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The Children's Justice Task Force appreciates the efforts of the following persons in compiling this manual:

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The Alabama Children's Justice Task Force

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PREFACE

It is ironic that law schools expend great amounts of time teaching trial advocacy, evidentiary matters, commercial law, etc., and very little on interacting with the people whose problems create a lawyer's very existence. This irony is magnified when lawyers with little or no training in dealing with children save the experiences of life, must interact with children who find themselves thrust into the "system."

Although defense of the rights of the accused is important as is protecting the interest of individuals and corporations, there is no greater legal duty than safeguarding and promoting the best interests of a child whose opportunity for his/her best future may lie in a lawyer's hands.

If you have come to read this manual it is because you have been asked to carry in your hands some child's opportunity to experience, his/her best future possible, and no matter what your knowledge and experience the problems dependent children face today are disheartening, complex, and sometimes unresolvable. Clearly lawyers, who serve to represent children are confronted with situations that often no amount of knowledge or experience can hope to satisfy.

Although no manuscript can instill sudden or great knowledge, and certainly this does neither, this manual has been developed to provide a means of promoting thought and consideration for lawyers who interact with children, specifically lawyers who serve in the role of Guardian ad Litem. The manual touches upon some elementary and some very complex issues which confront Guardians ad Litem. Issues relating to responsibilities, communication with children, child development, families in need, physical, sexual and emotional abuse, advocacy and trial parameters. Much of this manual is a compilation of the very best information, discussions and thoughts from other sources. Please note the authority for which any information is given as personal contact with the provider may enable enhancement of the information given in this manual.

As a first edition, omissions most certainly have been made, and alternative thoughts and perspectives may not have been explored. Since this is the case, with your shared insights, new experiences and changing concepts a second edition will follow.

Please use the manual to generate thought, consideration and action, and as this manual will evolve into future editions, please provide comment, insights and experiences.

Good luck in serving the interests of children.

**MANUAL
FOR
GUARDIANS AD LITEM**

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GUARDIAN AD LITEM

“(N)o single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires.”

President’s Commission on Law Enforcement
and Administration of Justice¹

CHAPTER 1

RIGHT TO COUNSEL IN JUVENILE PROCEEDINGS

Please note that much of the information contained in chapters I through VII are taken from the Juvenile Justice Procedures Manual published by the Administrative Office of Courts (AOC). AOC is currently in the process of revising this manual.

As usual, shepardize each case before you use it.

A. Rights of Juvenile

1. **Delinquency & CHINS Cases**

In delinquency and need of supervision cases, a child has the right to be represented by counsel at all stages of the proceedings, including appeals, and if the child or his parents/custodian/guardian are unable to afford counsel, the court must appoint an attorney for the child. §§12-15-63(a), 15-12-21(b), Code of Alabama 1975, Rule 11B(1) & (2), (D), (E) & (P) and Rule 22, Alabama Rules of Juvenile Procedure ("ARJP")

Counsel **must** be appointed by the court in any proceeding where there is a "reasonable likelihood" that the child may be committed to an institution in which his or her freedom may be curtailed, if counsel has not otherwise been retained. §12-15-63(a), Code of Alabama 1975 and Rule 11(F)(1)(a), ARJP²

"(T)he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child." In Re Gault, 307 U.S. 1, 42, 87 S.Ct. 1428, 1451, 18 L.Ed.2d 527 (1967)

Counsel **may** be appointed by the court in all other proceedings upon request or when the court deems such appointment is in the interest of justice. §12-15-63(a), Code of Alabama 1975 and Rule 11(F)(1)(b), ARJP

2. **Dependency Cases³**

The court is required to appoint counsel for a child in a dependency case where:

- a. The parent and child have conflicting interests; or
- b. The parent is an unmarried minor; or
- c. The parent is under the age of 18 years and is married, widowed, widowed or divorced; or
- d. Required in the interest of justice §12-15- 63(b), Code of Alabama 1975⁴

3. **Involuntary Commitment Proceedings**

a. If there is a reasonable likelihood that the child may be committed to an institution in which the child's freedom may be curtailed, and in which proceeding counsel has not been retained, counsel shall be appointed for the child." Rule 11(F)(1)(a), ARJP; See also §12-15-63(a)

b. In an involuntary commitment proceeding initiated pursuant to §12-15-90, Code of Alabama 1975, the court is required to ascertain the need for and the ability to pay legal counsel to represent a minor or child who is the subject of said proceedings and shall appoint an attorney or guardian ad litem as otherwise provided for juveniles. §12-15-90(d)(2)

4. Paternity Actions - Alabama Uniform Parentage Act

a. Child

A minor child who is made a party in a paternity action and is not otherwise represented by counsel "shall be represented by his general guardian (not mother or father) or a guardian ad litem appointed by the court." §26-17-11, Code of Alabama 1975. See 70 ALR 4th 1033, discussing the appointment of independent guardian for child who is the subject of paternity proceedings.

b. Minor

A minor defendant in a paternity proceeding who is not otherwise represented by counsel shall be appointed a guardian ad litem by the court. §26-17-17(b), Code of Alabama 1975.⁵

5. Abortion Parental Consent Law

A minor (defined as person under the age of 18) who petitions the juvenile court for a waiver of the parental consent requirements of Alabama's Abortion Consent Law has a right to appointment of counsel if she is unable to pay for the services of an attorney. §26-21-4(b), Code of Alabama 1975

The Alabama Supreme Court has held that the attorney appointed in such cases is to be a guardian ad litem. In re Anonymous, 531 So.2d 901 (Ala. 1988).

6. Revocation of Probation, Aftercare, or Protective Supervision

A child has the right to counsel at any proceeding where the child's probation, aftercare or protective supervision may be revoked, causing the child to be institutionalized. §12-15-75(c) read in conjunction with §12-15-63(a) & (b), Code of Alabama 1975; Rules 11 and 22, ARJP⁶

7. Other Juvenile Proceedings

The court may appoint counsel in any case where it deems such appointment is required in the interest of justice. §15-12-21(b), Code of Alabama 1975 and Rule 11(F)(1)(b), ARJP

[See discussion infra regarding appointment of guardians ad litem]

8. Appeals

"Right to counsel at all stages of the proceedings shall include the right to counsel in an appeal." Rule 22, ARJP

If a juvenile who is a party to an appeal is "otherwise by law or rule of court to be represented by appointed counsel," appointment should be made by the trial court. However, the presiding judge of the court to which the appeal is taken is authorized to appoint counsel where appointment has not been made by the trial court or if it becomes necessary to provide counsel. §15-12-22(c), Code of Alabama 1975⁷

B. Right of Parents, Guardian or Custodian

1. **Dependency Cases**

a. Statutory Right

The parents, guardian or custodian of a child who is the subject of a dependency proceeding have the right to be represented by counsel, and if indigent, are entitled to appointed counsel. §12-15-63(b), Turley v. Marshall County Dept. of Pensions & Security, 481 So.2d 406 (Ala.Civ.App. 1985); Smoke v. State Dept. of Pensions & Security, 378 So.2d 1149 (Ala.Civ.App.1979)

b. Constitutional Right

Although indigent parents are granted the right to appointed counsel in dependency cases by statute, appointment of counsel in dependency and temporary custody proceedings is not required under the Due Process Clause of the constitution, Morgan v. Lauderdale County Dept. of Pensions & Security, 494 So. 2d 649 (Ala.Civ.App 1986) and there is no right under the federal or state Constitutions, Alabama statutes or rules which require the trial court to inform an unsuccessful parent in a termination of parental rights proceeding⁸

2. **Paternity Proceedings**

a. Title 15 - Indigent Defense

"In... paternity cases and civil and criminal nonsupport cases, **which may result in the jailing of the defendant,... when a defendant is entitled to counsel as provided by law**, the trial judge shall before arraignment ascertain from the accused, or otherwise:

- 1) Whether or not the defendant has arranged to be represented by counsel;
- 2) Whether or not the defendant desires the assistance of counsel; and
- 3) Whether or not the defendant is able financially or otherwise to obtain the assistance of counsel." §15-12-20, Code of Alabama 1975

b. Alabama Uniform Parentage Act

"(a) In all proceedings under this chapter (Alabama Uniform Parentage Act), any party may be represented by counsel...

"(c) It is the express intent of this chapter that parties to proceedings... should pay the fees and expenses of retained counsel, expert witnesses, guardians ad litem, the costs of appropriate tests and other costs of the trial as they may, themselves, incur. The court may order reasonable fees for attorneys,... guardian ad litem fees, to be paid by the parties in such proportions as the court may direct. In the event the court determines that a party is unable to pay the fees and costs as directed, it may order

fees and costs ... to be paid from the fund entitled, "court costs not otherwise provided for"... Provided, ... fees of retained counsel shall not be paid from said fund...

"(d) Nothing contained in this chapter shall be construed so as to guarantee court-appointed counsel at the state's expense to any party who is not otherwise entitled to court-appointed counsel under statutory or case law." §6-17-17, Code of Alabama 1975

Lassiter, Supra, dealt with the right to counsel issue in the context of termination of parental rights proceedings and held that the Constitution does not require appointment of counsel in every parental termination proceeding, but that **such determination must be made on a case-by-case basis by the trial court**. Lassiter v. Department of Social Services of Durham, N.C., 452 US 18, 26-27, 101S.Ct. 2153, 2159, 68L.Ed.2d 640 (1981)

As guidance in implementing this case-by-case analysis, the Supreme Court opined that in any case where there is no immediate potential for incarceration, trial courts should utilize the factors set out in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) and weigh them against the strong presumption against appointment of counsel to determine whether due process requires counsel to be provided at the state's expense. These factors are:

1. "(T)he private interest that will be affected by the official action;"
2. "(T)he risk of an erroneous deprivation of such interest through the procedures used, and the Probable value, if any, of additional or substitute procedural safeguards;" and
3. "(T)he Government's interest, including the function solved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id., 424 U.S. at 320, 96 A.Xr. R 896 (1975)

Utilizing the factors in Mathews v. Eldridge, supra, the United States Supreme Court held that appointment of counsel was not required in parental termination proceedings brought under North Carolina laws.

Applying this same balancing test in Little v. Streater, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981), the Supreme Court held that the Connecticut statute in question, as applied, which denied indigent putative fathers in paternity proceedings a blood grouping test at state expense was violative of the Fourteenth Amendment Due Process Clause. Little, supra, did not hold that an indigent putative father is constitutionally entitled to court appointed counsel at state expense or that, in all instances, they are entitled to free blood tests.

Because paternity cases are no longer criminal or even quasi-criminal in nature since the effective date of the Uniform Parentage Act (May 7, 1984), it would appear that caselaw regarding the right to counsel in criminal proceedings would not be applicable to putative fathers named in paternity suits.⁹

3. Contempt Proceedings¹⁰

Rule 70A (a)(2) (C), Alabama Rules of Civil Procedures, defines "criminal contempt" arising out of civil actions as:

- "(i) Misconduct of any person that obstructs the administration of justice and that is committed either in the court's presence or so near thereto as to interrupt, disturb, or hinder its proceedings
- "(ii) Willful disobedience or resistance of any person to a court's lawful writ, subpoena, process, order, rule, or command, where the dominant purpose of the finding of contempt is to punish the contemnor."

Rule 33.1(b)(3), Alabama Rules of Criminal Procedure, uses the same definition, but only applies to those contempt actions arising out of criminal cases.

a. Criminal Contempt

Due process guarantees, which include the assistance of counsel, apply to criminal contempt proceedings in all but a narrow category of cases. State Ex Rel Payne v Empire Life Ins. Co. of America, 351 So. 2d 538 (Ala. 1977), cert. denied, Ex parte Moody, 435 U.S. 969, 98 S.Ct. 1607, 56 L. Ed.2d 60. (See definitions in Rule 70(A)(c)(3), Alabama Rules of Civil Procedure).

The limited exception for which a contemnor is not entitled to due process guarantees is where the alleged contempt of court is of direct criminal form, Graham v. State, 427 So.2d 998 (Ala.Crim.App. 1983) and "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority... before the public.'" In Re Oliver, 333 U.S. 257, 68 S.Ct. 499 (1948)

Applying the general rule applicable to criminal misdemeanor offenses, appointment of counsel is required if actual imprisonment is imposed as punishment. Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1978); Lake v City of Birmingham, 390 So.2d 36 (Ala.Crim.App.1980); Westmoreland v. City of Hartsell, 500 So.2d 1327 (Ala.Crim.App. 1986)

In actions involving criminal contempt arising out of civil cases, Rule 70A(c)(3), ARCP, states that upon request and proof in indigence, counsel shall be appointed to represent the alleged contemnor. Also in the case Parcus v. Parcus, 615 So. 2d 75 (Ala Civ. Appeal, 1992), the appellate courts have recognized that, upon request, an accused in a contempt proceeding is entitled to assistance of counsel.

b. Civil Contempt

Rule 70A(a)(2)(D), ARCP, defines "civil contempt" arising out of civil actions as: "Willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with."

Rule 33.1(b)(4), ARCP, uses this same definition, but only applies to those contempt actions arising out of criminal cases.

In United States v. McAnlis, 721 F.2d 334 (11th Cir. 1983), the United States Court of Appeals for the Eleventh Circuit recognized that the right to counsel exists in a civil contempt proceeding "if the litigant may lose his physical liberty if he loses the litigation." Id at 337.

The United States Supreme Court, the Eleventh circuit court of Appeals, and Alabama appellate courts have failed to specifically address whether appointment of counsel is required for indigent defendants facing civil contempt for nonsupport. However, since an indigent defendant who has no present ability to pay may not be held in contempt for willful nonpayment and would not be facing the possibility of incarceration, Mims v. Mims, 472 So.2d 1063 (Ala.Civ.App. 1985), it can be argued that he has no right to appointed counsel in a civil contempt proceeding for nonsupport. Andrews v. Walton, 428 So.2d 663 (Fla. 1983); See also Knight v Sager, 370 So.2d 311 (Ala.Civ.App. 1979), partially adopting the same view. However, the trial court cannot incarcerate an individual for nonpayment without first making a finding that he is financially able to comply. Bowen v. Bowen, 471 So.2d 1274 (Fla. 1985). But see Ridgeway v. Baker, 720 F.2d 1409 (5th Cir. 1983).

4. Criminal Nonsupport

In criminal nonsupport proceedings instituted pursuant to §13A-13-4, Code of Alabama 1975, an indigent defendant has the right to appointed counsel if a sentence of incarceration is actually going to be imposed. Since such offense is classified as a Class A misdemeanor, the general rule regarding appointment of counsel in criminal proceedings is applicable. Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1978); Westmoreland v. City of Hartsell, 500 So.2d 1327 (Ala.Crim.App. 1986)

5. Other Proceedings

In proceedings in which a juvenile is a party, when it appears to the trial court that the juvenile's parent(s)/guardian(s)/custodian(s) are entitled to counsel and are unable to afford counsel, "upon request, the court shall appoint counsel to represent and assist such parents, guardian or custodian..." §15- 12-21(c)

The procedures applicable to criminal trials are also applicable to minors and adults in any proceeding arising under §12-15-31(1). Code of Alabama 1975¹¹

6. Cases Involving Abused or Neglected Children

Code of Alabama 1975, Section 26-14-11 provides that an attorney shall be appointed to represent the child... Such attorney will represent the rights, interests, welfare and well-being of the child, and service as guardian ad litem for said child.

CHAPTER II

Appointment of Guardian Ad Litem

A. Definition

“Guardian Ad Litem” is defined as “[a] licensed lawyer appointed by a court to defend or represent a child in any action to which such child may be a party.” §12-15-1(12), Code of Alabama 1975

Black’s Law Dictionary, 5th Edition, defines a “guardian ad litem” as “a special guardian appointed by the court to prosecute or defend, in behalf of an infant or incompetent, a suit to which he is a party, and such guardian is considered an officer of the court to represent the interests of the infant or incompetent in the litigation.” [cited in Burkett v. State, 439 So.2d 737 (Ala.Crim.App. 1983).]

Although definitions vary, a “guardian ad litem” is generally considered to be an officer of the court appointed to protect the interests of an unrepresented infant and is an impartial person and not an advocate for other parties whose interests may conflict with those of the infant.

The primary duties of a guardian ad litem are to ascertain and protect the equitable and legal rights of an infant in a particular suit and to bring these rights to the court’s attention. These duties exist only during the particular proceeding and may be terminated at the discretion of the court appointing him.

A guardian ad litem’s powers are limited, inasmuch as he has no powers either prior to the institution of the proceedings he is appointed in or after termination and he does not have charge of or take possession of the infant’s person or property. 18A Words and Phrases, Guardian Ad Litem, p. 704.

