

Working With the Courts in Child Protection

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PREFACE

The Child Abuse Prevention and Treatment Act was signed into law in 1974. Since that time, the Federal Government has served as a catalyst to mobilize society's social service, mental health, medical, educational, legal, and law enforcement systems to address the challenges in the prevention and treatment of child abuse and neglect. In 1977, in one of its early efforts, the National Center on Child Abuse and Neglect (NCCAN) developed 21 manuals (the *User Manual Series*) designed to provide guidance to professionals involved in the child protection system and to enhance community collaboration and the quality of services provided to children and families. Some manuals described professional roles and responsibilities in the prevention, identification, and treatment of child maltreatment. Other manuals in the series addressed special topics, for example, adolescent abuse and neglect.

Our understanding of the complex problems of child abuse and neglect has increased dramatically since the user manuals were first developed. This increased knowledge has improved our ability to intervene effectively in the lives of "at risk" children and their families. For example, it was not until the early 1980's that sexual abuse became a major focus in child maltreatment research and treatment. Likewise, we have a better grasp of what we can do to prevent child abuse and neglect from occurring. Further, our knowledge of the unique roles of the key professionals involved in child protection has been more clearly defined, and a great deal has been learned about how to enhance coordination and collaboration of community agencies and professionals. Finally, we are facing today new and more serious problems in families who maltreat their children. For example, there is a significant percentage of families known to Child Protective Services (CPS) who are experiencing substance abuse problems; the first reference to drug-exposed infants appeared in the literature in 1985.

Because our knowledge base has increased significantly and the state of the art of practice has improved considerably, NCCAN has updated the *User Manual Series* by revising many of the existing manuals and creating new manuals that address current innovations, concerns, and issues in the prevention and treatment of child maltreatment.

This manual, *Working With the Courts in Child Protection*, is designed to provide guidance primarily to nonlawyers who work with the judicial system. Court intervention in a child maltreatment case may not be necessary until long after CPS has become involved or it may never be necessary. CPS often investigates suspected abuse or neglect and provides services to families without initiating legal proceedings. However, once court involvement begins, all the individuals affected face an elaborate system of laws, rules, and procedures, which is certainly confusing and often intimidating. This manual is intended to provide general and background information about the various applicable court systems, explain recent developments in the laws affecting child protection, and present practical examples and tips to enhance the professional's performance in court-involved cases.

ACKNOWLEDGMENTS

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OVERVIEW OF THE MANUAL

The prevention and treatment of child abuse and neglect cannot be accomplished through the court system alone. The legal process is just one tool for the protection of children. An understanding of this process, however, is crucial for any professional involved in child protection.

Child maltreatment cases are handled in a variety of courts. Thus, the rules and procedures that govern these cases may differ, depending on the *type* of proceeding within which an allegation of abuse is brought.

In recent years, a number of reforms have addressed the unique nature of child maltreatment and the special needs of its victims. Both legislative and judicial efforts have improved the courts' ability to respond to allegations of abuse or neglect. The role of the courts in child protection, therefore, has become more flexible in recent years. Courts now have more alternatives and resources from which to choose when faced with a family in which abuse or neglect is suspected.

PURPOSE OF MANUAL

This manual provides the basic information needed by professionals and concerned citizens to work successfully within the court system. The manual:

- ⌘ presents an overview of the various court processes;
- ⌘ defines the legal requirements for proving maltreatment in the various courts; and
- ⌘ provides practical tips and examples to prepare professionals for their involvement in the court system.

One note of caution is necessary. On its own, this manual cannot adequately prepare *any* professional, legal or nonlegal, to practice in the area of child protection. Consultation with a skilled legal specialist is *critical*, as is comprehensive training on working with the courts, particularly with respect to unique State laws and local practices.

CHILD MALTREATMENT: HISTORY AND OVERVIEW OF THE JUVENILE COURT

In 1899, States began to establish juvenile court systems to address the problems of children. While these new courts dealt with such subjects as abuse, neglect, and dependency, delinquency was their primary focus. Social reformers, concerned largely with children accused of crimes, argued that a separate juvenile court system was necessary because children should be rehabilitated rather than punished. These courts took on a parental role toward the children they encountered and attempted to treat, protect, and reform them.¹

One way to “save” children was to change their families’ values and behaviors through direct intervention. Although it was generally agreed that efforts should be made to keep children with their parents, the resources to help these families stay together were scarce. As a result, in those early years of juvenile courts, children were usually removed from their parents when there was trouble at home.²

In the years that followed, the juvenile courts persisted in their vision of justice for children as benevolent and rehabilitative. Children did not have even basic rights in the juvenile courts, since these would have been inconsistent with the notion that the court’s decisions were always made for the child’s own good. Thus, rights for children were thought to be simply unnecessary.

The juvenile court system was revolutionized in 1967, with the Supreme Court’s landmark *Gault*³ case. In the *Gault* case, the Supreme Court found that the juvenile court, in spite of its best intentions, had not been adequately meeting the needs of children. The Court ruled that, under the Constitution, children in delinquency cases are entitled to due process rights. These include the right to a court-appointed lawyer, the right to be notified of the charges against them, the right to examine and cross-examine witnesses, and the privileges against self-incrimination. The *Gault* decision was a clear departure from the former view of the juvenile court as a benevolent system where judges had unlimited discretion to tend to children’s needs. Since *Gault* was decided, *all* juvenile court actions (not only delinquency cases) have become more procedurally technical. The rights of children and parents have continued to be expanded and redefined, both by judges’ decisions and by new laws.⁴

The juvenile court system was and remains unique in its reliance on nonlegal professionals, particularly public Child Protective Services (CPS) caseworkers, private agency social workers, psychiatrists, physiologists, and physicians. To make decisions as informed as possible, many judges welcome information from an unusually wide range of disciplines. Juvenile court judges are often quick to recognize that their decisions, which may profoundly affect a child’s life, are only as good as the input they receive. Thus, the use of nonlegal professionals (as investigators or expert witnesses, for example) has become an integral part of the juvenile court system.

