of abuse has been made. The language of provisions such as this passively assumes that these examinations can be used to determine culpability as well as the best disposition alternative. In all likelihood such sweeping provisions will be severely challenged by those who see it as a fishing license to further intervene in the family.

C. MEDICAL EXAMINATION OF THE CHILD.

A number of states have now recognized the fact that a diagnosis of child abuse is an arduous task, requiring diverse skills. These same states have recognized that individual social workers are not reservoirs of such skills. As a result, five states now make provision in the reporting statute for a complete medical examination of the child with or without the parents permission. -This medical examination, coupled with the expertise of the social worker should provide for a much more accurate diagnosis.

D. COLOR PHOTOGRAPHS AND X-RAYS.

In order to facilitate the investigation and preserve evidence, eighteen states now make provisions for the taking of color photographs and x-rays with or without the parents approval.

E. STATE-WIDE CENTRAL REGISTRY.¹⁷

It is well documented that child abuse is a pattern of behavior. It continues over a period of time and damage increases proportionately. It is also commonly recognized that many abusive parents doctor shop and hospital shop. They take the child to a different doctor of a different hospital with each injury. As a result the attending physician only develops a one dimensional picture of the child that he or she is examining. If, however, the physician had access to data indicating other injuries over a period of time, he might be able to see this pattern of child abuse begin to emerge. A central registry is a repository of past reports of suspected child abuse.

It is believed that a central registry which is properly conceived and properly structured can serve four functions. One, it can provide statistics. Two, it can provide raw data for research purposes. Three, it can be used as a diagnostic tool. Four, it can be used to measure the effectiveness of an agency dealing with child abuse. These beliefs have proven to be so pervasive that 40 states have now created central registries by statute and another six states have created central registries by administrative fiat.

F. TEMPORARY PROTECTIVE CUSTODY.

In cases of child abuse it is often necessary to assume temporary custody

of a child believed to have been abused. The reasons are three-fold. One: there is often a need to remove the child from his home before further damage can be inflicted. Two: there is often a need to retain a child in a hospital setting because there is a strong possibility that further damage will be inflicted if the child is returned to his home. Three: the child is in need of additional medical care and there is a real possibility that the parents will not return the child.

Consequently, 28 states have enacted provisions within their reporting statute which allow professionals - doctors, hospital administrators, social workers, police officers - to assume temporary protective custody without parental permission and without the consent of the court.

G. THE CHILD PROTECTION TEAM.¹⁸

When the investigation has been completed, the investigatory data must be analyzed and three issues must be resolved. One: has this child been abused (diagnosis)? Two: What are the chances for successful treatment (prognosis)? Three: What treatment ought to be offered (treatment plan)?

These are complex, eclectic issues to resolve. At a minimum they require a basic understanding of medical pathology, psychiatry, social work and legalese. It is unrealistic to expect any one individual to have substantive expertise in all of these fields. In almost every state, however, it is a single social worker who must complete the investigation, analyze the data, and resolve these difficult issues. An obvious solution to the dilemma would seem to be to create a pool of necessary expertise.

These pools of expertise are called multi-disciplinary child protection teams or in short, child protection teams. Ten states in America have created these child protection teams by statute to help resolve the complex issues involved in child abuse.

TINKERING WITH THE MOST COMPLEX COMPONENT: INTERVENTION.

When the investigation has been completed, when the data has been analyzed and when the issues of diagnosis, prognosis, and treatment are resolved, it is necessary to implement the treatment plan. The actual implementation of the treatment plan is referred to as intervention. Intervention in America can take two forms. It can be a voluntary agreement between the parents and the Department of Social Services or it can be involuntary - initiated and monitored through the juvenile court. At this final stage there are two potential problems. One, if it is necessary to utilize the courts to implement the treatment plan the case often proves difficult to establish. Two, in most communities treatment programs and services simply do not exist.

The problems which surround the issues of intervention are by far the most complex to resolve. States, in their efforts to impact intervention have tentatively approached the problem from three different directions.