B. Appointment of Guardians Ad Litem for Children/Minors¹²

1. **When Appointment Authorized or Required**

a. Generally, the court is authorized to appoint a guardian ad litem to represent a child’s interest at any stage of a juvenile court proceeding in which the child is a party if:

- 1) The child has no parent or guardian or custodian appearing on his behalf; or
 - 2) The child’s interests and those of his parent, guardian or custodian conflict.
- §12-15-8(a), Code of Alabama 1975.

b. **Involuntary Commitment Proceedings:**

In a proceeding to involuntarily commit a child or minor to the Department of Mental Health and Mental Retardation. After ascertaining the need for and lack of ability to pay for an attorney, the court must appoint either an attorney or a guardian ad litem to represent the child or minor. §12-15-90(d)(2), Code of Alabama 1975

c. Interstate Compact on Runaway Juveniles:

Pursuant to the Interstate Compact on Runaway juveniles. Where a juvenile has run away and is subsequently taken into custody and detained, he must be taken forthwith before a judge of a court in the state where the juvenile is found, at which time, counsel or a guardian ad litem may be appointed. ("Juvenile" is defined under the compact provisions as "any person who is a minor under the law of the state of residence of the parent, guardian, person or agency entitled to the legal custody of such minor." §44-2-7, Articles IV and V, Code of Alabama 1975).

d. Paternity Proceedings¹³

1) If a **child** is a party to a paternity action and is not represented by counsel or by his general guardian, the court must appoint a guardian ad litem to protect his interests. §26-17-11, Code of Alabama 1975¹⁴

The appointment of a guardian ad litem for a child in a paternity action is statutorily mandated only where the child has been made a party to the action. Thomas v. Callen, 521 So.2d 1322 (Ala.Civ.App. 1987)

2) The court is required to appoint a guardian to represent a defendant who is a minor and who is not otherwise represented by counsel in a paternity proceeding. §26-17-17 (b), Code of Alabama 1975

e. Waiver of Parental Consent for Abortion

A minor (defined as any person under the age of 18) who petitions a Juvenile Court for a waiver of parental consent required before an abortion may be performed is entitled to be represented by counsel, and if she is unable to pay for the services of an attorney the court must appoint an attorney for her §26- 21-4(b), Code of Alabama 1975

In Ex parte Anonymous, 531 So.2d 901 (Ala. 1988), the Alabama Supreme Court noted that an attorney appointed to represent a minor under the Parental Consent Abortion statute is a guardian ad litem, and such appointment should be so designated and should entail the responsibility attendant to such appointments.

f. Cases Involving Abused or Neglected Child

In any case involving an abused or neglected child that results in a judicial proceeding, §26-14-11 appears to require appointment of an attorney who shall serve as a guardian ad litem, representing the child's rights, interests, welfare and well-being. §§26-14-11, 12-15-63(b) Code of Alabama 1975. However, in Burkett v. State, 439 So.2d 737 (Ala.Crim.App. 1983), the Court of Criminal Appeals noted that, although this statute appears to have carte blanche application to all judicial proceedings involving an abused child, it was "directed primarily at protecting the interests of the child in a civil proceeding instituted against the child or in those proceedings attendant to a criminal prosecution for child abuse where the interests of the child conflict with those of the original guardian and/or cannot be adequately represented or protected by the state." Id at 745. The Court specifically cited Rules 10,11(A), (G) and 22, ARJP, as providing representation for a juvenile in juvenile proceedings.

g. Other Proceedings

1) Divorce Actions

Children of parties to a divorce action are not parties themselves, and no guardian ad litem is required. Cochran v. Cochran, 269 So.2d 884, reversed in part on other grounds, 269 So.2d 897, on remand 269 So.2d 905 (Ala.Civ.App. 1970)

2) Termination of Parental Rights

In Kennedy v. State Dept. of Pensions and Security, 166 So.2d 736 (Ala. 1964), the Alabama Supreme Court held that it was not necessary to appoint guardian ad litem to represent the interest of children in a termination of parental rights case where the father, a party to the proceedings, was represented by counsel.

3) Appeal of Termination of Parental Rights

Even where juvenile court had appointed a guardian ad litem to represent the children in a termination of parental rights proceeding, the circuit court did not err in failing to appoint a guardian ad litem for the children on father's appeal to circuit court. Power v. Snoddy, 111 So. 2d 14 (Ala. 1959); In Re Grayson, 419 So.2d 234 (Ala.Civ.App. 1982)

2. Responsibilities of Guardian Ad Litem

Unlike some jurisdictions, Alabama currently has no statute or rule which outlines the duties of a guardian ad litem or distinguishes between the roles of legal counsel and guardian ad litem. Although the distinction may be a subtle one inasmuch as both are advocates for the child's rights, attorneys who are appointed are said to represent the child by voicing only the child's wishes, while guardian ad litem advocate what is in the child's best interests, which may or may not coincide with the child's desires. This distinction has been succinctly summarized as follows:

"By definition,, the roles of legal counsel and guardian ad litem are different. The former is ethically obligated to represent his or her client's best interests.¹⁵

Borrowing from North Carolina's statutes, the primary responsibilities of a guardian ad litem appointed to represent a juvenile are:

- 1) "To conduct" an investigation, determine the facts, the needs of the juveniles, and the available resources within the family and community to meet those needs";
- 2) "To facilitate, when appropriate, the settlement of disputed issues";
- 3) "To explore options with the judge at the dispositional hearing"; and
- 4) "To protect and promote the best interest of the juvenile until formally relieved of the responsibility by the judge." NGS 7A-586 (1986)¹⁶

An attorney representing a juvenile as legal counsel and guardian ad litem must assume additional responsibilities, and may encounter conflicting duties in attempting to perform both roles. The duties of counsel are outlined generally by the Rules of Professional Conduct, but his/her primary responsibilities as counsel in juvenile court have been summarized to include:

- 1) Ascertaining the child's wishes and effectively advocating the child's views;
- 2) Possessing a thorough knowledge of juvenile laws and procedures and applicable criminal laws;
- 3) Possessing knowledge of the substantive rights, procedural safeguards and treatment alternatives for children.
- 4) Explaining the procedures and potential outcomes of juvenile proceedings and advise the child as to legal alternatives and consequences;
- 5) Analyzing issues and evidence objectively;
- 6) Investigating and gathering evidence and researching available community services;
- 7) Ensuring that courts and agencies stay within the limits of statutory and constitutional law.¹⁷

3. Persons Prohibited from Serving

The court may not appoint a party to the proceeding, or a party's employee or representative to serve as a guardian ad litem. §12-15-8(a), Code of Alabama 1975

In cases filed under Alabama's Uniform Parentage Act, the court may not appoint the child's mother or father to represent the child as guardian ad litem, but may appoint the public authority chargeable by law with the support of the child.

§26-17-11, Code of Alabama 1975

Section 12-15-8, Code of Alabama 1975 also provides for who may and may not be appointed in juvenile proceedings.

4. Number of Guardians Ad Litem

In Clement v. Merchants National Bank of Mobile, 493 So.2d 135 (Ala. 1986), where four guardians ad litem were appointed pursuant to Rule 17(d), ARCP, the Alabama Supreme Court held that a person is entitled to only one guardian ad litem unless special expertise or other unusual circumstances are shown.

CHAPTER III NOTICE

By statute or rule, a child and/or his parents must be informed of their right to counsel at the following stages of the juvenile justice process:

1. Notice to Child - when a child is taken into custody and before the child is questioned, Rule 11(B)(1), ARJP
2. Notice to Child - when child is detained, by the person in charge of the intake office or detention facility, Rule 11(D), ARJP

Notice to Parents - The person in charge of the intake office must attempt to notify the parents or guardian of a child who is detained, informing them of the child's rights and their right to be represented by counsel throughout the proceedings. Rule 11(D)(1), ARJP; §§12-15-60(c); 12-15-63; 12-15-65(c), Code of Alabama 1975

3. Notice to Parents - The intake office or person in charge of the detention facility is charged with the responsibility of notifying the child's parents or guardian, in the most expeditious manner, of the child's detention and must inform them of the child's and their rights, including the right to counsel. Rule 11(D)(1), ARJP
4. A written statement advising the parents, guardian or custodian of the child's and their right to counsel must be provided at their first meeting with the intake officer. If they do not appear within 24 hours or fail to attend the detention or shelter care hearing, the notice may be mailed to them. Rule 11(D)(2), ARJP
5. Notice to Parties - At the commencement of the detention, shelter or other care hearing (72 hour hearing). §12-15-60(c), Code of Alabama 1975
6. Notice to Child and Parents - where applicable, at informal adjustment. Rule 15(A), ARJP
7. Notice to Child and Parents - Where applicable, before entering consent decree. Rule 16(A), ARJP
8. Notice to Child and Parties - When a petition is filed. Rule 11(E), ARJP
9. Notice to Parties -
 - (a) During the adjudicatory hearing. Rule 24, ARJP, §12-15-65(c), Code of Alabama 1975;
 - (b) Notice to Petitioner - Prior to waiver of abortion consent hearing. §26-21-4(b), Code of Alabama 1975
 - (c) Notice to Parent - Orally and in writing of child's rights at initial hearing where petition has been filed to commit a child or minor to the Department of Mental Health and Mental Retardation. §12-15-90(d)(1), Code of Alabama 1975

CHAPTER IV
ATTORNEY FEES¹⁸

A. Computation

If approved by the Comptroller, attorney fees shall be paid by the state treasurer based on the amount of hours the attorney actually worked on the case, computed at the rate of \$40.00 per hour in-court time and \$20.00 per hour expended out of court. The total fees allowed per case may not exceed \$1,000 plus expenses reasonably incurred and approved by the trial court in advance. This same rate applies to cases appealed to the circuit court from a juvenile proceeding. §15-12-21(d), Code of Alabama 1975

Counsel appointed to represent a juvenile who has been certified as an adult for the trial of a capital offense or an offense which carries a possible sentence of life without parole, shall be limited to a \$1,000 maximum fee for out-of-court work at the rate of \$20.00 per hour, plus payment for all in-court work at a rate of \$40.00 per hour. However, an attorney representing a juvenile who has been certified as an adult for the trial of a capital offense may claim up to \$1,000 maximum fee for the sentencing phase of the case.

B. Payment

In all cases where counsel is appointed and where approved by the Comptroller, costs shall be paid from the Fair Trial Tax Fund. §§12-19-252 et seq., Code of Alabama 1975

Although certain fees and costs incurred under Alabama's Uniform Parentage Act are authorized to be paid from the fund entitled, "court costs not otherwise provided for," the costs of appointed counsel for a minor defendant or part are paid from the Fair Trial Tax Fund. §26-17-17(d), Code of Alabama 1975

C. Recoupment

1. From Non-Indigent Parents

The parents or other persons legally responsible for the care and support of a child who has been provided appointed counsel may be ordered by the court to pay the attorney fees if, after due notice and hearing, the court finds they are financially able to bear these costs. Willful failure to obey the court's order may be treated as contempt of court or a civil judgment may be entered against the non-complying parents. §§12-15-9; 12-15-11, 12-15-12, 12-15-71(c)(5), Code of Alabama 1975

2. From Child

If the child who has been appointed counsel in a juvenile proceeding has a separate estate "in the hands of a guardian or trustee, such guardian or trustee may be required" to make reimbursement for fee and expenses incurred in providing representation by counsel. §§12-15-11, 15-12-25, Code of Alabama 1975

If a child is not indigent, payment of attorney fees and other costs associated with the proceeding may be made a condition of probation, for which revocation may result for willful nonpayment. §12-15-75, Code of Alabama 1975

3. Person to Whom Recouped Fees Paid

Payment for the reimbursement of attorney fees shall be made to the court clerk who shall make remittance to those to whom compensation is due. §12-15-11, Code of Alabama 1975

CHAPTER V

APPEARANCE OF COUNSEL

Counsel must enter his appearance in all court proceedings:

1. With the court clerk; or
2. By appearing personally before the court in a court hearing and advising the court that he is a party.

Once counsel has entered an appearance or accepted an appointment, he cannot withdraw from the case without the court's consent. Rule 14, ARJP

CHAPTER VI

DISCLOSURE OF NOTICES/RECORDS

A. Notices

An attorney who has accepted an appointment or entered an appearance "shall receive copies of all notices required by statute or rule to be given to parties, and, in such cases, notices need not be given to the parties" unless ordered by the court. Rule 14, ARJP

B. Court Records and Law Enforcement Records

Files and records of the court, including social, medical, psychiatric and law enforcement records and law enforcement records and files shall be made available to the child's parents (except when parental rights have been terminated) or the child's guardian and the child's counsel and guardian ad litem. §§12-15-100(a)(6), 12-15-101(b)(7), Rule 25(F), ARJP

CHAPTER VII

UNIFORM GUIDELINES FOR ATTORNEY FEE DECLARATIONS

Recommended by the Indigent Defense Committee
of the Alabama State Bar

PREFACE

The following guidelines were promulgated by the Indigent Defense Committee of the Alabama State Bar, and adopted by the Board of Bar Commissioners of the Alabama State Bar, to assist and guide lawyers throughout the state with respect to billing procedures in cases in which they are appointed by the court to represent persons accused of crimes who have also been determined to be indigent. It is the hope of the Alabama State Bar that these guidelines will provide guidance to lawyers and serve as a standard by which questionable conduct can be judged.

Those lawyers who follow the letter and spirit of these guidelines will be protected from charges of impropriety; those who do not will have no added protection from charges to the contrary. In short, these guidelines, through designed chiefly to aid and assist members of the bar, also stand as this bar's self-policing mechanism for questionable fee practices.

The Alabama State Bar expresses its sincere appreciation to those who dedicate themselves to the representation of those who do not have the means to hire a lawyer. At the same time, it cautions anyone who attempts to take advantage, either of their clients or the State of Alabama, by practices such as double-billing, that abuses of this honorable system will not be tolerated.

1. ACTIVITIES ARE TO BE LISTED SEPARATELY

All activities for which compensation is claimed shall be listed separately on contemporaneous time reports. In order to receive payment, activities must be listed in the appropriate spaces on the fee declaration form or, if contemporaneous time records are kept in a manner that conforms to the fee declaration form, the contemporaneous records may be themselves submitted without the necessity for transferring them to the fee declaration form.

2. STANDARD TIME REPORTING

All time shall be declared in increments of .1 hour (six minutes). Counsel may bill for time spent under six minutes at a minimum rate of .1.

3. PHONE CALLS

The purpose, not substance, of phone calls should be briefly specified. For example: "phone call to defendant's brother re: raising bail" or "phone call to defendant re: trial date." Each call should be listed separately (on the contemporaneous time records, not on the fee declaration form).

4. MILEAGE

The rate for mileage shall conform to Alabama Code (1975) §36-7-22 (as of July 29, 1991, this rate is twenty-five cents [\$0.25] per mile).

5. EXPENSES

Certain expenses must be approved prior to the time they are incurred. Alabama Code (1975) §15-12-21(d). A general definition of expenses is impractical. Therefore, a definition is given by way of what is and what is not an expense which requires approval prior to being incurred. Counsel should file the appropriate motion in cases of uncertainty. In cases where court approval is required, counsel shall file a copy of the court's pretrial order along with the fee declaration form in order to obtain reimbursement.

The following are examples of expenses which do require approval prior to being incurred:

- A. Private investigators
- B. Expert witnesses
- C. Transcripts of trials or hearings not otherwise available
- D. Interpreters
- E. Scientific tests

The following are examples of expenses which do not require approval prior to being incurred:

- A. Copying (limited to twenty-five cents [\$0.25] per copy, except in extraordinary circumstances)
- B. Long distance phone calls
- C. Travel

6. OPENING AND CLOSING CASE FILES

Counsel may bill for this activity, but the maximum time which may be billed (for opening and closing combined) is .5 hour.

7. TRAVEL TIME TO AND FROM COURT

Travel time to and from a court appearance should be billed as out-of-court time, except under the following circumstances, where it may not be claimed:

- A. Travel time to arraignment when counsel is not assigned a defendant prior to arraignment; and,
- B. Travel time to arraignment when counsel is assigned a client prior to arraignment, but counsel fails to file a waiver of arraignment (where "waiver" is provided by local law or otherwise) without just reason. Some examples of jus reasons for failing to file a waiver include that the client refused to waive arraignment, or that counsel could not locate client prior to arraignment, etc.

If travel time involves more than one case, it should be divided equally among the case; e.g., if two cases are involved, one-half of travel time should be billed to each case.

8. ARRAIGNMENT

Only the actual time spent arraigning a defendant is compensable unless counsel is assigned a client prior to arraignment and counsel is required due to circumstances beyond his control. Such waiting time may be billed as in-court time and should be noted as such on the fee declaration form.

9. HEARINGS AND TRIALS OF CO-DEFENDANTS OR DIRECTLY-RELATED CASES

Attendance at the hearings and trials of co-defendants or cases directly related to your clients should be billed as out-of-court time and your attendance should be justified by an attachment to the declaration. However, in cases where a co-defendant's case has been consolidated with your case, in-court activities may be billed as in-court hours.

10. PRELIMINARY HEARINGS

An appearance at your client's preliminary hearing should be billed as in-court time even in the event you are proffered the state's witnesses for interview and the preliminary is thereafter waived. However, interviewing witnesses after your client's preliminary hearing is concluded should be billed as out-of-court time. Waiting time required by circumstances beyond counsel's control may be billed as in-court time and should be noted as such on the fee declaration form.

11. LAW CLERKS, PARALEGALS AND ASSOCIATES

Time spent by qualified law clerks and paralegals working at your direction should be billed at one-half the hourly out-of-court rate, and the name of the law clerk or paralegal should be noted on the declaration. Time spent by qualified associates working at your direction should be billed at the statutory rate, provided that a) the associate's assistance was required by circumstances beyond your control and b) the name of the associate is noted on the declaration. An associate will not be permitted to serve as lead counsel without prior approval from the court.

12. ACTUAL TIME RECORDS

Actual time records, notations or memoranda shall be maintained contemporaneously.

13. TOTAL BILLING IS REQUIRED

A declaration should not be filed until the case has reached conclusion, e.g., it is not permissible to file a declaration after a preliminary hearing where the defendant has been bound over and been indicted.

When, however, a client fails to appear or absconds, a declaration may be filed sixty (60) days thereafter. Similarly, if new counsel is appointed or retained, a declaration may be

filed immediately. However, the continuity of counsel provided by statute is to be strictly adhered to and should be departed from only in those cases in which it is absolutely necessary to have new counsel.

14. SEPARATE DECLARATIONS ARE REQUIRED IN MULTIPLE CHARGE CASES

In the past, it has been the normal practice to file a separate fee declaration form for each separate case number, in cases involving multiple counts, defendants, and/or indictments. That was prior to joinder and consolidation under the new temporary rules of criminal procedure. These cases no longer should be treated separately, but rather should be billed in the following manner.

All cases arising out of the same transaction shall be billed as one case. For example, if a client is charged with breaking and entering and burglary of the same dwelling, and the cases are joined, they shall be treated as one case. If, at the initiation of the proceedings, the cases were listed separately, simply list the additional case number on the fee declaration form with an explanation that the cases were consolidated.