Some States have special juvenile courts that are separate from adult courts. Other States, however, have juvenile courts that are less distinct from the rest of their court systems, and child protection cases are heard in juvenile sessions of regular courts that handle all types of cases. Whether a child protection case is brought in a separate juvenile court or incorporated into the broader court system may affect some practical aspects of the case. For example, the court with a general civil and criminal docket (schedule) is usually burdened with a greater number of cases than a juvenile court’s docket. Since child maltreatment cases brought in regular courts must share court time with many other types of cases, delays are more

likely in actually getting the case into court and formally resolved. In addition, because general jurisdiction trial court judges must deal with a wide selection of cases, these judges are less familiar with child welfare issues. Court personnel and services are often less focused on these issues as well, although some general jurisdiction courts have specially trained personnel for use in child protection cases.

THE COURT SYSTEM AND CHILD ABUSE AND NEGLECT

DECIDING WHETHER TO GO TO COURT

In civil child protection cases, the decision to go to court is usually made by the child welfare or protection agency (often in consultation with the agency's attorney) or by a court employee known as an intake officer. Criminal cases are initiated at the discretion of the prosecutor, who (if a family member is to be charged with a crime) will hopefully talk to the child's caseworker before making the ultimate decision to prosecute.

The decision to go to court (either civil or criminal) with a case of intrafamilial child maltreatment is a complex one. The benefits of court protection against, and punishment of, someone who has mistreated a child must be balanced against the potential disruption of the parent-child relationship. Rehabilitation of this relationship might be best achieved through means other than court intervention, and this should be taken into consideration when determining whether court action is appropriate.⁵

There are two basic questions to ask when deciding whether to initiate a court proceeding to remove a child, provide in-home protective supervision, or compel treatment:

- ⌘ Is the child in clear danger of significant harm?
- ⌘ Can the child's safety be maintained by providing help to the family without court proceedings?

Other factors may also be relevant when deciding whether to go to court, including:

- ⌘ parental incapacity to care for a child (e.g., incarceration or mental or physical illness);
- ⌘ need for control over the alleged abuser (i.e., a pending court case may be useful as leverage for a CPS caseworker to obtain the abuser's cooperation, or a court order may keep the abuser away from the child for a period of time); and
- ⌘ need for treatment that is available by court order only.⁶

The likelihood of winning a case may also be a consideration in making this decision, particularly in criminal cases. However, if a child is in danger, a civil child protection petition may be appropriate regardless of the strength or weakness of the available evidence. Because of the wide range of ethnic, social, and economic differences that exist among families where child maltreatment occurs, it is essential for those intervening in the lives of such families to maintain a sensitivity to the cultural norms of each family. Caseworkers, child welfare agencies, and courts are charged with protecting children from abuse and neglect; they are not, however, entitled to use the court to impose their own values and standards of child rearing on others. Thus, in deciding whether court intervention is necessary to protect a child, cultural differences must be kept in mind.

Child welfare and CPS caseworkers often voice concern that they will be sued if they initiate a child protection proceeding. While they may be sued, it is extremely unlikely that they will lose. The decision to go to court is essentially a matter of the caseworker's discretion. So as not to discourage them from bringing child protection actions, both Federal and State courts have granted the petitioners in these cases *immunity* from liability. In some jurisdictions, the immunity is *absolute*, meaning that regardless of his/her conduct or motive for seeking court intervention, the petitioner will not be held liable. In other jurisdictions, the immunity is *limited* or *qualified*, allowing liability to be imposed in extreme cases, such as when the decision to go to court was made in bad faith (i.e., maliciously or for some grossly improper reason). As of this writing, no child welfare or CPS caseworker has *ever* been found liable for his/her decision to file a maltreatment petition.

RIGHTS OF PARENTS AND CHILDREN IN JUDICIAL PROCEEDINGS

The court system accords both parents and children certain legal rights, depending on the type of proceeding in which they are involved.

Right to Family Integrity and “Reasonable Efforts”

Public policy has long recognized that there is a right to family integrity, and courts have deemed it constitutionally protected as a fundamental right.⁷ The right to family integrity includes not only parents' rights to raise their children as they see fit, but also a family's right (which belongs to both parents and children) to remain together without State interference. Of course, this right is not absolute. A State may restrict the right to family integrity (for example, by removing a child from the home) if it is justified by a compelling State interest, such as the need to protect children from significant harm.⁸ A closely related requirement in Federal law is that the State child welfare agency must make reasonable efforts to keep a family together or, if the child has already been removed under emergency circumstances, to reunify that family for a State to be eligible for certain Federal funding.⁹ In addition, many State legislatures *mandate* that the agency make efforts to prevent the need for placement (except when not possible due to an emergency).