1. MAKING THE CASE EASIER TO PROVE.

Child abuse is a difficult case to prove. It is difficult because it takes place in the family home behind closed doors, there are no eyewitnesses willing to testify, data which is relevant is difficult to collect, and the burden of proof is high.

Five states have therefore drafted a portion of their statutes in such a way as to make a case of child abuse in the juvenile courts easier to establish. These statutes simply require that evidence of a non-accidental injury to a child be provided. They do not require a showing of who did what to whom. If a non-accidental injury is established with the requisite burden of proof, the burden of going forward then shifts to the parents. It then becomes the parent's responsibility to provide a reasonable explanation for

the injuries in question. If they cannot, the evidence which has been presented is deemed sufficient for a finding of abuse.

2. PROTECTING THE CHILD'S INTEREST: THE GUARDIAN AD LITEM.¹⁹

No one would question the fact that a child's safety and interests not jeopardized in a case of child abuse. Until recently, however, a child suspected of being abused was not provided with any form of representation if the case proceeded into court.

Recognizing the fact that a child's interests were not adequately represented in cases of child abuse, some states in 1971 began to appoint a guardian ad litem to represent those interests. A guardian ad litem is simply a guardian appointed by the court to protect the child's short and long range interests. Although there is no requirement that the guardian ad litem be an attorney, almost every guardian ad litem who is appointed in America is an attorney.

Today, 26 states require the appointment of a guardian ad litem to represent the child's interests in a case of child abuse.

3. GETTING BETTER MILEAGE OUT OF CURRENT RESOURCES.

The single largest problem today in America in the field of child abuse is the lack of treatment services for the abused child and his family. It is a problem destined to become more severe over the next decade. Resources which are scarce now will be stretched to the breaking point. Americans are only now beginning to accept the fact that the state and federal governments can not continually increase their allocations for child abuse.

A few of the more progressive states have therefore begun to grapple with the issue of a large and increasing problem, and in some cases, shrinking resources. These states have attempted to avoid the duplication of scarce resources by making the system more efficient. These states attempt to combine the resources and expertise of different agencies. Sixteen states now require cooperation and coordination between agencies dealing with the problem of child abuse, five states require a comprehensive plan for child abuse activities within the state, and five states have created state-wide counsels to oversee child abuse activities.

Cooperation, coordination and planning, alas, are much easier to draft into legislation than they are to operationalize.

CONCLUSION.

The child abuse system in America may be characterized as a reactive system and a reactive process. The problem was formerly identified in 1962. Two years later the first mandatory reporting statute became law. Eight years later every state in America had enacted a mandatory reporting statute. The purpose of this first generation of reporting statutes was identification. The result can only be classified as being eminently successful. Unfortunately, as the number of identified and reported cases increased, the state's ability to investigate each case decreased. Consequently a second generation of reporting statute emerged which focussed on a state's responsibility to make a thorough and immediate investigation. The identification function, gasping for breath, continued to lunge forward and upward. States, now seeing the breadth of the problem and the staggering numbers involved, attempted to alter their legislation in order to absorb the tide. A third generation of reporting statutes - still reacting to the problem - was born. The birth might better be described as a stillbirth. The effort was dead before it could gasp its first breath.

The problem of child abuse in America might best be described as the following:

"Every year one and a half to two percent of our children are

reported as suspected victims of child abuse. While social agencies are working to help this years two percent, they are still trying to figure out what to do with last years two percent and are pleading with legislators for more money to deal with next years two percent. The problems of abuse and neglect accumulate at the rate of one and a half to two percent more children each year."²⁰

The current child abuse system in America is destined to failure. As the identification process becomes more efficient and more thorough, the system will overload and short. Treatment services which are already functioning at capacity will sink. Slowly at first then rapidly.

America if it is to be successful in dealing with the problems of child abuse must develop a new and different perspective. The perspective is prevention. To do anything less is to worship at the alter of futility.