In contrast, if cases arise out of separate transactions, they may be billed individually, even if they have been consolidated. For example, if a client commits three separate and distinct burglaries at three separate locations, and the cases are consolidated, they may be billed separately.

Double-billing will not be tolerated under any circumstances. Therefore, if you are billing for more than one case, be careful not to charge for the same work more than once.

Finally, though payment will be permitted for new trial motions and like proceedings, including sentencing, all such billing shall be treated as trial, rather than post-conviction, billing.

15. "IN-COURT" VERSUS "OUT-OF-COURT" TIME

Consistent with sections 8 and 10, supra, all waiting time at the courthouse for a scheduled court appearance, caused by circumstances beyond counsel's control, may be billed as in-court time and should be noted as such on the fee declaration form i.e., that portion of the total in-court hours which reflects necessary waiting time should be specifically noted as "waiting time" on the declaration form.

16. FEES COLLECTED FROM THE CLIENT

Any fees or expense money collected from the client (or from anyone on the client's behalf) before, during or after working the case for which counsel has been appointed, shall be reported. All amounts received shall be deducted from the amount finally paid to the lawyer.

In the event of changed circumstances (i.e. the client becomes able to retain counsel or secures outside assistance to retain counsel), counsel shall immediately notify the court that he/she has been retained, and the appointment shall be withdrawn. Retained counsel will not be required to file a fee declaration form, because no state funds will be paid.

THE DUTIES OF A GUARDIAN AD LITEM (GAL)

The guardian ad litem (AL) is a full participant in the court proceeding and is the only party whose sole duty is to protect the child's needs and interest. The GAL assumes the role of an advocate for the child's interests and in no way represents the petitioner (usually an agency) or the respondents (usually the parents or custodians). A GAL is appointed because of the child's immaturity and lack of judgement. Therefore, the GAL stands in the child's shoes and exercises substitute judgement for the child.

In fulfilling this child-centered role, the GAL performs ten important and interrelated duties. The GAL:

1. Acts as an independent fact finder (or investigator) whose task it is to review all relevant records and interview the child, parents, social workers, teachers and other persons to ascertain the facts and circumstances of the child's situation;
2. Ascertains the interests of the child taking into account the child's age, maturity, culture and ethnicity including maintaining a trusting meaningful relationship with the child via face-to-face contact;
3. Seeks cooperative resolutions to the child's situation within the scope of the child's interest and welfare;
4. Provides information through testimony or report with recommendations to the Court to assure that all relevant facts are before the Court;
5. Appears at all hearings to represent the child's interest, providing testimony when required;
6. Explains the court proceedings to the child in language and terms that the child can understand;
7. Asks that clear and specific orders are entered for the evaluation, assessment, services and treatment of the child and the child's family.
8. Monitors implementation of service plans and dispositional orders to determine whether services ordered by the Court are actually provided, are provided in a timely manner, and are accomplishing their desired goal;
9. Informs the Court promptly in writing or orally if the services are not being made available to the child and/or families, if the family fails to take advantage of such services, or if such services are not achieving their purpose and brings to the Court's attention any violation of orders, or new developments requiring the Court's attention; and
10. Advocates for the child's best interests in mental health, educational, family court, juvenile justice, criminal justice, and other community systems.

(Sample order from Jefferson County, Kentucky)

JEFFERSON FAMILY COURT
DIVISION _____
CASE NO. _____
IN THE INTEREST OF CHILD/CHILDREN

ORDER APPOINTING GUARDIAN AD LITEM

*** **

Good cause appearing, **IT IS ORDERED** that pursuant to KRS 620.100, 625.041 or 625.080 that _____

_____ a practicing attorney of this Court, be an is hereby appointed guardian ad litem to protect the interest of child/children until the disposition of the case or unless sooner discharged by the Court subject to the "Duties of a Guardian Ad Litem" set forth on the reverse side of this Order and incorporated herein

IT IS ALSO ORDERED that the said guardian ad litem shall serve effective immediately and shall receive reasonable fees and costs.

IT IS FURTHER ORDERED that the guardian ad litem shall:

1. Be allowed access the child by the caretaker of the child whether caretakers are individuals, authorized agencies or health care providers;
2. Have, upon presentation of this Order to any agency, hospital, organization, school, individual or office, including, but not limited to the Clerk of this Court, human services and/or child caring agencies, public or private institutions and/or facilities, medical and mental health professionals, law enforcement agencies and the Attorney General, the authority to inspect and receive copies of any records, notes and electronic recordings concerning the child that are relevant to the proceedings filed under this chapter without the consent of the child or individuals and authorized agencies who have control of the child;
3. Hold any information received from any such source as confidential, and shall not disclose the same except to the Court and where allowed by the Court, to other parties to this case and where provided by law;
4. Be given notice of all hearings and proceedings including, but not limited to, administrative, family, civil, criminal, grand juries or appellate; and all conferences including, but not limited to, multi-disciplinary team meetings, individual educational program meetings or inter-agency cluster meetings involving the child and shall protect the best interest of the child therein, unless otherwise order by the Court;
5. Appear at all hearings, court proceedings and monitor or attend case planning conferences to protect the best interest of the child unless otherwise directed by the Court; and
6. Have party status in any agreement or plan entered into on behalf of the child.

Court Date: _____

JUDGE

Time: _____

_____ Family Court #: _____ DATE

FOOTNOTES

- ¹ 1. The Challenge of Crime in A Free Society, p.8, U.S. Government Printing Office, 1967, cited in 47 Am Jur.2d "Juvenile Courts and Delinquent and Dependent Children §38, p. 1015.
- ² 2. See Rogers v. State, 491 So.2d 987 (Ala. Crim. App. 1985) holding that juvenile charged with delinquent act of night hunting who was never taken into custody and was subject only to a fine and revocation of hunting privileges, was not entitled to appointment of counsel.
- ³ 3. In many instances, a child may be classified in more than one category. See Anonymous v. Anonymous, 504 So.2d 289 (Ala. Civ.App. 1987), holding that a 16 year old emotionally abused child who ran away from home and refused to return was both dependent and a child in need of supervision.
- ⁴ 4. See Kennedy v. State Dept. of Pensions and Security, 166 So.2d 736 (Ala. 1964) holding that there was no necessity of appointing guardians ad litem to represent children, where the father of the children was a party to the proceeding to take custody from the parents and was represented by counsel. See also Power v. Snoddy, 111 So.2d 14 (Ala. 1959) and In Re Grayson, 419 So.2d 234 (Ala.Civ.App. 1982).
- ⁵ 5. Note that §26-17-17(d) provides that "Nothing contained in this chapter shall be construed so as to guarantee court-appointed counsel at the state's expense to any party who is not otherwise entitled to court-appointed counsel under statutory or case law. Appointment of counsel for a minor defendant or party who is entitled to counsel and the compensation of such appointed counsel shall be governed by the other applicable law." Further, §15-12-20 provides that, "In all criminal cases, including paternity cases, and civil nonsupport cases which may result in the jailing of the defendant... when a defendant is entitled to counsel as provided by law, 'the trial judge must ascertain whether he wants the assistance of counsel and whether or not he is able **financially or otherwise**' to obtain the assistance of counsel."
- ⁶ 6. See Gognon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973), Armstrong v. State, 312 So.2d 620 (Ala. 1975) See also Franklin v.State, 545 So.2d 183 (Ala. Crim. App. 1988), holding that after informing probationer of his right to request counsel, if counsel is refused, the court must expressly state the grounds for refusal in the record.
- ⁷ 7. See Sexton v. State, 460 So.2d 865 (Ala. Crim. App. 1984), holding that trial court properly denied counsel for juvenile on appeal, where mother had already secured an attorney to represent her daughter.
- ⁸ 8. "It is in dependency cases that the issue of termination of parental rights arises." In Re Ward, 331 so.2d 571 (Ala.Civ.App. 1977).
- ⁹ 9. See 4 ALR 4th 363, "Right of Indigent Defendant in Paternity Suit to Have Assistance of Counsel at State Expense."
- ¹⁰ 10. See 52 ALR 3d 1002, "Right to Counsel in Contempt Proceedings."
- ¹¹ 11. Aiding, encouraging or causing any child to become or remain delinquent, in need of supervision or dependent; disregarding or failing to obey a juvenile court order; Interfering with the custody of any child under the juvenile court's jurisdiction; Interfering with the custody or removal of any child who is or is alleged to be dependent, delinquent or in need of supervision or any child in the court's custody or the custody of a probation officer or other authorized person or department; knowingly interfering with or obstructing a probation officer or representative of DHR in the performance of his duties; or disclosing, using, or permitting the use of confidential juvenile information in violation of §§12-15-100, 101 or 102
- ¹² 12. For appointment of "guardians of the person" for children, see §12-15-8(b), Code of Alabama 1975.
- ¹³ 13. Note that §26-17-17(d) provides that "Nothing contained in this chapter shall be construed so as to guarantee court-appointed counsel at the state's expense to any party who is not otherwise entitled to court-appointed counsel under statutory or case law. Appointment of counsel for a minor defendant or party who is entitled to counsel and the compensation of such appointed counsel shall be governed by the other applicable law. Further, §15-12-20 provides that, "In all criminal cases, including paternity cases, and civil nonsupport cases which may result in the jailing of the defendant... when a defendant is entitled to counsel as provided by law, " the trial judge must ascertain whether the defendant has retained counsel, whether he wants the assistance of counsel and whether or not he is able **financially or otherwise**" to obtain the assistance of counsel.
- ¹⁴ 14. See Ex parte Martin v. Burkheimer, Ms. 87-637, ___ So.2d___ (Ala. 6/30/89), holding that unless a child is made a party to a divorce action and represented by a guardian ad litem, a paternity determination arising out of a divorce proceeding will have no binding effect on the child.
- ¹⁵ 15. R. Horowitz and H. Davidson, Legal Rights of Children, p. 297 (1984).
- ¹⁶ 16. North Carolina, by statute, has adopted a program of guardian ad litem service for abused and neglected children involved in juvenile proceedings, which consists of a lay volunteer acting as guardian ad litem, assisted by an attorney. An office of Guardian Ad Litem Services is established within North Carolina's Administrative Office of Courts and in cooperation with each district court judge and court personnel, has implemented the volunteer/attorney guardian ad litem program statewide. Children and the Law in North Carolina: A Casebook for Practice, N.C. Administrative Office of Courts, Chapter VII, p. 11.
- ¹⁷ 17. Children and the Law in North Carolina: A Casebook for Practice, N.C. Administrative Office of Courts, Chapter XII, pp. 3-4, citing Long, When the Client is a Child: Dilemmas in the Lawyer's Role, 21 JFL 607, 633 (1982-83)
- ¹⁸ 18. See Uniform guidelines for Attorney Fee Declarations" recommended by the Indigent Defense Committee of the Alabama State Bar, vol. 50, No. 4, The Alabama Lawyer, July 1989 reprinted in Appendix.

CHAPTER VIII

Standards and Commentaries

INTRODUCTION

The following standards and commentaries were developed and adopted by the New York State Bar Association in 1988. With some changes the Committee believed that these standards were applicable in providing Alabama Guardians Ad Litem with a clear and simple statement of the role of the Guardian Ad Litem and suggested guidelines in fulfilling that role. The standards address a broad range of issues. However, not every guideline is relevant to every case. The Guardian Ad Litem should seriously consider each standard in the context of the particular proceeding, and apply those standards which are relevant and appropriate to the specific case.

PART A: PRELIMINARY STAGES

STANDARD A-1

The guardian ad litem should obtain and examine every available relevant document.

COMMENTARY:

The need to study salient documents is clear. Initial papers include the petition or complaint and any cross-petition, answer or cross-complaint. It is from these primary documents that the guardian ad litem may first glean the nature of the case, the parties' positions, the alleged facts upon which a claim is based and the child's age or ages, family relationships, and the child's residence. Additional court documents may include motions or applications for temporary or protective orders. If the proceeding is one for modification of an earlier decree, the guardian ad litem should review the original case file and records; similarly, any prior cases involving the family should be reviewed. When appointment is delayed, the guardian ad litem should act expeditiously, quickly reviewing the entire court file, obtaining important documents, verifying information and conducting appropriate interviews.

STANDARD A-2

The guardian ad litem should interview and observe the child to ascertain the detailed facts relevant to custody, the child's wishes, the need for independent evaluations and the need for or appropriateness of interim judicial relief.

COMMENTARY:

An initial client interview is of course crucial. The child's perceptions and factual descriptions concerning the role, relationship and specific activities of each parent) or other party seeking custody) are critical to formulating a guardian ad litem position and structuring a litigation strategy (see Standard B-2). Of equal importance may be the child's knowledge and perceptions concerning infra-family relationships, such as conflicts between his or her parents or between the child and the extended family members. The home environment

and school history (if the child is of school age) are additional areas to pursue. At the initial interview, the child should almost never be asked directly which parent he or she prefers to live with. Rather, the attorney should explain the proceedings, develop rapport, and raise specific factual questions. Topics might include the time each parent spends at home and with the child, what the child does at different times during the day, what the child does with each parent, the specific parenting tasks performed by each parent or other party, and who the youngster perceives to be the primary "parenting figure". The child's needs, interests, and his or her wishes may thereby become apparent, or at least significant issues may be illuminated. Whenever possible, the child's facts should be verified and compared with the positions and perceptions of the different litigants. But, regardless of the specifics and the age of the child (except the very young child who may not be able to articulate), the child's perceptions and views are always meaningful to the development of the case and to the attorney-client relationship.

Interviewing the child is not always an easy task and may even be impossible when representing the very young client. However, the attorney may always observe his or her young client. The child's demeanor, possible health and the child's inter-action with the environment and with persons can thereby be evaluated. Observation may also suggest the need for independent evaluations (see Standard A-10).

Petitions involve children ranging in age from new born to teenage. The applicable rules of professional responsibility take cognizance of the consequent ethical responsibilities: The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding.

Any mental or physical condition of a client that renders him incapable of making a considered judgement on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or if contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. (Rule EC7-12).

Perhaps the most critical clauses are 1) that "...the lawyer should obtain from him [the child] all possible aid", and 2) that the disabilities of the client, including age or mental capacity "...casts additional responsibilities on his lawyer". A young child can surely be of aid to the attorney, even if the youngster's age or maturity precludes dispositive conclusions concerning the case or the child's interests. The responsibility is to secure and verify every salient fact. As a rough approximation, the attorney's "special" responsibilities are inversely related to the age and maturity of the client. The younger the child, the greater need to seek independent sources and assume a greater burden in speaking for the youngster (of course, children mature at different phases and the attorney must evaluate the maturity and abilities of the particular child, regardless of age).

Interviews with the child client are best conducted at an early date and at a location other than the courthouse. The guardian ad litem's office is usually the preferable environment. It is also critical that the child be interviewed alone, i.e., without the presence of either parent or other litigant and in an environment where the child feels assured that his or her privacy and confidentiality will be protected. The guardian ad litem should also evaluate whether the child may have been "coached" by a parent or otherwise influenced to color the facts. However, observations of the child are usually best conducted at the youngster's home, perhaps as a part of the guardian ad litem's home visit (see Standard A-4).

Last, the initial interview is but the first step of a lengthy attorney-client relationship. Follow-up discussions are essential and the child should see the guardian ad litem on an on-going basis throughout the litigation process.

STANDARD A-3

The child should be advised, in terms the child can understand, of the nature of the proceedings, the child's rights, the role and responsibilities of the guardian ad litem, the attorney-client privilege, the court process, the possible consequences of the legal action, and how the child may contact the guardian ad litem at any time during the course of the proceedings.

COMMENTARY

The initial interview should not be a one-way street. While the guardian ad litem must elicit a great deal of information, the child must obtain and understand information concerning the proceedings, the guardian ad litem's responsibilities and the attorney-client privilege. This is a particularly difficult task when the child is of tender age (and is of course impossible when the child is an infant). A mere recitation may be insufficient. The guardian ad litem should enter into a dialogue and continue discussions until assured that the youngster has achieved an understanding of the proceedings, the consequences which may result, and the guardian ad litem's responsibilities.

The guardian ad litem should further advise the child that he or she may phone or write to the attorney at any time. The child should understand that the proceedings may be lengthy and complex, and that any questions or concerns will be addressed by the guardian ad litem.

STANDARD A-4

The parents' or other party's attorneys should be advised of the role and responsibilities of the guardian ad litem, including the guardian ad litem's legal standing in the proceedings, and the guardian ad litem's responsibilities to participate fully to protect the child's interests and to express the child's wishes.

COMMENTARY:

Attorneys are frequently unaware of the role and responsibilities of guardian ad litem. Even the term "guardian ad litem" may be an unfamiliar one. It is accordingly important that the guardian ad litem explain his or her functions.

One critical aspect is the guardian ad litem's standing, as counsel for the child, to partici-

pate fully. The basic rights of representation, such as the requirement of service of papers, the right to file motions and apply for court orders, and to subpoena witnesses and documents, should be clearly outlined. So too, the rights as counsel for the child to participate in conferences, to introduce evidence, call witnesses, cross-examine other parties' witnesses and to advocate a position merit explanation. In short, the guardian ad litem should advise and remind other counsel that he or she must be treated as an attorney representing a party in interest. When necessary, the guardian ad litem should follow-up by moving for appropriate judicial directives (for example, if the guardian ad litem has not been served with motion papers, he or she should move to dismiss the motion or at least to defer a determination until the guardian ad litem has been properly served and granted an opportunity to be heard).

The guardian ad litem should also explain to other counsel the guardian ad litem's responsibility to formulate a position in conjunction with the child (see Standard B-2) and to articulate and otherwise support that position before the court. The statutory responsibility to express the child's wishes and the responsibility to protect the child's interests, moving for protective court orders when necessary (see Standard A-8), should be clarified at the earliest practicable date.

STANDARD A-5

The child's present home and any proposed home should be visited by the guardian ad litem.