Right to Proper Notice of the Proceeding

Parents have the right to be notified of any abuse or neglect proceeding that involves their child. This right applies not only to parents who actually care for and reside with their child, but to those exercising visitation rights as well. Although locating a parent can sometimes be very difficult, a judge will require that sufficient efforts be made to notify each parent before proceeding without him/her. Even if a parent cannot be notified and the original proceeding takes place without him/her, the court has the power to grant a rehearing at that parent's request, as long as he/she did not willfully refuse to attend in the first place. Another protection of the parent's right to notice is the judge's option to make only preliminary findings without the parent present, which will become final later if that parent still fails to appear.¹⁰

Exceptions to the general parental notice requirement are *emergency custody orders*, which may be made without advance notice to parents. However, within a few days of any emergency custody order, the parents should be notified and another hearing held to review the initial removal decision.

Other persons may also be entitled to notice of a child protection proceeding. Generally, putative (i.e., unmarried, biological) fathers should be notified. This protects any constitutional rights that arise out of their biological relationship with their children, as well as preserves a possible option for child placement. Most important, notice to putative fathers ensures that the relationship between them and their children will be clarified early in the court process.¹¹

A relative or other person who has cared for the child may also be entitled to notice, even if that person never had custody of the child. Depending on the State, a judge may have the discretion to require the notification of the child's psychological parent (i.e., any person with whom the child has a bond that is emotionally equivalent to a parent-child relationship).¹² For example, a grandparent who has raised his or her grandchild, even if the child's biological parent never formally relinquished legal custody, may have the right to be notified of an abuse or neglect proceeding involving that child.

Right to a Contested Fact-Finding Hearing

Except in an emergency, a child cannot be removed from his/her home, and parents cannot be labeled as abusive or neglectful by a court or be ordered to participate in counseling, without an in-court hearing (unless the parties have agreed or stipulated otherwise). This hearing gives parents an opportunity to oppose the removal and requires the State to present evidence showing that the child is abused or neglected. If removal of the child is sought, the State or county may also have to establish whether reasonable efforts had previously been made to keep the family together. At the hearing, the burden of proof is on the State or county to show that the child has been maltreated. (See "How Much Evidence Is Required?")

Right to Counsel, Guardians *Ad Litem*, and Court-Appointed Special Advocates

While most States give indigent parents a right to free court-appointed counsel in abuse or neglect cases, not all States do. The Supreme Court held in the *Lassiter*¹³ case that parents have a constitutional right to a lawyer in at least some termination of parental rights cases, depending on the circumstances of the particular case.

As was mentioned earlier in the *Gault*¹⁴ case, when a child is accused of a crime, he/she has a right to an attorney under the Constitution. However, when the child is the subject of an abuse or neglect proceeding or a termination of parental rights case, his or her right to a lawyer varies from State to State.

Nearly every State requires that a lawyer or a guardian *ad litem* (or both) be appointed for a child in the proceedings. In fact, Federal law conditions States' eligibility for certain grants on meeting these requirements. (However, these requirements are not always fulfilled, especially not in all stages of a case.) In some States, guardians *ad litem* are not required to be lawyers. Nonattorney guardians *ad litem*, sometimes known as court appointed special advocates (CASA's), may be professionals trained in other disciplines such as social work or psychology or may be nonprofessional citizen volunteers.

The type of representation a child receives varies, depending on the State. In addition, the duties performed by that representative vary from State to State. The guardian *ad litem* may perform a variety of roles, including those of independent investigator, advocate, and advisor to the child. If the same child is involved in more than one court proceeding (e.g., a child protection case and a criminal case), the guardian *ad litem* may also serve the important purpose of bridging the gap between the various courts. Where both an attorney and a lay advocate are used, the two may, and hopefully will, work as a team to perform these various functions cooperatively.¹⁵

A guardian *ad litem* who is an attorney or who works with an attorney may be faced with conflicting roles. As a lawyer, he/she has an obligation to advocate zealously for his/her client's (i.e., the child's) position. When representing a child as a guardian *ad litem*, however, the lawyer may also be required to investigate the facts objectively and to advance his/her own view of what is in the child's best interests. For example, an abused child may insist to his/her guardian *ad litem* that he/she wants to return home to parents who, in the guardian *ad litem*'s opinion, still pose a serious threat to him/her.

The National CASA Association urges that all CASA programs include adequate access to legal counsel for the CASA volunteers. For example, in North Carolina trained and supervised volunteer guardians *ad litem* are available through the courts, and specialized attorneys are chosen in the various counties to advise and assist these volunteers. Under this type of system, CASA volunteers are assured of having access to sufficient legal expertise.

Right to Confrontation and Cross-Examination

It is important at this point to distinguish between the nature of criminal proceedings and civil proceedings.

In criminal cases, the suspected abuser is the "accused"; it is the criminality of his/her conduct that is on trial. However, in civil child protection cases, the abuser is not the focus of the proceeding; it is the status of the child (i.e., whether the child is abused or neglected). The State/county and court do not need to identify the abuser. Because of this basic difference, the existence of (and degree of protection given to) a suspected abuser's right to confront and cross-examine is often clearer in criminal cases.

When a case involving child maltreatment claims is brought to court, the suspected abuser *may* have the sixth amendment right to confront that child in court. This is most likely to occur in criminal cases. In civil cases in some States, the fifth amendment's due process clause requires confrontation.

Due to the special nature of child maltreatment and the sensitivity of its alleged victims, the right to confront is weighed against the possible trauma that the child might experience by testifying in the presence of his/her alleged abuser. Concerns for the child victim have encouraged the increasingly common practices of admitting as evidence prior testimony of the child or permitting the child to testify outside the accused's presence via closed-circuit television. While these practices protect the child, they obviously deny the accused, to some extent, the opportunity to face his/her accuser.