FOOTNOTES

- ¹ For a much more comprehensive discussion of the aspects discussed here see:

Fraser, A Glance at the Past, A Gaze at the Present and Glimpse at the Future: A Critical Analysis of the Développement of the Child Abuse Reporting Statute. Chicago Kent Law Review, Sept. 1978.
- ² Kempe et al, The Battered Child Syndrome, 181JAMA17, 1962.
- ³ Light, Abused and Neglected Children in America: A Study of Alternative Policies, 43 Harvard Ed Rev. 556 at 557 , 1975.
- ⁴ Kempe, Approach to Preventing Child Abuse, 13 Journal Dis. Child 941 at 945, 1976.
- ⁵ Public Law 93-247 (42 U.S.C. 5101-5106, 1974.
- ⁶ 42 U.S.C. 5103 (b) (1), 1974.
- ⁷ Conversation with the National Center for Child Abuse and Neglect, H.E.W., Washington, D.C., 1978.
- ⁸ U.S. Department of H.E.W., Childrens Bureau: The Abused Child; Principles and Suggested Language for the Reporting of the Physically Abused Child, 1963.
- ⁹ American Medical Association, Physical Abuse of Children, Suggested Legislation (1965). Council of State Governments, Program for Suggested State Legislation, 1965.

- 10 Shepard, *The Abused Child and the Law*, 22 Wash. and Lee, Law Review, 182 at 184, 1965.
- 11 Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 Am. Crim. Law Review 103 at 104, 1974.
- 12 Fraser, *Child Abuse and Neglect: Alternatives for State Legislation*, Education Commission of the States, Report No. 44, 1973 (Denver, Colorado)
- 13 Fraser and Besharov, *Child Abuse and Neglect: Model Legislation for the States*, Education Commission of the States, Report No. 71, 1975.
- 14 Sussman and Cohen, *Reporting Child Abuse*, 1974.
- 15 Wald, *State Intervention on Behalf of Neglected Children*, 27 Stan. Law Review 985, 1975.
- 16 Comment, *Civil Liability for Failing to Report Child Abuse*, Detroit College of Law 135, 1977.
- 17 Fraser, *Toward A Practical Central Registry*, 51 Denver L. Journ. 509, 1974.
- 18 Schmitt, *The Child Protection Team*, 1976.
- 19 Fraser, *Independant Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 Cal. W. L. Rev. 16, 1977.
- 20 Helfer, *Prevention of Serious Breakdowns in Parent Child Interaction*, National Committee for Prevention of Child Abuse, 1978.

Child Protection: The Role of the Courts

- Standard of Proof

PROVING CHILD MALTREATMENT

In any child abuse and/or neglect hearing, reference to the state's statute is absolutely essential. Not only is the statute the source of the definition of child abuse and neglect, but it also provides the guidelines, or criteria, of "how much proof" or "how much information" is necessary to persuade the court that the child is in need of protection.

Although standards of proof and rules of evidence apply to all types of child abuse and neglect hearings, they are most stringently applied in the adjudicatory hearing.

STANDARD OF PROOF*

The burden of proof in any child abuse or neglect hearing is always on the petitioner. The standard of proof varies from jurisdiction to jurisdiction and varies depending on the type of hearing.

In general there are three standards of proof: *beyond a reasonable doubt*, *clear and convincing evidence*, and *preponderance of the evidence*.

Exhibit II on the following page depicts the use of various standards of proof. The highest standard of proof required in United States courts is *beyond a reasonable doubt* which is applied in criminal proceedings and in all juvenile delinquency proceedings that could result in incarceration. The *beyond a reasonable doubt* test requires that the evidence point to one conclusion; it leaves no reasonable doubt about that conclusion.

The standard of proof in child abuse and neglect hearings (normally the adjudicatory hearing) is usually either *clear and convincing evidence* (the intermediate test) or *preponderance of the evidence* (the test normally applied in civil proceedings); in rare cases, however, the *beyond a reasonable doubt* standard may be applied. Some states require the *clear and convincing test* which means "fully convincing or more than the majority of the evidence points to one conclusion." Other states provide that in abuse and neglect hearings the standard of proof is the *preponderance of the evidence*, which means that after all the evidence has been weighed, the outcome will be in favor of the side that has presented the most convincing evidence.