COMMENTARY:

A home visit can constitute an important element in determining the child's interests and formulating a guardian ad litem position (see Standard B-2). The physical characteristics of the home may be ascertained and the child may be observed in his or her usual environment. Frequently, the parenting roles of the litigants may be clarified by carefully observing the home and by discussing with the child and with the parent the different aspects of the household. If the child is spending time in more than one home, the guardian ad litem should visit each household or family unit. If a party to a custody action proposes a home different from her present resident the guardian ad litem should visit it.

STANDARD A-6

The guardian ad litem should interview the parties and any other relevant person, including, any one with relevant knowledge of the child or the parties, as well as any potential factual or expert witnesses.

COMMENTARY:

Custody cases are frequently complex, involving hotly contested facts and widely differing perceptions. They are also very emotional and hard fought. For these reasons, and to formulate a position based on accurate facts, the guardian ad litem should attempt to interview every person who may offer relevant information. Interviews may be of special importance in light of the limited discovery techniques customarily employed in custody cases; for example, depositions or interrogatories are rarely utilized.

The parents are obviously important parties and should be interviewed, with their attorney's permission, as well as any non-parent party who seeks custody. Parents are normally represented by counsel and it would be inappropriate to interview the client without counsel's consent. However, the guardian ad litem is usually viewed as an important neutral person, one with whom the parties should cooperate and frequently cultivate.

In addition to salient factual information, the parent should be asked specific questions concerning his or her detailed plans for the child. Where the child will live, the specific accommodations for the child, specific parenting functions, school plans, the parents' work schedule, day care, the manner in which the parent will address the child's special needs, and the parent's life style are several of the topics which should be covered. In many cases, it may also prove useful to observe each party with the child; such an interview should take place after interviewing the child and the parents separately.

Other persons may also shed considerable light on the case. Collateral relatives, such as grandparents, may provide useful information and insight. School officials and child care personnel frequently possess important knowledge concerning the child. And mental health professionals, such as psychiatrists or psychologists, may have been provided for diagnostic or therapy service. Any person who may provide useful information or may be a potential witness in the case should be interviewed, including any persons who may reside in the proposed custodial home.

Whenever needed, parental authority for third parties to release information to the guardian ad litem should be requested. If denied, the guardian ad litem may draw appropriate conclusions, discuss the matter with counsel for the relevant party, and may subsequently seek a judicial subpoena for relevant records or testimony.

STANDARD A-7

The guardian ad litem should apply for appropriate court orders to protect the child or obtain temporary relief, determine visitation, and limit repeated or unnecessary interviews or evaluations.

STANDARD A-8

The guardian ad litem should participate whenever any party requests an interim court order which may affect the child.

COMMENTARY:

As a full participant in the proceedings, assigned to represent the child's interests, the guardian ad litem should quickly determine whether the child needs temporary or protective relief and, if so, should move for appropriate measures. Children may unfortunately become pawns in an action, to be fought over or perhaps used as bargaining chips. The guardian ad litem should move expeditiously to protect his or her client. For example, the child may need protection against repeated evaluations. Custody actions frequently become a "battle of the experts", with each side retaining expert psychologists, psychiatrists, counselors, social workers, or any combination thereof. While evaluation may be necessary, the child should not be subjected to continuing rounds of visits with different experts,

paid to develop specific positions. The guardian ad litem may move for the appointment of an independent expert in lieu of adversarial experts (see Standard A-10), or may move to limit the number of experts or the number of diagnostic sessions.

Where child abuse is alleged in the course of a custody action, the guardian ad litem should move quickly for independent evaluations and may need to apply to stay the custody action while the child protective service investigates abuse or neglect allegations. When appropriate, the guardian ad litem should also determine the need for and immediately seek a protective order limiting visitation or contact between child and the alleged abuser.

Further, issues of temporary visitation, therapy, protection, or support frequently arise. The guardian ad litem's role is not limited strictly to custody (see Standard B-2), and the child's attorney should do everything possible to assure every aspect of the child's needs. The guardian ad litem should be a full participant (Standard A-8) and should not hesitate to take a position, to initiate a request for temporary orders, or to move for modification of existing interim orders. Temporary orders may remain in effect for several months and may structure the litigation (for example, the parent who has temporary custody may have an advantageous negotiation position). It is important that the child's interests be assessed and advocated at the earliest possible date. (See also Standard B-3 concerning participation at conferences or negotiations.)

STANDARD A-9

When appropriate, independent court ordered evaluations or studies should be requested.

COMMENTARY:

The most important evidence in a dispute may be reports and testimony by independent diagnostic experts. Professionals retained and paid by a party may be biased or are often suspected of bias, and expert testimony offered by the two opponents often conflict. The guardian ad litem, who represents only the child, may secure court ordered independent evaluations. Examples include psychiatric, psychological, educational, medical, and social work evaluation, as well as a probation investigation or a probation "home study". The court may order any of these, or any combination, at the request of the guardian ad litem, or on it's own. The guardian ad litem should not hesitate to move for appropriate independent evaluations at the earliest practical date.

PART B: PRE-TRIAL

STANDARD B-1

All available potential evidence should be obtained and analyzed, including discovery documents, expert evaluations and witness statements.

COMMENTARY:

Assembling and analyzing relevant evidence constitutes an important first step in determining the guardian ad litem position and plan (Standard B-2), participating in negotiations (Standard B-3), and preparing for trial. As the case progresses, medical or mental health evaluations will be completed, school reports will become available, interviews will be completed, and documentary evidence produced. Affidavits filed by a party (or other person), perhaps to support temporary relief, will also be available, as well as documents relating to any prior litigation.

It is important that the guardian ad litem obtain and review every source of information which may be relevant to custody or visitation. If, for example, custody is one aspect of a divorce action based on alleged cruelty, the allegations and documents to support a fault divorce may well be relevant to the issue of parental fitness and best interests of the child (and false allegations may be as significant as valid charges). Most custody disputes also involve the material needs of a child, and may involve maintenance or a property distribution. The required detailed financial statements, including the net worth statements, are crucial to determine the material needs of the child and may be important in determining a parent's motivation and sincerity. All relevant documents should be obtained and reviewed in light of the child's wishes and interests. The guardian ad litem should also obtain the names, qualifications and summary of expected testimony of expert witnesses.

Since the guardian ad litem is frequently viewed as an impartial participant, one to whom the judge may look to for guidance, the other attorneys may be willing to share information. In fact, gentle persuasion may yield information which would be unavailable as a matter of right (the likely testimony of a witness called by a party, for example). Cooperation may be enhanced by advising the attorney of the guardian ad litem's role and responsibilities (see Standard A-5). When necessary, the guardian ad litem should move for court ordered disclosure of relevant material well before the scheduled trial date.

STANDARD B-2

The guardian ad litem should develop a position and strategy in conjunction with the child concerning every relevant aspect of the proceedings.

COMMENTARY:

The desirability of shaping and advocating a complete guardian ad litem plan constitutes a major theme throughout the Bar Association Standards for Representing Children. Given the importance of a custody determination and the wide latitude of the court in determining custodial, visitation and financial issues, the need for such development is manifest. Indeed, the formulation of a comprehensive position and plan may be the paramount guardian ad litem responsibility, for it represents the key to effective advocacy necessary to protect the youngster's interests.

Development should have commenced at an early date, although the goals and specifics may be refined and updated as the litigation progresses. The ingredients include the results of multiple interviews with the child (Standards A-2 and B-4), interviews with the parents and other relevant persons (Standard A-6), home visits (Standard A-5), records and documents available to the attorney, and relevant evaluations including independent evaluations, ordered by the court (Standard A-9).

When the child is too young to articulate his or her wishes or provide assistance to counsel, the guardian ad litem must of course determine the child's interests independently. When the child is of sufficient age to articulate his or her desires and to assist counsel, the plan should be developed with the child's cooperation and agreement. The child often has a keen insight concerning his or her needs. ****If the child is of sufficient age and maturity, the court must elicit his views (see Standard C-5).**

The guardian ad litem's position should be developed through an ongoing and extended attorney-client dialogue. Children may be reluctant to indicate their wishes when confronting a dispute between two parents; the attorney should encourage a meaningful dialogue entailing a discussion of every option and the advantages as well as the disadvantages of each possibility. The child should feel free to articulate his views and concerns, but should never feel compelled to choose between parents.

Further, the custody litigation need not be presented as an all or nothing choice. Unless patently unfit, each parent is entitled to a meaningful relationship with his or her child (and a non-parent may be entitled in appropriate circumstances). The child is entitled to the continuation of a meaningful relationship with each parent. Liberal or extended visitation, joint decision making or legal custody, vacations, the possibility of modification as the child matures, and, in some cases, an agreement for joint physical custody merit discussion whenever appropriate. The youngster should also be advised that custody is never a permanent award, although it is not lightly or frequently changed. The child should not feel that he or she must "elect" a custodial parent but, should be encouraged to speak in terms of where he or she wishes to live or should live, with appropriate measures for a continued meaningful relationship with the "non-residential" parent. The legal positions of each parent should be explained and ongoing parental responsibilities should be discussed, including visitation rights of the "non-residential" parent even when the child would prefer the absence of visitation. It may be appropriate to tell the older child of an evaluator's findings.

The prognosis of the litigation may also be explained and realistic alternatives offered. For example, the reluctance of the court to award custody to an unfit or less fit parent even if the child wishes to live with that parent should be discussed, as well as the alternative of advocating liberal visitation and joint decision making. In most cases, it is thereby possible to articulate a position with which both the guardian ad litem and the child agree, one which will further the child's needs and interests without seriously compromising his or her desires.

In developing the guardian ad litem position with the child, the youngster should be advised that neither the child nor the guardian ad litem will decide the case and determine who the custodial parent will be. The decision is made by the judge after considering all the relevant evidence, including the child's wishes.

Last, it is important that the guardian ad litem plan include every aspect of the litigation which is relevant to the child. Custody, visitation and decision making are of course essential components. When appropriate, protection of the child should be included (for example, the need for a protective order or curtailed visitation). Of equal significance are the material needs of the child, including housing arrangements, medical insurance and child support. The guardian ad litem should carefully develop a plan encompassing every relevant element.

STANDARD B-3

The guardian ad litem should participate fully in pre-trial conferences and negotiations and should endeavor to resolve the case without the need for a trial.

COMMENTARY:

Custody trials are lengthy, bitter and divisive. Tension between the parents is further exacerbated and the child may need to testify (even in-camera testimony may be traumatic to the young client). Pre-trial conferences or informal negotiations between the attorneys are of course a common occurrence and may succeed in resolving the case. In fact, most custody disputes are settled at the pre-trial level.

The guardian ad litem's full participation is essential and should encompass every potential resolution method, from phone calls to formal conferences; in some cases, mediation should be suggested as an alternative to litigation. Whatever the forum or format, every issue should be raised. The guardian ad litem should be an active participant when discussions are proposed by the court or counsel to a party, and should initiate discussions whenever a resolution may be possible.

One key to meaningful negotiations is the guardian ad litem position and strategy (Standard B-2). A plan should be developed before serious discussions are held and should guide the guardian ad litem throughout the litigation process. In most cases, the guardian ad litem's proposed outcome and the child's desires should be presented to the other contestants, along with supporting evidence.

Another key is the interests and wishes of the child, which should be integrated into the plan (see Standard B-2). These, and only these factors, guide the guardian ad litem. Any proposed settlement which is deleterious to the child should be rejected, even if both parties to the custody dispute agree. Compromise may be possible and every effort should be made to resolve differences, provided they do not hurt the child. Even a trial, with the almost inevitable difficulties, is preferable to a settlement which goes against the child's interests and wishes.

Helpful to the guardian ad litem is the fact that he or she is the only neutral participant other than the judge, and the person who is legally bound to represent the child's interests. A guardian ad litem proposal may accordingly be viewed by a party as less threatening and less adversarial. The other attorneys know that in most cases the court looks to the guardian ad litem for suggestions for a resolution. Great weight may therefore be given to the guardian ad litem's position, a fact which is often helpful in negotiating a pre-trial resolution.

STANDARD B-4

The guardian ad litem should discuss the case periodically with the child.

STANDARD B-5

The guardian ad litem should prepare thoroughly for trial.

COMMENTARY:

As noted previously, in a custody case the guardian ad litem and the child enter an ongoing and sometimes lengthy relationship (see the commentary following Standard A-2). Continued discussions with the client increase in importance as the litigation moves from the preliminary stages through negotiation and possible trial. Standard B-4 is intended as a reminder of the importance of close communications as the case progresses.

As a full participant, the guardian ad litem should also thoroughly prepare for trial. The nature of preparation depends upon the case. Examples include pre-trial discussions with experts who will be called upon to testify, and the preparation of witnesses whom the guardian ad litem may call to testify. The guardian ad litem should also research the appropriate law, draft an opening statement, prepare any appropriate motions which may be made during the trial, and draft appropriate memoranda of law.

PART C: THE TRIAL

STANDARD C-1

When necessary, the guardian ad litem should move for protective orders at the commencement of the trial.

STANDARD C-2

If appropriate, the guardian ad litem should present a guardian ad litem case, including independent evidence and witnesses.

STANDARD C-3

The guardian ad litem should be familiar with the relevant records, reports and evidence, insure that necessary witnesses testify and relevant material is subpoenaed and introduced into evidence and cross-examine witnesses.

STANDARD C-4

The guardian ad litem should deliver a summation, and prepare any necessary memoranda of law to support any recommendation made.

COMMENTARY

One important guardian ad litem responsibility is to protect the child. Hence the need to consider if a protective order is desirable and, if so, to apply for the relevant judicial decree. For example, a party may wish to call the child as a witness in open court. In almost all cases, the child's testimony in court would be inappropriate and any testimony should be in-camera (Standard C-5). In such event, an early judicial determination should be sought. Or a party may be pressuring the child to take a position or to testify in a specific way; such harassment may be prohibited by a protective order. To cite but one additional example, evidence which is of questionable relevance or validity but may be highly emotional can and should be barred by protective order.

As the child's advocate, the guardian ad litem's interest is to insure that, to the greatest extent possible, all relevant facts, expert opinions, and records that support the guardian ad litem's position are introduced into evidence. Standards C-2 and C-3 thus encourage the guardian ad litem to be familiar with the possible evidentiary material (see Standard B-1),

and to question and cross-examine witnesses whenever necessary for full presentation. Similarly, as the advocate for the child, the guardian ad litem should subpoena and call witnesses and present evidence.

Last, summation is an essential part of the trial and is of particular importance to the guardian ad litem. Summation presents perhaps the best opportunity to articulate the guardian ad litem position, as buttressed by the evidence. Every relevant issue, including custody, visitation, parental decision making, conditions for custody, and child support should be detailed so the court is apprised of the exact plan developed by the guardian ad litem (even if fully discussed at the pre-trial level). When appropriate, the guardian ad litem should also offer to submit a post-trial memorandum outlining the evidence, the legal issues and the guardian ad litem's conclusions and recommendations.

STANDARD C-5

If the Court conducts an in-camera interview with the child, the guardian ad litem should request that it be held in chambers with only the judge, the guardian ad litem and a court reporter present and only after the guardian ad litem has advised the child of the purpose of the interview.

COMMENTARY:

A special guardian ad litem responsibility is to protect the child against the usually intimidating and traumatic experience of testifying against his or her parent in their presence. Case law clearly supports the principle that as an alternative, in almost all cases, the child may be interviewed in chambers with only the judge, the guardian ad litem and a court reporter present.

If the child is very young, testimony is in all probability unnecessary and an in camera interview may yield useful information. For the older child, ascertaining the youngster's wishes through testimony or interview may be necessary and in fact is required by case law precedent. An interview should usually be held only in chambers with the guardian ad litem seated next to his or her client. In exceptional cases, it may be appropriate or beneficial for the older child to testify in open court. The guardian ad litem should determine whether to call the child as a witness, and should request that the Court conduct an in-camera interview, whenever appropriate.

The format for in-camera interviews varies and some judges summarize the content of the interview on the record. If requested, the court may permit opposing counsel to propose written questions to be asked by the judge (of course the guardian ad litem may object to a specific question), and some judges permit the attorneys to be present at the interview. A stenographic record of the interview must be made, and the record sealed for appellate review (CPLR 4019). The attorney should thoroughly prepare the child for in-camera interviews or testimony, advise the client of the nature of and purpose of the procedure, and the use and disclosure that may be made of the information and opinions she provides to the court.

PART D: POST-TRIAL

STANDARD D-1

The guardian ad litem should explain to the child, in terms the child can understand, the court's determination and its consequences, the rights and responsibilities of each of the parties, including the child, the possible right to appeal, and the possibility of future modification.

COMMENTARY:

Custody decrees are frequently complex, encompassing issues such as custody, visitation, special conditions or limitations, travel, decision making for the child, and child support. It is essential that the child clearly understand every aspect. As always in explaining complicated issues, the guardian ad litem should engage in a colloquy with the child and continue discussions until assured that maximum knowledge and understanding has been reached. It is of particular importance that the child understand his or her continuing relationship with each parent (or the non-parent party) and each parent's continuing responsibilities to the child.

Custody orders are never final and may be modified at any time until the child reaches majority. The child should understand this principle and know that the guardian ad litem and the court are always available if, for example, his visitation or custodial needs should change, though the client should be advised that custodial changes are not easily made. Last, the child should be advised of his or her right to appeal (see Standard D-3).

It is also helpful to maintain communication with the child subsequent to the trial. Post-trial problems may thereby be ameliorated or appropriate legal action commenced. The ability of the guardian ad litem to file post-disposition enforcement or modification motions is not clear, but the attorney for the child may well possess standing. As an alternative, the guardian ad litem may advise a party to initiate modification or enforcement action. The better practice would be to seek enforcement or modification relief whenever appropriate.

STANDARD D-2

The guardian ad litem should examine the court order to insure that it complies with the findings and disposition.