The Supreme Court has now addressed this issue in the criminal context. In the *Craig*¹⁶ case, the Supreme Court decided that the confrontation right of a criminal defendant was not violated by allowing a child victim to testify and be cross-examined outside the accused's presence by closed-circuit television. However, before this may be permitted, the judge must find that such a procedure is necessary to protect the child. (See "Constitutional Challenges to 'Special Treatment' for Child Witnesses.")

In civil child abuse and neglect proceedings, which may result in consequences generally thought to be less serious to the parent than in criminal cases (i.e., no incarceration), judges have exercised broader discretion in permitting protective testimonial aids for children. However, even in civil proceedings, some judges are reluctant to deny suspected child abusers their confrontation rights in light of the profound impact a finding of abuse and neglect will probably have on their lives.

As with the use of closed-circuit television and videotapes, the admission of hearsay evidence sometimes presents constitutional problems. Hearsay is a statement made outside the courtroom that is presented in court by someone other than the original speaker. When someone else repeats a child's out-of-court statements, this does not allow for face-to-face confrontation of the child by the accused. Nevertheless, this is sometimes permissible when the statement is found to be sufficiently reliable. (See the section describing the Hearsay Rule in a subsequent chapter in the manual entitled "Proving Child Maltreatment in Court" for a partial list of circumstances considered to be relevant to a statement's reliability.)

Right to a Jury Trial

In civil child protection cases, parents are only entitled to a jury trial in a few States. In contrast, in any criminal case involving child maltreatment, the defendant has a constitutional right to a jury trial.

Right to a Public Trial

The right to a public trial is normally associated with criminal cases, and even in these cases, limited exceptions are allowed on a case-by-case basis during the child's testimony. This right, however, does not apply in civil child protection proceedings. In child protection cases, the courtroom may not be open to the public, and the court records are kept confidential in nearly every State.

GENERAL POWERS OF THE COURT

To facilitate the litigation of the cases they hear, judges have certain powers that are especially helpful in child abuse or neglect matters.

Power To Compel Testimony

A judge has the authority to compel the appearance of a witness in his/her courtroom and to require that witness to testify. To enforce this authority, the judge also has the power to hold an uncooperative witness in contempt of court, which means the witness can be jailed or fined (or both) until he/she cooperates. The power to compel testimony, however, is limited by a number of constitutional and statutory protections.

The fifth amendment's privilege against self-incrimination is perhaps the broadest of these restrictions. Under the fifth amendment, witnesses may not be forced to testify against themselves in criminal proceedings or to provide any information that might tend to subject them to criminal liability in the future. Accordingly, even in civil child abuse and neglect cases, a parent or other alleged abuser will be permitted to "take the fifth" if there is a real possibility that a criminal prosecution may occur. To avoid this, the court may grant use immunity to a witness in a civil child protective proceeding, which prevents his/her testimony from being used against him/her in any future criminal case. Use immunity is a particularly helpful tool for a civil court judge whose goals may be the securing of rehabilitation and treatment for family members, and who needs as much input and cooperation as possible from an alleged offender and other family members to reach these goals. Once this immunity is granted, the parent can be compelled to testify.

In the *Bouknight*¹⁷ case, the Supreme Court restricted the use of the fifth amendment's privilege against self-incrimination in a civil child protection proceeding under very specific circumstances. The Court ruled that a parent whose custody rights have been limited under a previous court order may not later refuse to tell the judge the child's whereabouts. In such a situation, a parent does not have a privilege against self-incrimination and may be compelled to reveal the location of his/her child.

Witnesses may also decline to testify concerning certain confidential communications which they have had. Depending on State law, conversations with professionals such as doctors, social workers, and lawyers may be considered privileged, and, if so, their contents are not disclosable without permission of the patient or client. The purpose of this rule is to encourage those who seek professional assistance to interact freely and openly with their service providers, without fear of public exposure or legal repercussions.

In many States, these privileges are eliminated or limited by law in child abuse and neglect cases. Statutes that remove privileges vary from State to State: some eliminate the privilege for reporting purposes only, while others admit evidence of privileged material at trial; some pertain only to civil proceedings, while others apply to criminal matters as well. The relationship of the professional to his/her patient or client may also be significant in determining whether a statutory waiver of privileged communications applies. For instance, a court-appointed psychologist generally will not be bound by privilege, since he/she was appointed for the very purpose of reporting to the court. However, a psychologist with a pre-existing therapeutic relationship with the accused may be prevented from revealing the contents of his/her conversations with the patient. (See the section on privileged communications in a subsequent chapter in this manual entitled “Proving Child Maltreatment in Court.”)

Power To Subpoena Documents and Records (*Subpoena Duces Tecum*)

The court also has the power to compel individuals or organizations to produce documents and records for use in court. For example, a hospital may be required to provide its records on a certain child to the court, or a caseworker may have to submit his/her case file.

Power To Assist CPS When Investigative Barriers Exist

Even before a petition has been filed, the court may have additional powers to assist child welfare agencies during the investigative stage of a child maltreatment case. CPS caseworkers often face seemingly insurmountable barriers to their investigations into suspected child abuse or neglect. These obstacles include inability to gain access to the child, to his/her home, or to relevant information in the possession of third parties (e.g., school officials). Some States have statutorily authorized court-ordered investigative interviews and physical examinations of children, entry into the home, and access to third party records, upon a showing to the court cause, good cause, or probable cause (depending on the State) for this type of remedy.¹⁸ Cause sufficient to justify court intervention might arise in any number of situations. For instance, cause might be found for an order allowing a caseworker access to a child’s medical records if the child’s doctor refuses access without parental consent, the parents will not consent, and the child claims that his/her recent injury, treated by that doctor, was inflicted by the parent. An order compelling a physical examination of a child might be deemed warranted if a day care provider reports that, based on observations of the child’s genital area during diaper changes, he/she suspects that the child is being sexually abused at home; however, the parent refuses to permit the child to be examined by a doctor.