*Based on material developed by B.A. Caulfield, *The Legal Aspects of Protective Services for Abused and Neglected Children*, U.S. Department of Health, Education, and Welfare, 1978.

EXHIBIT II

STANDARDS OF PROOF			
	Type of Hearing		
Standard of Proof	Delinquency Hearing	Child Abuse or Neglect	Adult Criminal
Beyond a Reasonable Doubt	x	x*	x
Clear and Convincing Evidence		x (some states)	
Preponderance of the Evidence		x (some states)	

*Applies in only one state

The best interests of the child normally applies to custody determinations in separation or divorce proceedings. It is not a standard of proof, but rather a criterion for judicial disposition. It is used in the dispositional hearing after there has been a finding of abuse/neglect, as a basis for determining appropriate court orders; it is sometimes applied in the adjudicatory hearing.

Child Protection: The Role of the Courts

- Types of Dispositions

Types of Dispositions*

There are a number of possible dispositions in cases of child abuse and neglect. The various dispositional alternatives and their implications are included in the following discussion. *It is important to remember that dispositional alternatives vary from state to state.*

*Adapted from material written by Sue Schleifer Levy for: *The Abused and Neglected Child: Multidisciplinary Court Practice*. New York: Practicing Law Institute, 1978.

Dismissal

If there is insufficient evidence to make a finding of child abuse or neglect which would justify legal remedies, the case may be dismissed. This may occur at any of the following stages in the legal process: prior to filing a petition, through informal agreement; at the fact-finding hearing, for failure to prove the allegations of the petition; or even after a finding of abuse or neglect has been made, if the situation has been rectified so that the child is no longer in any danger.

Adjournment in Contemplation of Dismissal*

In some jurisdictions, the case may be adjourned prior to the adjudicatory hearing or upon fact-finding. In those states where this alternative is available, the court may defer making a finding of fact, if parties consent to a specified court order. The court then imposes conditions which must be met within a specific time. During this time, the probation department or CPS supervises the family's participation in the treatment program and reports to the court on the family's progress.

If the problems have been remedied according to the court order and within the time set by the court, the case is dismissed. If, on the other hand, there is a failure to observe the order, the court can make a finding of fact without a full fact-finding hearing. There must, however, be a hearing on the failure to conform to the terms of the agreement. If the probation officer's report of failure to comply with the conditions is sustained, the court may proceed to a dispositional hearing as though a full fact-finding hearing had been held.

It is important to remember that the adjournment in contemplation of dismissal is a contractual arrangement which raises the question of the adequacy of the parents' due process rights.

Suspended Judgment

Some states permit suspension of judgment after presentation of evidence in an adjudicatory hearing, either before or after the finding of fact. The court orders conditions which must be met within a specified time, usually six months to one year. During this time, the family is subject to informal supervision by a

*For detailed information regarding this alternative, readers are referred to the New York State Family Court Act.

probation department or CPS, and the terms of the court order are subject to review. Based on its review, the court may decide to extend the time limitations.

If the parents have complied with the conditions in the order, the case is dismissed at the designated time. However, if the parents fail to comply with the order, a hearing is usually held; if noncompliance is proved, the court may revoke the suspension and issue an order based on the evidence presented at the adjudicatory hearing.

Order of Protection

An order of protection permits the child to live with his or her natural parents, with a relative, or with some other person under the protective supervision of an authorized agency such as a probation department or CPS. The supervision focuses on the protection of the child; it ensures that the caretaker abides by the provisions of the order.

The order specifies well-defined terms and conditions which must be observed for a designated time in order for the child to remain in the home. State statutes may provide for extension of that period. Failure to comply with the terms and conditions of the order may result in revocation after a hearing.