COMMENTARY:

Custody orders may be lengthy and often incorporate complicated provisions. For these reasons, the guidelines suggest that the guardian ad litem examine any proposed order submitted for settlement and further examine the actual order when issued (a variance may be corrected by informal request or motion). If necessary, the guardian ad litem should submit a counter-proposed order or amendment.

STANDARD D-3

If the guardian ad litem believes that the court's determination is contrary to the child's interests, after considering the wishes of the child, a notice of appeal should be filed and measures undertaken to assure that the appeal is perfected expeditiously.

COMMENTARY:

If the case has been determined by the Family Court, the guardian ad litem has standing to initiate and argue an appeal; see F.C.A. §1120. When the custody case has been heard and determined by the Supreme Court, the guardian ad litem's standing to initiate the appeal is less clear (although the guardian ad litem may clearly participate when a party appeals). Until the issue is determined by case law or through a statutory amendment, the guardian ad litem appealing from a Supreme Court order should carefully research the question and be prepared to defend the right to appeal.

An appeal to the appropriate appellate division should be initiated whenever the guardian ad litem, after considering the child's wishes and desires, concludes that the court's determination is adverse to the child's interests and grounds exist upon which to base an appeal. If necessary, temporary appellate relief should be requested, such as a stay of the order.

The decision to appeal is implemented initially by filing a notice of appeal. However, the guardian ad litem should follow up by securing the necessary transcripts and perfecting the appeal or, alternatively, requesting that the appellate division appoint a new guardian ad litem for that purpose (the guardian ad litem should become familiar with the rules and practice of the relevant department). The guardian ad litem appointment continues through appeal, regardless of which party initiates the appellate process (Family Court Act Section 1120). The attorney's responsibilities are to file the notice of appeal and either perfect the appeal or request that the court appoint separate counsel for that purpose.

Last, the attorney maintains responsibility when a different party appeals a decision. If a party appeals a decision from the Family Court or the Supreme Court, the guardian ad litem should file a brief and participate at oral argument or, alternatively, move that the appellate division appoint a new guardian ad litem for that purpose.

STANDARD D-4

The guardian ad litem, if feasible, should represent the child in any subsequent relevant proceeding, including a modification, a violation, or an enforcement action.

COMMENTARY:

A custody determination may be in effect for many years, but is always subject to modification. Violation or enforcement actions may also be brought at any time. Continuity of representation is of great importance and, whenever possible, the guardian ad litem should represent the child in any proceeding subsequent to the initial custody determination.

CHAPTER IX RC CASE

It is very important that guardian ad litem representing children in Alabama understand the principles evolving from the RC Case.

THE RC CASE

Alabama's child welfare system is undergoing extensive reform brought about by the consent decree in a class action suit, the RC Case.

The RC Case was filed in November 1988. The plaintiffs are represented by the Washington, D.C.-based Judge David L. Bazelon Center for Mental Health Law (formerly the Mental Health Law Project), the A.C.L.U. of Alabama, and the Southern Poverty Law Center.

R.C. was then an eight year old child who had been placed with his father due to allegations of abuse against his mother. He was later removed from his father due to allegations of neglect and placed in a series of short-term placements that concluded with months of placement in private psychiatric hospitals. The plaintiffs alleged that locked isolation and psychotropic medication were used excessively with R.C. and that his father was prohibited visitation. R.C. was ultimately discharged and placed in a long-term residential treatment facility three hundred miles from his home for ten months. He was discharged and returned to the custody of his father. R.C. and his father have now moved to another state.

An extensive period of discovery was undertaken, with plaintiffs' and defendant's experts examining the child welfare system. Samples of the population of children in care were reviewed through case record reviews, interviews with caretakers and analysis of data from the Department's foster care tracking system, ACWIS.

THE SETTLEMENT

After two years of examination of evidence in the case, trial was set for July, 1991. In the weeks preceding trial, DHR and the plaintiffs reached an agreement to settle the case without trial. The U.S. District Court approved the settlement in December 1991.

The settlement requires DHR to create a "system of care" for class members and their families. It includes an agreed upon a set of goals of the system of care. These are to:

- (1) Protect class members from harm due to abuse and neglect; and
- (2) Enable class members to:
 - * Live with their families; and when that cannot be achieved through the provision of services, to live near their home;
 - * Achieve stability and permanency in their living situation;
 - * Achieve success in school; and
 - * Become stable, gainfully employed adults.

The settlement adopts a set of principles by which the system of care must operate and that will apply to all class members.

IMPLEMENTATION PLAN

An Implementation Plan was developed to implement the R.C. vs. Hornsby consent decree by the Alabama Department of Human Resources. The decree identifies a specific group of children and family members who have entitlements. The entitled children — i.e., the plaintiff class — are:

- * children in foster care or DHR custody who have an emotional or behavioral disorder;
- * children at imminent risk of placement in foster care or DHR custody who have an emotional or behavioral disorder; and
- * children at imminent risk of placement in foster care or DHR custody who are at high risk of developing an emotional or behavioral disorder.

In a recent study conducted by the Florida Mental Health Institute, approximately two-thirds of children in foster care or DHR custody were determined to be class members. Nearly all children at imminent risk of entry into foster care or DHR custody due to abuse or neglect are currently thought to be class members.

CHAPTER X

CHILD MALTREATMENT

A. Introduction

Although Alabama provides a legal framework for child protection, most actual cases of child maltreatment are not clear cut. Except in the most blatant cases of abuse or neglect, making a determination that child maltreatment has occurred is a complex process. There are no absolute distinctions between abusing or neglecting and nonabusing or non-neglecting families. Rather, interactions between a parent and child should be viewed as occurring on a continuum ranging from acceptable (healthy, productive) to unacceptable (damaging, unproductive) behaviors. The quality of parent-child interactions fluctuates over time; families and individuals vary in their susceptibility to abusive and neglectful behavior; and families and individuals exhibit differences in their actual manifestations of such behaviors. (*1)

Effective representation of children requires an understanding of the legal and professionally recognized forms of maltreatment, and of the dynamics involved in each form. The following information defines each type of abuse and summarizes current knowledge about the special dynamics involved. It is important to recognize that causative and reactive factors are involved in abuse dynamics, i.e.; how abuse happens, how it effects victims and families, the behavioral manifestations of the effects, and how all of these factors effect the disclosure process. System response to disclosure of maltreatment remains the key variable in achieving positive outcomes.

B. Definitions of Child Maltreatment

The following definitions of child maltreatment are taken from the Code of Alabama, 1975. Section 26-14-1. (Effective February 27, 1994) Definition.

For the purpose of this chapter, the following terms shall have the meanings respectively ascribed to them by this section:

- (1) ABUSE. Harm or threatened harm to a child's health or welfare. Harm or threatened harm to a child's health or welfare can occur through nonaccidental physical or mental injury, sexual abuse or attempted sexual abuse or sexual exploitation or attempted sexual exploitation. "Sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having a child assist any other person to engage in any sexually explicit conduct or any simulation of the conduct for the purpose of producing any visual depiction of the conduct; or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children as those acts are defined by Alabama law. "Sexual exploitation" includes allowing, permitting, or encouraging a child to engage in prostitution and allowing, permitting, encouraging or engaging in the obscene or pornographic photographing, filming, or depicting of a child for commercial purposes.

(2) **NEGLECT.** Negligent treatment or maltreatment of a child, including the failure to provide adequate food, medical treatment, supervision, clothing, or shelter.

(3) **CHILD.** A person under the age of 18 years.

(4) **DULY CONSTITUTED AUTHORITY.** The chief of police of a municipality or municipality and county; or the sheriff, if the observation of child abuse or neglect is made in an unincorporated territory; or the Department of Human Resources; or any person, organization, corporation, group, or agency authorized and designated by the Department of Human Resources to receive reports of child abuse and neglect; provided, that a "duly constituted authority" shall not include an agency involved in the acts or omissions of the reported child abuse or neglect.

Section 26-14-7.2. Child denied medical treatment due to parents' religious beliefs.

When an investigation of child abuse or neglect by the Department of Human Resources determines that a parent or legal guardian legitimately practicing his or her religious beliefs has not provided specific medical treatment for a child, the parent or legal guardian shall not be considered a negligent parent or guardian for that reason alone. This exception shall not preclude a court from ordering that medical services be provided to the child when the child's health requires it.

The following definitions of child maltreatment are taken from the Rules of the Department of Human Resources, Social Services Division.

660-5-43-.01 Definition of Protective Services for Children.

Services directed toward preventing or remedying abuse, neglect, or exploitation of children under the age of 18 years unable to protect their own interests or harmed or threatened with harm by a person responsible for the individual's health or welfare (and for runaways) through: (1) non-accidental physical or mental injury; (2) sexual abuse or exploitation; (3) or negligent treatment or maltreatment including the failure to provide adequate food, medical treatment, clothing or shelter. Services include; identifying children in need of protection, receiving child abuse and neglect reports, making reports to the central registry, investigation complaints or reports, diagnosis and evaluation, making reports to courts having juvenile court jurisdiction, providing casework and counseling services, providing information and referral, supervision of child in home of parents or relatives, arranging protective placement, providing legal services, arranging medical care, making use of community resources, including training for parents and providing shelter care including clothing when shelter care is provided in a purchase of service contract. Shelter (and clothing and transportation under a purchase of service contract) is limited to 30 days in any six months period. Service also includes transportation or runaways from and to another state and transportation for children returned to this state and transportation for children returned to the state and from this state to another state pursuant to placement agreements. In combination with these services certain other services may be provided without regard to income when used to prevent or remedy abuse, neglect, or exploitation of the individual receiving protective services for children. These services are: home-maker services for children (limited to 90 days WRTI in any six months period) and day care for children (limited to 90 days WRTI in any six months period).

660-5-34-.02 Protective Services as Specialized Social Services.

(1) When complaints or reports are received, the County Department has the duty and responsibility to investigate the complaint or report and:

- (a) evaluate the extent to which children are being harmed;
- (b) evaluate the parents' capacity to use help to improve the situation;
- (c) provide the supportive services needed to better the family's situation for children; and
- (d) when parents are unable to use this help, invoke legal authority of the court by petition and secure adequate protection, care, and treatment for children whenever necessary to meet their needs and rights.

(2) For the purpose of reporting cases or suspected child abuse and/or neglect, Alabama statutes give the following specific definitions:

- (a) A "child" is defined as a person under the age of eighteen.
- (b) "Abuse" means harm or threatened harm to a child's health or welfare, which occurs through nonaccidental physical or mental injury, sexual abuse, or attempted sexual abuse, or sexual exploitation or attempted sexual exploitation.
- (c) "Neglect" means negligent treatment or maltreatment of a child. Such negligent treatment or maltreatment includes the failure to provide adequate food, medical treatment, clothing, or shelter. The failure to provide medical treatment is neglect, provided that the parents or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child is not, for that reason alone, to be considered a negligent parent or guardian. Such an exception, however, does not preclude a court from ordering that medical services be provided to the child where his health requires it.

(3) For the purpose of screening and accepting reports of child abuse/neglect that are received by the Department, the following Departmental definitions of abuse and neglect are used:

- (a) The definitions of physical abuse indicate a non-accidental injury or threatened injury to a child. Physical abuse which is directly attributable to a physical act of a perpetrator include:
 - 1. Death;
 - 2. Brain damage or skull fracture;
 - 3. Subdural hematoma and/or internal injuries;
 - 4. Burns and/or scalding;
 - 5. Consumption of poisonous or noxious substances; i.e., any substance other than mood altering chemicals or alcohol, taken into the body in ingestion, inhalation, injection, or absorption that interferes with normal physiological functions. Virtually any substance can be poisonous if consumed in sufficient

quantity; therefore, the term poison more often implies an excessive degree of dosage rather than a specific group of substance;

6. Wound; i.e., injury to child's body cause by a knife, gunshot, or other potentially lethal weapon;
7. Bone or cartilage fractures (other than skull);
8. Cuts and/or bruises, including those received in corporal punishment, with consideration given to the following factors;
 - (i) The child's age;
 - (ii) The child's medical condition, behavioral, mental or emotional problems, developmental disability, or physical handicap;
 - (iii) Severity of the cuts/bruises (size, number, depth, extent of discoloration);
 - (iv) Location of the cuts/bruises;
 - (v) Whether an instrument was used on the child; and
 - (vi) Previous history of indicated abuse or neglect.
9. Human bites;
10. Sprains and/or discolorations;
11. Substance misuse; i.e., the giving of mood altering substances [includes cannabis (marijuana), hallucinogens, stimulants (including cocaine), sedatives (including alcohol and valium), narcotics or inhalants] to a child by the perpetrator or the child misusing mood altering substances at the encouragement or insistence of the perpetrator;
12. Tying, close confinement, or bizarre discipline; i.e., disciplinary actions, events, and/or devices used in an attempt to set behavioral standards or to modify behavior, which are markedly unusual, eccentric, irrational, the disciplinary situations, and which cause, or place the child at risk of, physical injury, severe mental injury, or the removal of basic needs; and

(b) The definitions of neglect indicate a failure by the parent/caretaker to meet minimum standards of care to keep children physically safe, free from ill health, and with a modicum of environmental comfort and include:

1. Neglect due to blatant disregard of parent/caretaker responsibilities; i.e., incidents where the risk of harm to the child is so imminent and apparent that it is unlikely that a parent or caretaker would have exposed the child to such danger without exercising precautionary measures to protect the child from harm. The following results of blatant disregard are considered neglect:

- (i) Death;
- (ii) Brain damage or skull fracture;
- (iii) Subdural hematoma and/or internal injuries;
- (iv) Burns and/or scalding;
- (v) Consumption of poisonous or noxious substances; i.e., any substance other than mood altering chemicals or alcohol, taken into the body by ingestion, inhalation, injection, or absorption that interferes with normal physiological functions. Virtually any substance can be poisonous if consumed in sufficient quantity; therefore, the term poison more often implies an excessive degree of dosage rather than a specific group of substance;
- (vi) Wounds; i.e., injury to child's body caused by a knife, gunshot, or other potentially lethal weapon;

- (vii) Bone or cartilage fractures (other than skull);
 - (viii) Cuts and/or bruises, including those received in corporal punishment, with consideration given to the following factors;
 - (I) The child's age;
 - (II) The child's medical condition, behavioral, mental or emotional problems, developmental disability, or physical handicap;
 - (III) Severity of the cuts/bruises (size, number, depth, extent of discoloration);
 - (IV) Location of the cuts/bruises;
 - (V) Whether an instrument was used on the child; and
 - (VI) Previous history of indicated abuse or neglect.
 - (ix) Human bites;
 - (x) Sprains and/or dislocations; and
 - (xi) Substance misuse including the failure of the parent/caretaker to take responsible actions to prevent the child from misusing mood altering substance [includes cannabis (marijuana), hallucinogens, stimulants (including cocaine), sedatives (includes alcohol and valium), narcotics or inhalants]. Fetal syndrome or drug withdrawal at birth (excluding Methadone withdrawal) caused by the mother's addiction to drugs is considered child neglect;
2. Failure to provide supervision, care, guidance, and/or protection, thus placing the child in a situation beyond his ability to cope, at risk of physical harm, at risk of sexual or other exploitation, or the commission of criminal acts, engagement in substance abuse and/or status offense;
 3. Abandonment; i.e., the legal caretaker's relinquishment of caretaking and responsibility which results in the current risk of harm to the child;
 4. Failure to provide or have available food adequate to sustain normal functioning, and to prevent nutritional deficiencies, significant or continuing illnesses, diseases, developmental delay or impairment of physical and mental functioning;
 5. Failure to provide or seek to provide shelter which is safe, healthy, and sanitary and which protects the child from the weather elements and from environmental hazards in the dwelling and on their property, which have the potential for injury, illness, and/or disease and which are under the control of the parent/caretaker;
 6. Failure to provide adequate clothing. A child is inadequately clothed if the clothing is consistently dirty, torn, too large or small, worn thin, or the clothing is not suitable for weather conditions;
 7. Failure to provide physical care which results in personal uncleanliness. Personal hygiene is inadequate if it results in social ostracism of the child or presents a threat to the child's health;
 8. Failure to seek, obtain, and follow through with a complete diagnostic study or medical, dental, or mental health treatment for a health problem, symptom, or condition which, if untreated, could become severe enough to represent a danger to the child. However, any child who in good faith is under treatment by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall not, for that reason alone, be considered to be

neglected under any provision of these definitions, unless the judge in a court of law shall find that it is in the best interest of the child for the court to take jurisdiction. Failure of parent(s) to obtain immunizations for their child or failure of parent(s) to sign permission slips for school physicals is not considered neglect in and of itself; there must be some other allegation or home situation which might cause harm to the child (refer to Rule 660-5-34-.05(3) for medical neglect of handicapped infants under one year of age);

9. Educational neglect, i.e., any minor aged seven to sixteen, who is not meeting mandated educational requirements with the consent, encouragement or insistence of the parent/caretaker; and
10. Failure to thrive; i.e., a serious medical condition most often seen in a child under one year of age whose weight, height, and motor development falls significantly below the average growth rates of normal children and is determined to be non-organic in nature. The perpetrator must be directly involved/responsible.

(c) Emotional Abuse/Neglect (mental abuse/neglect) is defined as injury to the intellectual or psychological capacity of a child as evidenced by substantial impairment or a threatened impairment of intellectual, psychological, or emotional well-being and functioning of the child with due regard to his/her culture.

1. Mental abuse includes, but is not limited to, rejecting, intimidation, ridiculing, belittling, excessively guilt-producing, hostile, or violent behaviors and exposure to such behaviors.
2. Acts of exploitation include the frequent and inappropriate expectations or demands on a child to perform tasks and chores which emotionally or physically exhaust, deplete, or weaken the child.
3. Mental injury also occurs in custody struggles in which the child is a pawn between the two parents and/or other relatives.
4. The scapegoating of one child in a family or the placement of excessive work demands on a single child.
5. Mental neglect is the failure to meet the child's basic emotional needs due to highly erratic parental behavior or a chaotic lifestyle which provides an unstable environment for the child and which offers the child no opportunity to develop the capacity to relate to others.