OVERVIEW OF THE CIVIL CHILD PROTECTIVE COURT PROCESS

JURISDICTION

Juvenile and family courts, as well as many general trial courts, have jurisdiction (i.e., authority to make decisions) over civil child maltreatment cases. However, only children who are identified in a State's law as needing the court's protection may become the subject of a child protection petition. Each State has its own terms and definitions in the jurisdiction provisions of its law.

State laws vary widely in the terms they use, as well as in the definitions they apply to those terms. To obtain court jurisdiction over a child, for example, the caseworker must be able to show that the child is: abused, battered and abused, abused or neglected, sexually abused, maltreated, dependent, deprived, abandoned, uncared for, in need of aid, in need of services, or in need of assistance. Moreover, it should be noted that conduct which may have to be *reported* under a State's reporting law will *not* necessarily be sufficient to give jurisdiction to that State's juvenile court. Before bringing a child protection proceeding, the jurisdiction requirements of the particular State's law must be consulted.

THE INTAKE PROCESS AND THE PETITION

A civil child protection proceeding is initiated by filing a document called a petition with the court. The petition contains the essential allegations (charges) of abuse or neglect that make up the petitioner's complaint about a particular child's situation. It does not include all of the detailed facts available to the petitioner to support these allegations. Such supporting facts are *evidence*, which will be presented to the court later, at the trial stage of the proceedings.

A petition is usually filed at the initiative of a CPS or child welfare caseworker. Some States, however, also permit private citizens or other public officials (e.g., physicians, hospital personnel, and police officers) to initiate petitions, but may impose certain screening requirements in those cases.¹⁹

A crucial task in helping an attorney draft a petition is to explain in descriptive language the actual treatment of the child so that it meets with the legal definition of abuse or neglect in that State. In other words, the law says what the subject matter is (i.e., abuse or neglect) and how the main characters must have acted in order to have broken the law (e.g., hurting a child or failing to feed a child). After consulting the law, the attorney must construct a real-life story, identifying the characters and describing the events and the setting (i.e., the facts), based on the caseworker's documentation of the case.²⁰

Petitions should not repeat exactly what the law states. For example, a petition should not say, "The father committed a willful act by significantly impairing his son's physical health." While the petition may use some of the language of the appropriate law, merely repeating these words without relating them to the facts of the case does not alert the judge or the parent(s) to what will be proved at trial.²¹

Lawyers' opinions differ greatly on whether a petition should have only the most significant points or be as detailed as possible. Petition length will vary depending on the complexity of a particular case and the local policy and practice.

Long petitions may be useful as a guide to gathering and presenting evidence and serving as a checklist in

preparing for trial. They also give the judge a colorful and complete picture of the family's problems.

However, long petitions often contain extra details that cannot be proven later at trial. If there is no evidence available to support a fact at the hearing, the judge will have to dismiss certain portions of the petition, making the case seem unreliable. When the petition has language such as, "Mrs. Jones has repeatedly beaten Mary with excessive force, causing severe welts and bruises," petitioners are always free to present evidence in court of specific supporting facts, as long as the rules of evidence are not violated. (See "The Rules of Evidence.") For these reasons a short petition is often preferred. In preparing a short petition, the challenge lies in recognizing and illustrating each and every legal element while avoiding the extra details. Any mistakes in this process will result in either dismissal of the petition or having it sent back to be amended.²²

To begin drafting the petition, the attorney should first consult State law. Using *one* State's definition of abuse, listed below are all the elements of the statutory definition:

- ✍ Any willful act
- ✍ resulting in any physical, mental, or sexual injury
- ✍ that causes (or is likely to cause) significant impairment
- ✍ to the child's physical, mental, or emotional health.²³ An attorney might be faced with a case similar to the example below.

On October 17, Ed Jackson threw his 3-year-old stepson, Billy Jackson, against a wall, causing him to pass out. He was taken to Children's Hospital where Dr. Snyder diagnosed a concussion. According to the doctor and to earlier clinic reports, Billy is significantly developmentally behind for his age group, and he was slow to walk and talk. The doctor found many bruises in different stages of healing, indicating that Billy had been battered many times before.

Mr. Jackson told the attorney that he did not intend to hurt Billy, but that he was just trying to get him to act his age, to walk faster, and to stand straighter. Mr. Jackson said that is how he himself learned to be tough as a child. Billy's two older stepsisters, Tina (age 8) and Dinah (age 10), were placed in foster care a year ago, after having been found to be abused. Billy's day care provider states that he is sometimes bruised and crying when he is dropped off.