Orders of protection may be used alone or in conjunction with any other disposition. Typically, an order of protection would require a parent to:

- refrain from any conduct that is detrimental to the child(ren)
- refrain from any conduct that would make the home an improper place for the child
- give adequate attention to the care of the home
- comply with visitation terms if the child has been removed from the home
- comply with the treatment plan.

The actual order of protection is the base power or authority of the juvenile court; the court has wide discretionary power as to how it is used. If the order is violated, a hearing is held, at

which point the parents may be held in contempt of court and a fine or imprisonment may be imposed. However, the court is more likely to redraft the order or, if warranted, to remove the child(ren) from the parents' custody.

Placement

Placement involves the removal of a child from his or her parents or caretaker. This disposition is usually imposed if all other less drastic alternatives have been exhausted. The court may decide where the child is to be placed, or it may give custody of the child to a public or private agency which in turn will place the child. Possible placements include relatives or friends of the family, foster homes, group homes and institutions.

Appropriate placement orders are time-limited, and specific conditions necessary for the return of the child are outlined. The time limitation may be extended by the court; however, in most states the juvenile court's jurisdiction ends upon the child's eighteenth birthday.

Termination of Parental Rights

In many states, the juvenile court has the authority to sever all legal ties that bind a child and parent, thus freeing the child for adoption. Some states provide for termination of parental rights at the dispositional stage of a child abuse/neglect case. However, most states require that a termination proceeding be a separate cause of action. The criteria for filing a petition and the standard of proof are different from those required by the child abuse and neglect statute. The basis of determination of parental rights ranges from "unfitness of the parent(s)" to "the best interests of the child"; however, the standard of proof required varies from state to state.

The following are some of the grounds specified in state statutes which permit termination of parental rights.

- The child has been abandoned.
- The parent(s) exhibit(s) significant abuse of drugs/alcohol.
- The parent(s) is(are) mentally ill or mentally retarded.
- The child has suffered repeated maltreatment.

- The child has been in foster care for a specific length of time and the parents have failed to work with the placement agency or to plan for the return of the child.

Termination of parental rights may be ordered in some cases where it has been determined that the parents are not and are unlikely ever to be able to adequately care for the child and that the best interests of the child are felt to be served by adoption.

RIGHT TO APPEAL*

Although appeal procedures vary from state to state, generally an appeal may be made from either the adjudicatory or dispositional hearing. Any party has the right to appeal to a higher court for review of the lower court's decision and actions. Where juvenile courts do not keep a record of the proceedings, the first appeal would normally be made to the state trial court; this appeal is *de novo*. A true *de novo* hearing involves a rehearing of the evidence and testimony of witnesses.

The state trial court will keep a record of the proceedings which will be forwarded to the appellate court. Any disputes concerning the admissibility of evidence in the juvenile court hearing are resolved in the trial court.

If the trial court makes a finding of abuse/neglect, the decision may be appealed directly to a state appellate court. This appeal is not generally *de novo*; that is, the appellate court will not rehear evidence or testimony or make a finding of fact. Appellate courts review the record of the proceedings (court transcripts). Then the appeals court has a number of alternatives.

- It may uphold or affirm the juvenile court action.
- It may reverse the juvenile court decision and return the case.
- It can remand the case to the juvenile court for a rehearing. This may occur if there was a violation of due process, an error in procedure or improper acceptance or rejection of evidence.

*Some of this material was adapted from B.A. Caulfield, *The Legal Aspects of Protective Services for Abused and Neglected Children*. U.S. Department of Health, Education and Welfare, 1978.

The appellate court's review of the transcripts can also be appealed to the state's highest court.

PERIODIC REVIEWS

In most states, periodic reviews are an integral part of the juvenile court hearing process. When a child has been declared dependent, the juvenile court retains jurisdiction until the child reaches adulthood or until the dependency status is terminated by the court. Thus, in order to measure the progress of a case and determine the need to modify a previous order, the juvenile court will hold periodic hearings to review the case.