(d) Sexual abuse includes;

1. Sexual exploitation - the sexual use of a child for sexual arousal, gratification, advantage, or profit;
2. Sexual molestation - sexual conduct with a child when such contact, touching, fondling or interaction over or under the child's clothes is used for arousal or gratification of sexual needs or desires;
3. Sexual penetration - any intrusion or entrance, however slight, between the sex organ, mouth or anus of one person and the sex organ, mouth or anus of another person. Sexual emission or release is not required; and

4. Sexually transmitted diseases - diagnosis of any sexually transmitted infection in a child who is prepubertal but not neonatal. The presence of any sexually transmitted infection in older children may also be due to sexual abuse. The disease may include, but is not limited to gonorrhea, syphilis, genital herpes, non-gonococcal vaginitis, proctitis, chlamydia, and HIV/AIDS.

C. Sexual Abuse

Professionals who work with child sexual abuse tend to develop their own "operation" definitions. Many define the problem in terms of sexual assault, child rape, child molestation and incest. These terms focus on specific aspects of the problem but do not address the overall problem. One definitional approach uses the term "sexual victimization," emphasizing that the children are victimized because of their age, naivete and relationship with the offender rather than being victimized by the aggressive intent of the abuse behavior. Using this conceptual framework, a "clinical" definition would include: 1) a description of what occurred; 2) information about age and stage of development of the persons involved; 3) an understanding of the nature of the relationship between those involved; 4) a description of the attitudes, reactions and responses of other family members; and 5) the prevailing cultural attitudes about sexuality in the community.

Differences in definitions create differences in philosophical approaches on how to respond to child sexual abuse. There is a basic dilemma about whether child sexual abuse should be regarded as a crime, a form of mental illness or — particularly in cases of incest — as a major symptom of broader family dysfunction." In Alabama, the Alabama Department of Human Resources is responsible for handling all reports of child sexual abuse, regardless of the relationship of the perpetrator to the child.

1. Incidence

Females experience greater susceptibility to sexual abuse. The rate for females, as reported in the National Incidence Study, is nearly four times the rate for males. Boys, however, are less likely to report sexual abuse because they fear people will think they are less masculine and/or unable to protect themselves. Perpetrators are usually males and usually members of the victim's household, relatives, neighbors or acquaintances. (*2)

2. Family Dynamics of Sexual Abuse

There are important distinctions to be drawn between physically and sexually abusive families. Physical abuse may be a result of inadequate parenting skills, over disciplining, unrealistic expectations, and excessive stress. In contrast, sexual abuse is usually a premeditated, psychological process in which the child is selected or groomed by the abuser to be his or her sexual partner.

Two of the most well formulated and professionally accepted conceptual frameworks for understanding child sexual abuse are "The Child Sexual Abuse Accommodation Syndrome" by Dr. Roland Summit and "Four Preconditions: A Model" by David Finkelhor.

Dr. Summit described a cluster of characteristics typical of sexually abused children. The Syndrome includes five categories, two of which deal with vulnerability of children, and the other three with their reaction to a profoundly abnormal and uncontrollable situation. These are:

1. Secrecy
2. Helplessness
3. Entrapment and Accommodation
4. Delayed, Conflicted and Unconvincing Disclosure
5. Retraction

1. Secrecy must be maintained by the offender in order for the abuse to continue. The secrecy is maintained by psychological and physical threats and coercion. The need to keep the secret is both the source of fear and promise of safety. "Everything will be all right if you just don't tell." This has created an assumption that uncomplaining children are acting in a consensual relationship. It is important to recognize that compliance is not consent.
2. Helplessness: In fact children do not have the ability to say no to adults in authoritative positions because they are dependent on them for affection and survival.
3. Entrapment and Accommodation: By the time the child realizes the behavior is abusive or unbearable she must accommodate herself in whatever way necessary to survive and not be the source of family disruption.
4. Delayed, Conflicting, Unconvincing Disclosure. Most sexual abuse is not disclosed. Disclosure is an outgrowth of overwhelming family conflict, accidental discovery, or increased public awareness of the signs and indicators of abuse. Particularly in ongoing abuse there will be a "merged memory" of the different incidents occurring over time so that the child's descriptions often lack clarity and cohesiveness. This inability to give precise dates, times, etc. creates skepticism about the reliability of children's disclosures if professionals are unaware of the dynamics of disclosure, as well as child development concepts that influence children's recall and verbal expressions. (See Chapter XIII)
5. Retraction. Because of the (still) prevalent climate of disbelief among professionals and the public the child often alters or retracts her statement about abuse. This is a common dynamic in child sexual abuse and does not indicate a false report. (*3)

Besides the Accommodation Syndrome, sometimes the retraction is also caused by professionals who are untrained and/or unaware of the process of disclosure. Disclosure of abuse is not a one time event. It is a process of progressive disclosure over time that allows the child to move through tentative to full disclosure. (*4)

Little is known about the behaviors and characteristics of mothers who engage directly in incest with their sons or daughters. However, their potential for involvement should not be routinely discounted. (Similarly, the potential for sexual abuse of

young children by their older siblings should not be overlooked.) Because the vast majority of known cases involved fathers engaged in sexual activity with their daughters, research has produced more information on father-daughter incest than on the other types. (Dr. Summit has since written another article entitled "Abuse of the Child Sexual Abuse Accommodation Syndrome" which is especially helpful in relation to legal proceedings.)

According to social scientist David Finklehor, whether intrafamily or extra familial sexual abuse, four "pre-conditions" must be met for sexual abuse to occur: 1) The potential offender must have some motive to have sex with a child. 2) He or she must overcome internal inhibitions against committing abuse. 3) He or she must overcome external impediments to committing abuse. 4) The offender or some other factor must overcome the child's possible resistance to the abuse. (*5)

Last, it is important to remember that child sexual abuse occurs in families from all classes, races, ethnic groups and religious, educational, economic and social background. When the incident is disclosed, the family is usually experiencing extreme crisis. Each family member needs to be dealt with sensitively. In many cases the child is faced with an overwhelming ambivalence about the sexual abuse. In families where there is a "social position to maintain" or the child feels a family loyalty, there is great internal pressure not to disclose. As the child experiences greater discomfort with the abuse, the resulting behaviors in these cases can be runaway, attempted suicide, delinquent acts, etc. anything to achieve removal rather than the disclosure of the sexual abuse. (*6)

The non-offending parent is the crucial factor in the recovery of the child. In most cases the non-offending parent is the mother or female caretaker and the majority of victims are females. She can be the most definitive factor either positively or negatively. If she is supportive the child is not faced with divided loyalty or anxiety regarding protection or separation from her family. Sometimes the non-offending parent is unable to be supportive because of her own psychological, and/or financial dependency needs or difficulty separating her own abuse issues from those of her child. In these cases the child is more likely to alter her statement or recant.

Often the child will not disclose to the non-offending parent for a variety of reasons. These can include fear of not being believed; an instinctive knowledge that this parent cannot do anything even if they do believe; the child's fear that she has become the "rival" in this situation; and perhaps the worst of all, that this parent will choose to side with the offender, leaving her with no parental support.

3. Considerations in Sexual Offender Evaluations

Research currently indicates that no profile characteristic of or unique to child sexual abusers exists. Evaluation data provides little useful information when making legal or child protective decisions in cases involving offenders who are denying. It must be recognized that no psychological testing approach, regardless of its reliability or validity, can determine whether someone has committed a specific offense.

The MMPI (Minnesota Multiphasic personality Inventory) is one of the most frequently used instruments in the assessment of sexual offenders. The majority of the MMPI literature suggests that individual offenders against children vary tremendously in their psychological functioning as measured by the MMPI. There is no particular profile that indicates a propensity for sexual offending. A large number of offenders may show no measurable psychopathology.

The penile plethysmography is also often used in assessing sexual offenders and profiling them. However, there is little evidence for using sexual arousal data to profile an offender. Much of the research is based on group data which does not necessarily reflect the individual. It is also important to note that the offender who denies, or in incest cases, the most frequently observed profiles are likely a nondeviant arousal pattern or a pattern of low arousal to all of the stimuli. This does not prove they are not offending.

Although there is no known historical variable that will consistently differentiate child molesters from others, extensive and comprehensive evaluations of sexual offenders or alleged sexual offenders are crucial. They can be a valuable tool in planning and monitoring treatment with the overall goal of preventing child sexual abuse. However, a proper offender evaluation does not consist solely of psychological testing. Psychological evaluations alone cannot substitute for facts, investigation, and legal evidence. (*7)

It should also be emphasized that therapists experienced in treating sexual offenders require at least a minimum admission of guilt before accepting offenders for assessment and treatment being defined most often in terms of control, not cure.

D. Physical Abuse

Many caretakers of children, including parents have the capacity to strike out in anger, fear, pain or frustration. This capacity defines them as potential abusers. Yet, most are able to control violent impulses. Past life experiences, combined with certain family dynamics and environmental factors, contribute to the abusive parent's inability to control violence. Sometimes parental misuse of substances (alcohol and/or other drugs) exacerbates the problem. Alcohol and other drugs lower inhibitions that would normally control impulsive behavior.

1. Family Dynamics

Each member of a family affects every other member in some way. Some parents and children are fine on their own, but just cannot get along when they are together, especially for long periods of time. Troubled childhood histories tend to create troubled marriages. Serious marital discord, including spouse abuse, frequently exists in families where child abuse occurs. When parents are alienated from each other, isolated from friends and extended families and are unable to turn to others for emotional support in times of stress, one or more children may become the family's scapegoat — the target of maltreatment.

Certain common characteristics include:

- * a firm commitment to maintain a tight boundary between the family and the outside world;
- * strong, inflexible family rules, particularly a rule to maintain secrecy about abusive incidents;
- * unclear boundaries and roles within the family that may be inappropriately reversed at times, such as expecting the child to be the provider of emotional support; or one of the parents taking the role of a child rather than adult
- * limited capacity to cope with change as needed;
- * unstated or inappropriate expectations of family members;
- * difficulty setting or enforcing appropriate limits;
- * unclear values; and
- * an indirect system of communication among family members evidenced by difficulty expressing feelings and needs verbally i.e. one family member dominating all others.

Changes in financial condition, employment status or family structure may shake a family's stability. For some families, environmental changes may be positive, but, for others the stress resulting from the changes may have a negative effect. Stress makes some parents vulnerable to abusive behavior; there is a tendency to deal with stress by striking out, by reducing tension through aggression.

Perhaps the family characteristic most often cited as contributing to abuse is social isolation. Studies repeatedly show that abusive families are isolated families. They have little access to peer and family support systems, or other networks of social support. They have no one to help relieve them of the burdens of child care or other sources of stress or family crises. They have no one to help them realize that the expectations they are placing on their child or themselves may be unrealistic. (*8)

E. Emotional Abuse

Emotional abuse is almost always present when other forms of child maltreatment are identified. It is the most difficult form of abuse to define and diagnose, and many believe the most prevalent, devastating and crippling.

Mental injury occurs in custody controversies in divorce cases where one parent makes denigrating remarks about the other parent. This undermining of parental respect and engaging the children in the parental conflict takes its toll on the child's self-esteem.

Overtly or covertly pressuring the child to choose between parents and an emotional splitting of loyalties can be very damaging and guilt producing.

A determination of emotional abuse becomes more difficult in less obvious examples. A single demeaning verbal assault on a child may be emotionally devastating but not emotionally abusive; however, a persistent and chronic pattern of verbal assault may result in emotional abuse. Many parents who set high standards for their child's behavior and are strict are not abusive. However, when the standards become so unrealistic that a child can never reach them, and the parent is constantly critical of the child's failure, this may signal emotional abuse.

Scapegoating often occurs in emotionally abusive situations. Often one or two children are the target of all the family's denigration.

1. Diagnostic Criteria

Four criteria help differentiate the less obvious acts of emotional abuse from ineffective or even occasionally harmful parental behaviors toward children: first, emotional abuse is a pattern of behavior that has an effect on the child. It causes mental injury; second, the negative effect can be observed in the child's performance and behavior; third, the effect is long-lasting. The child's intellectual and/or psychological capacity is affected by the abuse (in other words, the child's reaction is more than temporary unhappiness or angry "acting out" behavior); and fourth, the effect of the emotional abuse constitutes a handicap to the child. It causes demonstrable harm or substantial impairment of the child's ability to function as a person, to think, learn, maintain lasting relationships and find satisfaction in personal endeavors.

Although emotional abuse is rarely prosecuted, it is a recognized form of maltreatment that needs to be acknowledged and fully pursued for remedy when appropriate. (*9)

F. Neglect

1. Chronic, acute, prognosis

Neglect is generally a matter of acute or chronic omission characterized by failure to provide for the child's basic needs for food, clothing, shelter, supervision, affection, education and medical care. For the chronic long-term forms of neglect it is often intergenerational and the prognosis for change is poor and treatment will need to be provided on a long-term basis. The recent neglect is often crisis-driven, isolated from extended family patterns, and the prognosis is broad. The parent or caregiver responsible for the child may either deliberately or by blatant disregard exhibit neglectful behaviors. Child neglect, like physical abuse, may prove lethal. In abandonment or poor supervision of very young children, driving with the child while intoxicated, and delay in obtaining urgently needed medical care, the risk of death is obvious.

2. Categories

There are three basic categories of neglect delineated in the 1986 National Incidence Study: physical neglect, educational neglect and emotional neglect. A review of specific forms in each category follows.

- * Physical neglect includes the parents' or caregivers' failure to provide or allow needed health care; failure to seek timely and appropriate medical care for a serious health problem; abandonment of the child; expulsion of the child from the home or refusal to accept custody of a returned runaway; unwillingness to maintain custody of the child, exhibited, for example, by chronically and repeatedly leaving the child with others for days or weeks at a time; inadequate supervision; and/or reckless disregard of the child's safety and welfare as evidenced by inadequate nutrition, clothing or hygiene and conspicuous inattention to avoidable hazards inside and outside the home.
- * Educational neglect includes situations where the parent permits chronic truancy, fails to register or enroll a child of mandatory school age, or often keeps a school-age child home for non-legitimate reasons, and/or refuses to allow or fails to obtain recommended remedial educational services without reasonable cause.
- * Emotional neglect includes marked inattention to the child's needs for nurturing, stimulation and affection; chronic or extreme exposure to spouse abuse, encouraging or permitting the child to use drugs or alcohol or engage in other maladaptive behaviors; refusal to obtain needed and available psychological care, or undue delay in obtaining that care; and/or other forms of inattention to the child's developmental and emotional needs.

Child welfare staff are more likely to encounter cases of child neglect than any other form of child maltreatment. Yet, neglect has not received the attention that the scope and severity of the problem seem to indicate. Child fatalities and severe injury are as frequently associated with neglect as with physical abuse. Children placed in foster care are twice as likely to be neglected as abused and neglected children tend to remain in foster care twice as long.

3. Family Dynamics

Many of the dynamics previously described also characterizes families in which neglect occurs. In addition, parents in such families reveal a high incidence of chronic depression and they exhibit poor judgement and an inability to learn from experience.

In families where chronic neglect is a problem, life tends to be marked by crisis, chaos and disorder. Difficulties in coping extend beyond child rearing into numerous aspects of family life. Roles of family members are often confused and reversed. (For example, the parent may play the role of older sibling competing with the children over whose needs will be met.)

In contrast to families experiencing chronic neglect, there are those whose neglectful behavior is a temporary response to personal or situational factors. Divorce, serious physical illness, depression resulting from a loss, etc., may cause a family to lose its equilibrium. Other families may experience particular difficulties meeting their child rearing responsibilities during a demanding stage of a child's development. One family may experience great difficulty in meeting the dependency needs of an infant while another may experience great difficulty in responding appropriately to an adolescent's needs for independence. (*10)

In contrast to parents who abuse, parents who neglect may have less attachment or emotional investment in their children. Often, the neglective parent will have a greater tendency to "drift away" when the child has been removed from the parents' custody.

CHILD MALTREATMENT FOOTNOTES

*1 Alabama Certification Training Resource Guide-Assessment, Division of Family and Children's Services, 1992, Child Welfare Institute, Atlanta, Georgia. See: "Understanding Child Abuse and Neglect", Cynthia Ragan, pp. 51-52.

*2 Ibid., Ragan, p.56.

*3 Child Abuse and Neglect, Vol. 7, 1983, "The Child Sexual Abuse Accommodation Syndrome", Roland C. Summit, M.D., pp. 181-188.

*4. How Children Tell: The Process of Disclosure, Teena Sonensen, R.N., M.A., Barbara Snow, D.S.W., Salt Lake City, Utah. Presented at the 8th National Conference on Child Abuse and Neglect.

*5 Child Sexual Abuse: New Theory and Research, Chapter 5, 1984, "Four Reconditions: A Model", David Finkelhor, pp. 53-68.

*6 Legal Representation of Kentucky's Children: A Guide for the Guardian ad Litem, 1992, Office of the Attorney General, Victim's Advocacy Division, Commonwealth of Kentucky. See "Child Abuse and Neglect: An Introduction", David Finkelhor. "Child Sexual Abuse! New Theory and Research", 1984, pp.56-57.

*7 The APSAC Advisor, Vol. 7, No. 1, Spring, 1994. "Offender Treatment — The Perils and Pitfalls of Profiling Child Sex Abusers", William D. Murphy, Terri J. Rau, and Patricia J. Worley, pp.3-4.

*8 Alabama Certification Training Resource Guide—Assessment, Division of Family and Children's Services, 1992, Child Welfare Institute, Atlanta, Georgia. See: "Understanding Child Abuse and Neglect", Cynthia Ragan, pp. 57.

*9 Ibid., Ragan, pp. 62-63.

*10 Ibid., Ragan, pp.60-63.