The attorney should compare the facts of this case to the legal definition of abuse:

- ✍ Was there a "willful act?" Yes. The act of throwing Billy against the wall was willful (not accidental) because Mr. Jackson chose to do it (he did not have to). Even if he did not intentionally hurt Billy, he did throw him against the wall on purpose.
- ✍ Was there a physical, mental, or sexual injury? Yes. Billy suffered a concussion, which is a physical injury.
- ✍ Was the physical injury caused by the willful act? Yes. The doctor will testify that the concussion was probably the direct result of Mr. Jackson throwing Billy against the wall. Mr. Jackson may admit that as well.
- ✍ Did the physical injury significantly impair Billy's physical, mental, or emotional health? Yes. A concussion is clearly a significant impairment of physical health. The attorney is now ready

to write the petition. The extent of the caseworker's involvement in this process varies from State to State.²⁴

Once a petition has been prepared, the intake process provides a mechanism by which the courts evaluate a petition to determine whether its allegations are sufficient (from a legal standpoint) for it to proceed. Some courts screen all petitions they receive; others screen only those brought by private citizens. The current trend is for courts to rely on the agencies' prepetition investigative and screening processes, and, accordingly, to expedite or even forego the intake process.²⁵

SHELTER CARE, DETENTION, OR TEMPORARY CUSTODY HEARING

The first court appearance in a civil abuse or neglect case usually takes place after the petition has been filed (or if the child was removed under emergency circumstances, within a few days after he/she was taken into custody). The precise deadline for this hearing depends upon State law.

Although this hearing is given a variety of names depending on the State, it generally serves the same purpose everywhere: to determine whether the child should be temporarily placed outside his/her home pending the ultimate disposition of the case. If the child is already in emergency out-of-home care, this hearing is used to decide whether this temporary custody arrangement should be continued.

All legally interested parties are notified of this hearing when they are served with a copy of the petition. This ensures that everyone involved in the case (particularly the parent) is informed of the specific allegations made and is aware of the date and time for which the hearing is scheduled.²⁶

This hearing is one point at which counsel are often appointed for indigent parents and some type of representation (e.g., a guardian *ad litem* or court-appointed special advocate) may be appointed for the child.

Reasonable Efforts Determination

Federal law requires that, before a State may receive Federal financial support for the costs resulting from a child's removal from home into foster care, a judge must determine that reasonable efforts have been made to keep the family together. Similarly, placement may not be continued with Federal support without a finding by the judge that such efforts have been made to reunite the family.²⁷ In many States, such reasonable efforts findings have been made mandatory under State law whenever a child is placed or continued in foster care.²⁸ The purpose of this requirement is to encourage State and county agencies to provide parents with the services they need to improve their ability to care for their children, thus preventing or minimizing the time that children spend in foster care.²⁹

Emergency and Temporary Protective and Removal Orders

Depending on the danger or harm to the child, the judge may make a temporary protective or removal order. When emergency custody has already been initiated, the court will either ratify the child's removal or return him/her home. Of course, any of the removal decisions by the court should be contingent upon its explicit finding that the required reasonable efforts were made in that particular case.

PRETRIAL CONFERENCES AND NEGOTIATING CASE SETTLEMENTS

Although it is not conducted in many courts, a pretrial case conference serves a number of critical purposes in a civil child protection proceeding. Since a child's future hangs in the balance during the pendency of such a proceeding, a fair, thorough, and speedy resolution of the case will always be in the

child's best interests. The pretrial conference is designed to promote such a resolution by providing an informal forum for settlement negotiations. If the parties can agree that the child has been abused or neglected (stipulate to an adjudication), further time-consuming court proceedings become unnecessary.³⁰ At the same time, implementation of the child's case plan can be expedited, and additional traumatic division among family members may be avoided.

However, settlement is not always desirable. Some children may feel that their disclosures have not been believed or taken seriously, that they were wrong to tell, or that their abuser is "getting away with it." Depending on the circumstances, children may also feel vulnerable to further abuse. Settlements may have a downside for parents, too. A parent who vehemently denies the abuse or neglect may feel pressured into accepting a settlement that, either explicitly or implicitly, acknowledges his/her responsibility.

Mediation may be particularly appropriate at this point to assist the parties in reaching an agreement nonadversarily.³¹

Regardless of how cases are settled, case resolution agreements must be properly drafted to create an adequate record for future court involvement, if it becomes necessary. In addition, in order for the family's child welfare agency case plan to be effective, the parties should agree on, not only the outcome of the case, but also on certain material facts underlying the petition as well. Parents, children, and the State or county child welfare agency need proper representation at this stage in the proceeding to ensure that no one is coerced into an agreement, and that the child's interests are reflected in the negotiations.³²

If settlement cannot be achieved, the pretrial conference is still important to expedite the coming trial and to keep its length as short as possible. The conference provides an opportunity for identifying and clarifying trial issues, resolving discovery disputes, and encouraging the exchange of information to avoid surprise at trial.³³

DISCOVERY

Before trial, parties in any civil court proceeding are permitted to conduct what is known as discovery. This process is designed to assist in preparing for trial by providing access to a variety of information sources. In most States, the parties to a civil child protection case will be allowed access to agency records (although laws generally permit the name of the original reporter of abuse or neglect to be omitted). Under certain circumstances, some sensitive material in these records (e.g., the child's psychiatric evaluations or reports of his/her therapy sessions) may be considered confidential and not accessible if it is not directly relevant to whether maltreatment occurred. (See "Privileged Communications.")

Although not often used, other, more formal discovery methods may be available in many States. For example, one party may submit written questions (interrogatories) to another that must be answered within a specified time or may orally question another party or a witness prior to trial (depositions).

THE ADJUDICATORY HEARING

Once pretrial matters have been resolved, the adjudicatory hearing or trial should ideally begin soon after. At this stage of the civil court process, based on the evidence presented at trial, the judge must decide whether the child has been abused or neglected. Each party will question his/her own witnesses; cross-examine opposing witnesses; and may present other evidence in the form of documents, records, photographs, or videotapes. (See also "Types of Evidence" and "Direct, Cross, and Rebuttal Examination.")

The attorney for the party who has filed the petition, usually the CPS agency, must present enough evidence to convince the judge that the abuse or neglect did, in fact, occur. Those in the legal system refer to this responsibility as the burden of proof. In a civil case, depending on the State, this burden is either to show by a preponderance of evidence or by clear and convincing evidence that the abuse or neglect happened (as opposed to a criminal case where the guilt of a given individual must be established by proof beyond a reasonable doubt). (See the section on how much evidence is required in a subsequent chapter in this manual entitled “Proving Child Maltreatment in Court.”) To determine whether a party has met his/her burden of proof, the trier of fact will not merely take into account the *amount* of evidence presented on each side (e.g., how many witnesses), but will also consider the *quality* of that evidence (e.g., how credible and/or persuasive the witnesses are).

Increasingly, courts (through State law or judicial system rules) are being required to complete these hearings within a given period of time from the filing of the petition or the removal of a child from the home (e.g., 30 days). In some additional States, a judge’s written factual determination, known as findings of fact, must also be made within a specific period of time.³⁴ The purpose of these requirements is to avoid case resolution delay that may be harmful to the child.

If the judge finds at the adjudicatory stage that maltreatment was not proven, he/she will dismiss the case. This means that the legal proceedings are terminated. In that situation, the child welfare agency has no leverage *from the legal system* to continue the case plan; however, the case plan may continue if the parents cooperate voluntarily.

THE DISPOSITION HEARING

If the judge determines that abuse or neglect has occurred, the trial will proceed to the disposition hearing. At this stage of the civil court process, the judge decides who will have custody and control over the child, and may, in some jurisdictions, have the authority to issue certain conditions on placement or instructions to the parties. In most States, the court has the authority to require parents to participate in treatment and counseling or to cooperate with agency caseworkers as conditions of keeping the family intact.³⁵ This judicial authority depends upon a prior finding of abuse or neglect, since without such an adjudication, the court does not have jurisdiction (i.e., power over the parties) to order these remedies. Witnesses may be presented and cross-examined at the hearing, and written agency reports, with recommendations, may be submitted.³⁶

Predispositional Studies, Evaluations, and Reports

The disposition of a case is based in part on a child welfare agency’s report and recommendations. In some States, dispositional recommendations are presented at the end of the adjudicatory hearing. In many States, however, the court will direct the agency to conduct a posttrial study of the family and prepare its report and recommendations accordingly. When a predispositional study is ordered, the judge may provide guidelines for the agency by, for example, requiring that certain options be explored or that a full explanation for its recommendations be provided. Generally speaking, however, the predispositional study should always present and fully explore all feasible dispositional choices for the court’s consideration.³⁷

The question of confidential or privileged information may arise in the context of predispositional studies, evaluations, and reports. These studies or reports may contain information that is normally considered confidential (e.g., conversations between patient and therapist). When this information is obtained specifically for a court-ordered evaluation, privileges will not apply. However, in other types of predispositional studies and reports that are prepared by a party (e.g., the agency), some privileged

information may not be allowed as evidence (although the rules of evidence are generally more relaxed at the disposition stage than at adjudication).

Renewed Consideration of Reasonable Efforts

If the child is to be removed from the home at the disposition phase of the case, the judge should consider at the disposition hearing whether reasonable efforts have been made to prevent the removal. When a child has already been removed, the judge should make a finding as to whether reasonable efforts were made to reunify the family.³⁸

Case Disposition Options

The judge has a number of dispositional options, usually delineated by State law, once the court has found that the child was abused or neglected.

Protective Supervision of Child in Own Home

A parent, even after an adjudication of abuse or neglect, may be permitted to retain custody of his/her child, under certain conditions and with supervision. Sometimes a child welfare agency will be given legal custody of the child with the understanding that it will exercise its discretion as to whether the child may reside in the parent's home. With all of these options, the court will keep authority over the parties involved or will delegate its supervisory powers to the agency. The court or agency then has a continuing responsibility to ensure that the terms of the protective supervision order are being met. The regularity and specific conditions of supervision may vary significantly from State to State.

Placement of Child in Substitute Care

The judge may decide to remove the child from his/her home. In some States, a court can only give custody to a social services agency, which will then place the child with a relative, foster family, group home, or residential institution. In other States, the court may give custody directly to a specific person or institution, such as a relative or foster home.

Placement with a relative (also known as kinship care) has become increasingly common in recent years. A child who can remain with his/her extended family will generally experience less disruption and trauma than if placed with strangers. Kinship care may also preserve important cultural and community ties that would otherwise be disturbed.³⁹ The Supreme Court has held in the *Youakim*⁴⁰ case that a relative who is licensed, certified, or approved as a foster parent is entitled to the same Federal foster care payments as other foster parents.

If the child is to be removed and placed in substitute care, the dispositional order should specify the type, location, and degree of restrictiveness of placement, as well as any other appropriate conditions for placement. Parental visitation or other contact with the child should also be addressed by the court.⁴¹

Protection Orders Against Alleged Perpetrators

In most States, the judge may also issue an order of protection or restraining order to control the conduct of the accused abuser or any other person who might harm the child or interfere with the disposition. For example, such orders could require that a certain person refrain from abusing the child, not enter the child's home, or even have no contact whatsoever with the child.

Parental Visitation

If the child is placed outside the home, parental visitation is generally permitted. Unless there is a good reason for these visits to be supervised, parent-child contact will typically be frequent and unsupervised. However, supervision may be necessary to protect the child or to observe the interaction between parent and child.