CHAPTER XI

COMMUNICATION WITH CHILDREN

Communicating effectively with children, particularly children who have been abused or neglected, requires special skills in the use of language and in building rapport. The following suggestions are included to assist the GAL in putting children at ease, explaining what is going to happen in the dependency or termination action, determining the child's wishes regarding placement and related issues, and eliciting information regarding the allegations of abuse or neglect, as appropriate.

A. Initial Contact: Practical Suggestions

1. Location

Select an appropriate place to meet the child. Choose a safe environment, one in which the child can speak freely without threat of reprisal. If the child attends school, try to avoid removing the child from class in order to conduct the conversation. The child may already have missed class time while being interviewed by the child protective service worker. Such interruptions also may expose the child to embarrassment or ridicule by his or her classmates. If the conversation is to take place at the child's home, spend a few minutes talking to the parent in the presence of the child while the child becomes accustomed to you and you get "approval" from the parent to talk with the child privately.

2. Participants

Ask the child if she would like to have the social worker, therapist or someone else who is the same gender as the child to be present, as appropriate. If, for example, a female child has been sexually abused by a male and her GAL is male, she may feel more at ease talking with another female present.

3. Establishing rapport and level of development

Put the child at ease. Greet the child by name and introduce yourself. Position yourself on the same spatial plane as the child at a distance of four to five feet so that the child does not feel physically intimidated. Do not touch the child; let the child initiate touch. Sit in a relaxed position, leaning back slightly, in an unhurried manner. Make small talk about the child's current activities or the child's interests, and recognize the child's achievements. Share personal information that the child can relate to, for example, that you have pets, a child of similar age, or a favorite ball team. Avoid constant, very direct eye contact, which the child may perceive as intimidating. Instead, alternate between glances at the child and glances in whatever direction the child is looking. Get a feel for the child's level of development, particularly the child's language skills and cognitive abilities. For example, determine whether the child can read and write, recite the alphabet, count, and understand concepts of time and sequence of events. Use the child's own terminology throughout the conversation and clarify unfamiliar or ambiguous terms.

If, for example, the child mentions "Dadaw", ask the child to identify that person. If that is the title the child uses for his or her mother's father, use the term "dadaw" in discussing the child's maternal grandfather.

4. Explanation of GAL role

Explain your role as GAL. Once the child relaxes, explain in language appropriate to the child's age and development, what a lawyer does, and why you are talking with him or her: "I'm a lawyer. Do you know what that means? A lawyer is someone who talks to people who have problems and tries to help them. I'm a special kind of lawyer. The people I talk to are children. I listen to their problems and try to help. Someone has said there have been some problems at your house. I'm here to talk to you about some of the ways I would like to try to help you." (See Section B, Child Development Concepts that Relate to Communication with Children) for a discussion of age appropriate language.) It may also be helpful to ask whether the child knows why you are here. The child's response may provide useful information regarding his or her expectations for the visit and the type of information that has been provided by the parents or the social worker.

5. Explaining legal hearings and processes

Explain anything you will be doing that might be intimidating to the child, such as taking notes or recording the conversation. Tell the child that adults, like children, sometimes forget things and that you are going to take notes to help you remember what he or she has said.

6. Child's input

Explain to the child in a step-by-step fashion what will happen in the dependency or termination action as it impacts on the child, for example, how many times the child's parent will be going to court, what will happen at each hearing, what you will be doing at the hearing, and what will happen to the child after each hearing is over.

7. Closing

After providing information about what will happen, focus the conversation on the child's concerns. Ask whether there is anything he or she would like to tell you, whether there is anything he or she might be worried about. Let the child direct this portion of the conversation. Use clarifying questions and prompts as necessary, but try to avoid repeating questions or asking a series of questions in rapid sequence. Elicit and address the child's concerns regarding the child's current placement, the effect of any existing court orders on the child and his or her family, and related issues. Provide reassurance as appropriate, but be truthful. Explain how you will use any information the child has provided and what will happen next. Thank the child for his or her cooperation and reiterate that talking about his or her concerns is the right thing to do. Then, close the interview by making small talk as a way to round out the interview. (*1)

B. Child Development Concepts that Relate to Communicating with Children

Application of the above listed suggestions is contingent on understanding child development concepts that guide how children think and communicate at each stage of their development.

Of particular significance is how their memory and language abilities combine to produce age related linguistic styles. Knowing general parameters of children's linguistic capabilities helps the guardian adjust his own style to the receptive and expressive language of the child.

The most important thing to remember in relating to children is that they are not miniature adults. Never the less, they generally know more than they can spontaneously recall or recount, even in non-stressful situations. They often need communication aids to cue their memory. These memory cues and props also serves to induce the likelihood of suggestive or inappropriate questioning by encouraging spontaneous verbal expressions and demonstrations. Play things like dolls, puzzles, crayons, markers, etc. are used to help children relax and begin to establish the rapport necessary for honest and productive communication.

Older children and adolescents also benefit from "distancing" techniques like paper and pencil exercises, drawing, and sentence completions while they are adjusting to yet another adult who is supposed to be helpful to them in some way. Asking for facts and feelings about painful things does not feel like help to children. The guardian must overcome the child's communication limitations as well.

The following material is organized to provide information crucial to communication with frightened, confused children who have no concept of what an "Interview" is supposed to be about.

1. Basic Principles

All models of child development recognize the importance of two developmental principles:

- a. Attachment. The process of emotional attachment to another person has developmental stages throughout life. It is a critical process in understanding behavior in children. When the psychological bond between mother and infant is fragile or fractured, nutritional deprivation ("failure to thrive") can occur. A school age child with insecure attachment may "attach" to a gang or drugs, or to an attentive abuser. Loss of attachment can be compensated for by forging a bond with a teacher, therapist or relative.

Abused children have histories of insecure, inadequate or unhealthy attachments that influence the way they relate to all adults. Knowing a child's history prior to the initial contact will help the GAL determine realistic expectations and tailor his approach to the child's needs. This approach protects him from the "Abused Child Profile" myth that undermines establishment of a working alliance based on a child specific assessment.

b. Regression is a psychological and/or physical response to stress. Some forms of regression represent a healthy psychological defense against unbearable pain or fear. (Example - child losing language or toileting skills in response to abuse.) This should not be interpreted as abnormal unless it persists over time, in which case it becomes a symptom of distress. For example, if a child is exhibiting behavior that is very immature for the child's age and is behavior that the child has outgrown i.e. a six-year old begins sucking her thumb or bedwetting, etc. during a custody visitation modification, the guardian needs to assume an active role with the parents, emphasizing the need to avoid degrading, accusative, or suggestive remarks that clearly are not in the best interest of their child.

2. Stages of Development

Each stage of development poses important questions and tasks that must be accomplished in order to move into the next stage with optimal timing and efficiency. "Milestones" of development in motor, language, cognitive, emotional, and moral spheres measure the degree of success a child has achieved. If a particular milestone is not achieved, you need to ask: What factors have limited the development? (*2)

1. Toddler Stage: Before age three children are developmentally limited in their ability to communicate verbally with clarity, consistency, or continuity. They communicate primarily through behavior and play re-enactment of what they have observed and/or experienced.

Language skills emerge - either slowly or abruptly - at this stage. Most infants can express two or three words other than "mama" or "dada" at their first birthday. By two years of age they can express fifty to two hundred words while combining words into short phrases. Especially important, the second year of life represents a time to acquire the ability to understand words. Receptive language (what we understand) is acquired before expressive language (spoken speech). A toddler at 18 months of age may express only ten to twenty words but may understand three hundred words. (*3)

A child may also be able to use words without understanding their meaning and implications. Children under four years of age may be more suggestible than other children under certain circumstances. There is some evidence that persistent, intimidating, and leading questions over a period of time by authoritative adults may result in desired response about peripheral details but not about information that has emotional significance for the child. Errors of omission, rather than commission, are usually the type of unreliability reported in the research literature.

2. Preschool Stage - (3-6 years of age): The toddler who has achieved milestones of autonomy through motor, language, and social skills enters the preschool period with an amazing repertoire of new abilities. This is the stage of fantasy and magical thinking. Idiosyncratic thoughts predictably enter the child's consciousness and inanimate objects take on a live quality that immediately affect the lives of child ("Why does the sun come up in the morning? - So I can eat breakfast and go to

school!). Imaginary friends, make believe play and fascination with fairy tales exemplify the preschool stage. These activities reflect a higher level of thinking as the brain matures to allow new forms of symbolic thought. The expression of magical thinking through fantasy and play is critical to the development of a healthy ego or sense of self. (*4)

Toddlers are quite able, however, to distinguish fact from fantasy and respond knowingly to a question of "Is what you're staying real or pretend?"

Preschool children can give limited accounts of (1) what has happened to them, (2) where it happened, (3) who was there, and (4) who did it. They think in very concrete terms, can only relate to one idea at a time, and do not always express pronouns, prepositions and conjunctions accurately. They give accurate but incomplete accounts if asked to provide a narrative of an event. But with the aide of verbal and physical cues and props to reconstruct the context in which the event occurred, they can give up to fifty or sixty percent more details.

3. Children's Use of Language

Many of the criticisms lodged against child victim/witnesses stem not from children's inability to recall situations but from their questioners' inability to use language in a way that enables children to tell what they know. Listed below are some general observations about the ways in which children develop language skills and some suggestions for using this information to improve communication.

1. Children's ability to use certain words in grammatically correct sentences does not always reflect their mastery of the concepts which correspond to those words. Between the ages of two and six, a child's vocabulary typically increases from 50 words to 8,000 to 14,000 words. However, the child's mastery of the underlying concepts for these words may not occur at the same time. Because children have a great facility for mimicking language, this discrepancy may not be readily apparent to the casual listener. For example, a four-year-old, when asked by his great aunt what he had learned in nursery school, responded, "Don't talk to strangers. Aunt Pat, are you a stranger?" Conversely, a child may have mastered concepts but apply the wrong label, for example, the child who clearly understands the concept of size but confuses the terms "big" and "little."
2. Children learn the concepts necessary for relating an incident in narrative fashion in the following sequence: "what," "who," "where," "when," and "why." The specific ages at which children learn these concepts may vary, but the sequence appears to be universal. Table 1 lists the developmental milestones for children's acquisition of these concepts. (*5)

Table 1. DEVELOPMENTAL MILESTONES: ACQUISITIONS OF NARRATIVE CONCEPTS

Developmental Age Milestones

2 - 3

1. Can answer closed-ended questions about "what happened" such as, "Did Granny put Timmy in the bath tub?"
2. Can identify the important people in his or her life, especially people the child has known over time.
3. Can give little or no information in response to "where" questions, whether closed-ended or open-ended.
4. Can give little or no information in response to "when" questions, whether closed-ended or open-ended.
5. Can give little or no information in response to "why" questions, whether close-ended or open-ended.

4 - 5

1. Can answer some open-ended questions about "what happened."
2. Can answer questions about "who" consistently and reliably.
3. Can answer some "where" questions by describing the location in relationship to someone he or she knows or by description but not by address or neighborhood.
4. Can answer "when" questions with some descriptive information ("when it snowed").
5. Can give little or no information in response to "why" questions, whether close-ended or open-ended.

6 - 8

1. Can give detailed answers to questions about "what happened."
2. Can answer questions about "who" consistently and reliably.
3. Can answer questions about "where" with significant detail. May or may not be able to give complete address.
4. Can answer "when" questions with descriptive information ("when my grandpa came to visit in the summer"). By age 10 to 12, many children may be able to give specific dates.
5. Can answer "why" questions. Responses will be concrete and may reflect what the child has been told by others ("because he loves me best").

In general, preschoolers may have difficulty with concepts related to time, including the order of events and the intervals between them, and the concepts of distance and speed. Older preschoolers, however, may be able to place events in time based on where they occurred or other events that occurred in close proximity. Example: "It happened when we lived in our house in Ohio." "It was when Mommy was in the hospital with the baby."

3. Young children use language that is simple, concrete, and literal. For example, when asked whether an event occurred in someone's house, the child may respond, "No." From the child's point of view, that is an accurate response because the incident occurred in an apartment, rather than a house.

4. Young children's mastery of syntax is incomplete. By age four or five, the child may be able to understand simple subordination introduced by "that," for example, "Is the person that promised to buy you the Barbie car here today?" However, pre-school children will have difficulty with other types of subordination (dependent clauses introduced by "if," "so," "before," "which," "when," "after," and "until), either because they require mastery of time concepts or because they require the child to think hypothetically, a skill which children do not typically master until they enter school. A solution to this difficulty in communication is to use the one-plus rule, that is, ask questions which include no more words than the number of years in the child's age plus one. An alternative strategy is to ensure that all sentences addressed to children, both statements and questions, contain only one main thought. The following example, adapted from an actual transcript, contains five separate propositions: "Did you tell them [1] that Jimmy touched you [2] because your grandma promised to take you to "King's Island" [3] or did you tell them that because [4] it was true [5]?" When presented with a question like this, children either process selectively and respond to the part they can understand or respond to the last part of the question, ignoring the rest.

5. Syntax may present an added difficulty in communication with children in that children younger than nine generally interpret the elements of a sentence sequentially. That means the child will have difficulty with passive voice. Thus, the child hears "Daddy hit Mommy" and "Daddy was hit by Mommy" as the same sentence.

6. Specific words may have different meanings for children than for adults. For example, the word "story" to an adult may mean simply a narrative account. To a child, however, a "story" may additionally mean a fabrication or a lie. Thus, to ask a child to tell his or her story and to tell the truth can create confusion.

7. Young children often fail to notice minor changes in wording. Thus, a child may appear to give inconsistent testimony when asked a series of questions with minor wording changes which significantly alter the meaning of the question. Such questioning is developmentally inappropriate for children, and the GAL should object in the event that i.e. occurs. (*6)

School Age Stage (6-12) covers a wide range of cognitive and language development. Children become increasingly fascinated with language and their mastery of it but do not be misled by their increased verbal skills. They still need the assistance of drawings and other communication aides to relax, establish rapport, and talk about what has happened to them. (Crayons, coloring books, play dough, etc.) They are increasingly influenced by other people outside of family. Consequently, it is important to be aware of significant influences in their lives.

Related to the ability to understand rules of socialization and learning is the development of a conscience - a sense of right and wrong. For the school age child, a conscience (or "superego") is often very concrete and demanding with little room for grey zones. The boundaries between right and wrong are clear and defined - a developmental phase that seems necessary to the later emergence of hypothetical thinking that is reached in adolescence.

The developmental problems that surface among school age children are a result of delays or distortions of these requisite skills. Learning disabilities, attention deficit disorder, conduct disorder, and school refusal are among these. Psychosomatic complaints (especially recurrent abdominal pain and headaches) are frequent symptoms among school age children who experience transient or chronic setbacks in the attainment of developmental skills. (*7)

8. Special considerations is given to communication with adolescents. Adolescence is divided into early (12-14), middle (14-16), and late (16-18) to emphasize the developmental differences and needs of each group. Even though young adolescents may appear very physically mature it is important to relate to them based on their cognitive/emotional development, not on their appearance. Their appearance and behavior belies their inability to use language to appropriately express facts and feelings.

Formal operational thought (the ability to consider a wide range of alternatives) begins in adolescence but probably exists in only 30-40% of all adolescents and adults. Their experience of abuse also interrupts normal development so you can assume that many/most adolescents will not be able to easily see or discuss an experience from the perspective of others. They think "As If" what they believe/wish is reality, making reasoning and confrontation ineffective ways of communicating with them. Instead, (1) express empathic understanding at their perspective, (2) realize that if they were abused after developing sexually characteristics they feel their appearance triggered abuse, (3) remember that their language is not usually an accurate indicator of their developmental status because the "in" language predominates, and (4) develop strategies that bypass these conditions. These include writing techniques and cognitive interview techniques.

A final difficulty teenagers who are at the concrete thinking level is their tendency to be "magical thinkers." This is a concept seen in early and mid-adolescents, which can cause considerable difficulty for youth, parents and society. It implies that the individual feels unique and that harm will not come to one because you are somehow special and immune to danger. This the young girl can be sexually active, refuse contraceptives and really be personally convinced that, though others may get pregnant, she will escape such a fate. Thus the teenage boy can drink heavily at a peer's party, and then drive home with friends - never worrying about a car accident. If you combine the concrete thinking skills with magical thinking, you have a very dangerous combination which justifiably can worry any parent! Youth are inclined to be impulsive and mistakes do indeed occur. If you tell a young concrete youth with magical thinking skills not to see a girlfriend or boyfriend with whom they

have formed a close relationship, you may find extreme impulsive reaction in some. They may not appreciate that this interruption of their relationship is not forever or that an impulsive reaction (as drug overdose) may be harmful as well as failing to solve the presented problem. Unfortunately, one can expect youth to make mistakes and the parents' reaction to such behavior can improve or worsen the entire situation. (*8) Help them understand the difference in bad judgment and abuse that occurs when the adolescent is somewhere they are not supposed to be, often doing something they should not be doing. Help the parents put the blame where it belongs.

Table 5

CHARACTERISTICS OF EARLY ADOLESCENCE

1. Preoccupation with Rapidly Changing Events of Puberty
2. Beginning of Symbolic Movement Away From the Home Environment
3. Comparison with Peers and Worry Over Perceived Abnormalities
4. Establishment and Maintenance of Same-Sex Friendships
5. Initial Abstract Thought Development

CHARACTERISTICS OF MIDDLE ADOLESCENCE

1. Significant Symbolic Movement Away From the Home Environment
 - a. Considerable need for independence
 - b. Strong reliance on peers setting personal rules
2. Major Change in Cognitive Abilities and Fantasy Life
3. Heterosexual Experimentation Predominates
4. Altruistic Nature Emerges
5. Identification with Non-Parental Adult Role Models

CHARACTERISTICS OF LATE ADOLESCENCE

1. Issues of Emancipation From Parents Essentially Resolved
2. Final Puberty Changes (Physiologic Fine Tuning) Occurs
3. Finalization of Secure, Acceptable Body Image and Gender Role
4. Establishment of "Adult" Versus Narcissistic Sexual Relationships; Acquisition of Adult Lifestyle
5. Considerable Energy Spent in Establishment of Vocational

When the legal professional is charged with evaluation of a child or adolescent, the key element is how the individual measures up to obtaining the above stated tasks. Is he or she acting appropriately at a particular stage? Is he or she precocious? Is he or she proceeding through these stages in a normal manner? Don't listen to the age but listen to what psychological stage the individual seems to be in - then see if the age matches.

It is important to remember that the child or adolescent must also be assessed in relation to her individual personality and communication style. According to Ann Burges, traumatized children display two distinct styles; expressive — where full expression is given of emotion; and controlled — where children deny the abuse by refusing to talk about it.

While all child maltreatment victims are not overtly traumatized, most of them have some P.T.S.D. symptoms of reexperiencing, avoidance and general unresponsiveness, and/or hyperarousal. Even if a child appears asymptomatic it is important for the GAL to recognize and express the "normalcy" of posttraumatic stress reactions to abusive situations.

C. Custody and Visitation

Although there is a presumption that there are more false allegations of child sexual abuse in custody/visitation disputes, research suggests that these cases are relatively rare and are no less likely to be "unfounded" than other reports. Less than 2% of reports in one study involved allegations of abuse. In a study funded by the National Center of Child Abuse and Neglect there were 2.5 children per 1000 children who were involved in unsubstantiated allegations. It is important to remember that unfounded or unsubstantiated does not mean an allegation is false.

Among the difficult decisions involved in these cases is whether the accused parent should be granted visitation. Recognizing a child's need to maintain contact with both parents and minimize feelings of abandonment and loss, it has become problematic in child sexual abuse when, where, and how these visits should be constructed.

Safety and control were taken from the child during victimization and must be guaranteed for him during visitation. Having his wish respected on whether or not to have visitation, gives back a sense of control and builds trust and respect for the system of people intervening in his life. When visits are forced or occur in an environment that does not feel psychologically and physically safe to the child, he feels he is being re-victimized and resorts to defensive behavior.

Most independent evaluators recommend withholding visitation during investigation and evaluation to avoid pressure for the child to recant, to allow unconflicted time to recall and recount the abuse and to express feelings in a safe environment.

If a report has been indicated the offender's therapist should assess the offender's ability to take responsibility for the abuse and arrange with the child's therapist a structured supervised visit. The visit should be supervised by a professional knowledgeable in the impact of victimization on children, child development behaviors, and dynamics of offenders. Family members are not appropriate supervisors because they are understandably biased toward members of their own family. Also in sexual abuse cases, there is a good probability of intergenerational abuse that produced the offender's behavior and prevents protective attitude.

During the visit, there should be agreed upon rules that include no whispering, note passing, touching or holding unless initiated by the child, and no discussion about the allegation and disclosure. It is crucial that the rules be enforced, that the visit is documented, and that it is terminated if the parent does not comply or verbally harasses the child or supervisor. Telephone contacts do not afford these protective measures and should be delayed until the evaluation is completed or a court disposition is made.

Unplanned visits can result in children having to repress their fears and emotions. Structured visits can help meet their emotional needs and help professionals meet their responsibility to protect and support abused children psychologically and physically.

If DHR personnel are appointed by the court to supervise visits, they should plan and coordinate them with the child's therapist. Notes should be taken by the visit supervisor and reviewed with the child and family's therapist on a regular basis.

D. Children as Witnesses

Historically, adults have discounted to varying degrees children's accounts of neglect and abuse. With the recent media focus of criminal prosecutions of sexual abuse in child care facilities, and allegations that parents coach children to relate accounts of sexual abuse as a weapon in child custody disputes, children's reliability as witnesses in cases involving neglect and abuse has come under increasing attack. Unfortunately, much of the research on children as witnesses has been done in laboratory situations, leaving open the question as to what extent the findings may be generalized to children's memory of real-life events. The following paragraphs summarize current research findings pertinent to children's ability to recall and recount events they have witnessed or experienced.

1. Children, like adults, sometimes lie. However, their motives for lying and the types of lies they tell differ significantly from those of adults, depending on the child's developmental stage. For example, children age three and younger generally lack the cognitive ability to process a lie. By age four or five, children may lie, but they are generally unable to sustain the lie. When they do lie, they lie to get out of trouble, that is, to avoid punishment, rather than to get into difficulty, which is what usually happens when a child recounts sexual abuse within the family. Additionally, they are more likely to lie by remaining silent rather than telling overt untruths. Children also may lie to express intense desires or to please parents, the most frequent cause of false allegations. Older children lie with approximately the same frequency, for the same reasons, and in the same way as adults.
2. The extent to which adults view children as credible witnesses corresponds, in many cases, to the degree to which children behave like adults. Children whose physical demeanor communicates poise and self-confidence are judged more credible than those who fidget or appear shy and insecure. Children's use of language also influences adult perceptions. The testimony of children who use simple statements of assertion, without qualifiers such as "kind of" and "I guess" which typify children's speech, is also judged to be more reliable.
3. Children's allegations of sexual abuse have been found to be fictitious in only a small number of cases, and most of those were adult-initiated. In distinguishing truthful from fictitious accounts, the presence or absence of certain "clues" can be helpful. Children's accounts of sexual abuse are considered more reliable if they:
 - 1) include explicit details of the abusive incident(s) including taste, smells, and other sensory data, not just a recounting of events;

- 2) include age-appropriate vocabulary;
- 3) are accompanied by affect that seems appropriate to the child's account;
- 4) coincide with behavioral indicators typically observed in children who have been sexually abused;
- 5) relate a pattern of abuse which reveals a progression of sexual advances over time and which includes the element of secrecy;
- 6) retain a consistency of the core elements even though the peripheral details may vary over time as the story is recounted.

4. Children's memory may be influenced by suggestions under certain conditions. According to current research, age may be less important than other factors in determining the suggestibility of children's memory. Children's memory of a particular event is more susceptible to influence if the event is not personally interesting, significant, or memorable; if the event did not recently occur; or if the questioner seems accusative, authoritarian, or formal. Children age four and above show remarkable resistance to suggestion.

5. Children do fantasize and may sometimes have difficulty distinguishing what they have done from what they have only thought about doing. However, they typically do not have difficulty distinguishing what they have done and what they have fantasized from what they have perceived. For example, a child may say, with equal sincerity, "I want to be a firefighter" and "I am a firefighter". The child would have no difficulty distinguishing either of these statements from "My daddy told me to touch his penis."

Additionally, because young children think concretely rather than symbolically, what seems to be fantasy to adults may be reality to a child. For example, children who profess to believe in Santa Claus or the Tooth Fairy typically lose credibility as witnesses. From a child's perspective, however, Santa Claus is real because the child has seen pictures of Santa on television, has sat in his lap at the mall, and has unwrapped Christmas presents left by Santa on Christmas morning. (*10) This example illustrates how preschool children are not developmentally capable of abstract thinking and must rely on real experiences for the images of fantasy. In fantasy they usually are heroes and conquerors, no victims. Many experienced evaluators are more concerned about children's denials, minimizations, omissions, and failure to (fully) report abuse that has actually occurred than falsely reporting incidents.

Developmental Table of Children's Experience of Divorce

AGE	REACTION	COMMON PROBLEMS	PREVENTION	RECOMMENDED CUSTODY/VISITATION
0-2	Aware of loss of parent	Regression; developmental delays; withdrawal; heightened stranger anxiety	Maintain routines; support caregiver; supplement caregiver	Frequent, short visits with noncustodial parent
2-3	Fears abandonment; misses absent parent	Regression; developmental delays; withdrawal; heightened stranger anxiety; toileting and sleeping problems; sex role confusion	Simple explanation to child; maintain routines/discipline	Overnight visits with noncustodial parent
3-5	Fears abandonment; misses parent; feels unloved	Regression; developmental delays; withdrawal; heightened stranger anxiety; toileting/sleeping problems; sex role confusion; clinging, whining or "perfect" behavior; sadness	Simple explanation to child; maintain routines/discipline; assure that child did not cause divorce; separate bed from parents	Overnight or longer visits no more than ten days apart
6-8	Fears abandonment; misses parent; feels unloved; fears for future; feels guilty; feels betrayed	Anger, behavior/academic problems; withdrawal; depression; dependency	Simple explanation to child; maintain routines/discipline; assure that child did not cause divorce; separate bed from parents; help child to stay out of parents' conflicts; keep as consistent an environment as possible	Longer visits; contact during week; some flexibility around child's school/social activities; involvement of noncustodial parent in school activities
9-12	Fears abandonment; misses parent; feels unloved; feels guilty; feels betrayed; may feel rejected; needs someone to blame for divorce	Worries about custody, hostile toward one or both parents; academic/behavior problems; may be parentified	Maintain adult supports for parents; maintain/improve parenting skills; help child process anger	May need to decrease frequency if had high frequency before; regular, flexible visits; involvement in school activities
12-18	Feels grief for loss of family life; fears about own future; feels responsible for family members; feels angry	Withdrawn from family or clinging; decreased self-esteem; academic/behavioral problems; concern about relationships with opposite sex; difficulty with career plans	Maintain discipline; keep low-profile of parental sexual activity; help child cope with ambivalent feelings; support career goals, higher education	Flexible visitation schedule; possible trial living with noncustodial parent
Young adults whose parents divorced earlier		Sleeper effect for girls—in general, difficulty in establishing relationships with opposite sex; confusion about career plans; difficulty with higher education	Therapy; re-involve parents	

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CHILD DEVELOPMENT FOOTNOTES

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*2 Child Development, A Judge's Reference Guide, 1993
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*5 See: Billie Wright Dziech and Charles B. Schudson, On Trial: America's Courts and Their Treatment Of Sexually Abused Children 41-72 (1989), and Anne Graffam-Walker, Limping Down the Road to Good Communication with Children: A Linguist Looks at the Pebbles in Your Shoe. (Presented at the Seventh National Symposium on Child Sexual Abuse, Huntsville, Alabama, March 20-22, 1991) (on file with the Victims Advocacy Division, Office of the Attorney General).

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*7 Stein, see note #2, p. 14 & 15.

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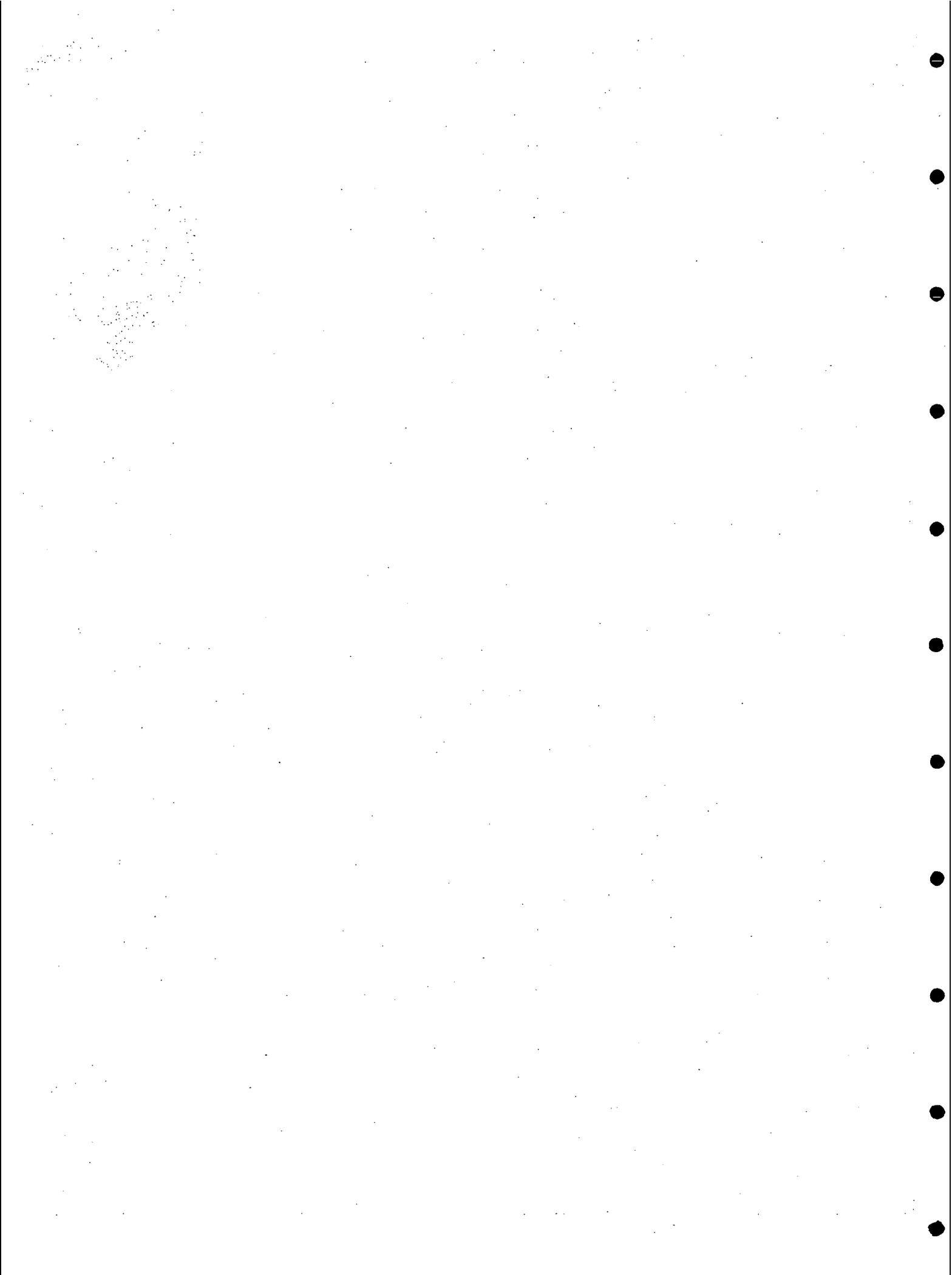
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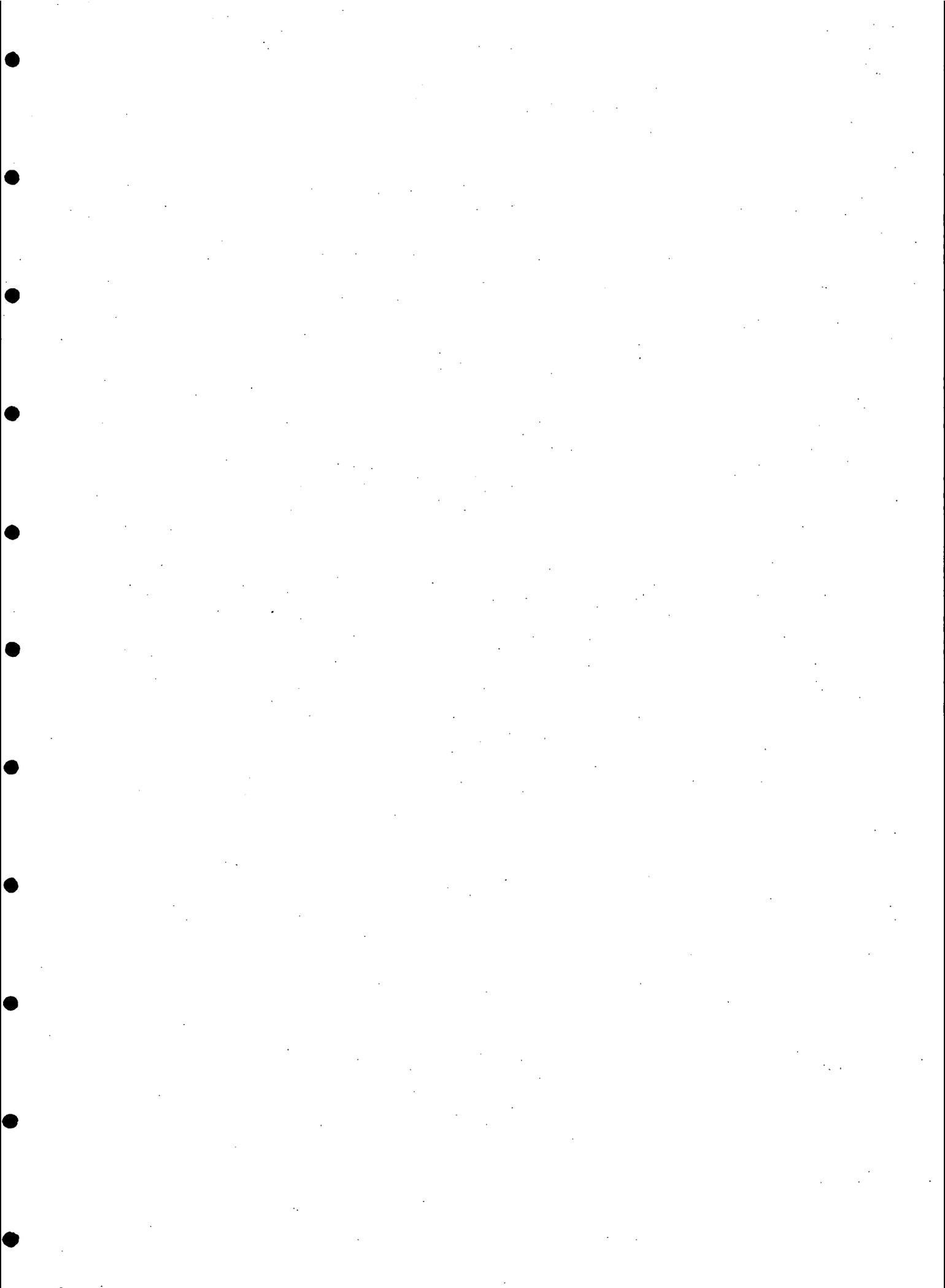
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See: Debra Witcomb, When the Victim is a Child, 24-26 (2nd ed., March 1992) and The Suggestibility of Children's Memory, (John Doris ed., 1991).

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