If supervision is ordered, parents' visits will take place with an adult third-party present. While agency staff members are most commonly used to supervise visits, other reliable adults (e.g., relatives, guardians *ad litem*, or CASA's) may also occasionally take on this responsibility. Some judges routinely specify the type and frequency of visitation, while others usually leave visitation to the discretion of the agency.

Termination of Parental Rights

The most drastic option that may be available to the judge at the disposition stage (depending on State law) is to permanently terminate a parent's rights to his/her child, making the child available for adoption. This option is not often available or used at the disposition stage, except in unusually severe and hopeless cases.

In many States, parental rights may only be terminated by filing a *separate* petition after the disposition of the abuse or neglect petition. In this situation, a separate hearing is held. The grounds for terminating parental rights must be established at this separate hearing by clear and convincing evidence (see "Termination of Parental Rights Hearings").⁴²

Other Permanent Placements

Where termination of parental rights is not appropriate (e.g., where a suitable relative may want to become the child's permanent caretaker, where an older child does not want to be adopted, or where a long-term foster parent does not want to adopt), the judge may order some type of permanent placement to ensure the child's continuity and stability. While in most cases adoption is preferable for a child who will not be returned home, alternatives such as guardianship and long-term foster care are available as choices to promote permanency.

Long-term foster care is generally used in cases where the child has become integrated into his/her foster home and cannot be adopted for whatever reason. The foster parent may then agree to keep the child in that foster home until the child reaches the age of majority. Such an arrangement provides the child with more security than he/she could expect in temporary foster care. However, it does not provide the child with the permanence that is achieved through return home or adoption. Guardianship or custody by a relative or former foster parent, which authorizes broad decision making powers with respect to the child, is another dispositional alternative. By eliminating or minimizing the involvement of the agency, guardianship or custody also introduces some degree of continuity into the child's life.

It is important to note that the availability and impact of these permanent placement options vary widely from State to State.

Dismissal

Even where abuse or neglect has been found, the judge might dismiss or close the case at disposition, meaning that no further legal action will be taken on that case. This may occur when the judge believes, for whatever reason, that the abuse or neglect is highly unlikely to recur (for example, the abuser has moved out of the home or circumstances indicate that the maltreatment was an isolated incident).

Court Approval of Case Plan

Federal law requires that a public child welfare agency case plan be developed for every foster child whose care is federally subsidized.⁴³ Each case plan must include a description of the child's placement and a scheme for providing services to the child, the biological parents, and the foster parents.⁴⁴ The child's health and education needs must be specifically addressed in this plan. In some States, the case plan must be submitted to and approved by the court.⁴⁵

The distinction between a case plan and a predisposition report is an important one. The report is prepared by the agency after investigating the family and should explore all alternatives thoroughly to help the court arrive at its decision. A case plan, however, specifies what actions are required of all of the parties involved to modify the conditions causing the need for placement, and when they are to be completed.⁴⁶ In States where the case plan must be submitted to the court for approval, the judge should hold a hearing at which the plan may be accepted, rejected, or modified.

PERIODIC REVIEW

Every State requires State courts, child welfare agency panels, or citizen review boards to hold periodic reviews to reevaluate the child's circumstances if he/she has been placed in foster care. The purpose of these reviews is to ensure that a child's placement continues to meet his/her needs and to avoid the problem of foster care drift by planning for the child's future and setting deadlines and timetables.⁴⁷

Federal law requires that for a State to receive certain Federal funds, a child's case must be reviewed at least every 6 months after he/she is placed in foster care to determine whether his/her placement is still necessary and appropriate, whether the case plan is being properly and adequately followed, and the degree of progress that has been made toward reunifying the family. A target date for the child's return home, adoption, or some other permanent placement must be set at these reviews.⁴⁸

Federal law also requires that within at least 18 months from the child's placement into foster care, and continuing at regular intervals, a special hearing must be held to establish a firm permanent plan for the case (i.e., whether the child is to be returned home, continued in foster care for a specified period, placed for adoption, or continued in long-term foster care).

Although this hearing is referred to as a dispositional hearing in the actual text of the Federal law, it should not be confused with the court's initial disposition decision after adjudication, which is usually known as the dispositional hearing in most States. (See "The Disposition Hearing.") The 18-month hearing, unlike the 6-month review, must be held by the court or a court-appointed or approved body. It also must be conducted with relative formality.⁴⁹

Even after the 18-month hearing, reviews of the child's case will continue to be held every 6 months for as long as an agency maintains custody or control over the child (usually until the child is returned home, adopted, or reaches the age of majority).⁵⁰ Such 6-month reviews may also be conducted by administrative panels or citizen review boards.

These Federal rules for case review are minimum requirements. Some States have more rigorous procedures than those required by Federal law. For example, in some States the hearing to establish a permanent plan must be conducted within 12 months (rather than within 18 months).

TERMINATION OF PARENTAL RIGHTS HEARINGS

As noted above, where a child has been found to have been abused or neglected, his/her parent's rights to that child *may be* terminated by the court. (See "Termination of Parental Rights.") Termination of

parental rights has a profound effect on the lives of both parent and child: the child will be free for adoption without the consent of his/her parents, the parent will no longer have the right to any contact with the child, and in most States the parent will not have any further obligation to support the child. For a child who cannot return home, termination of parental rights is generally sought in order to provide the child with a permanent home through adoption or guardianship.⁵¹

General Review of Statutory Grounds⁵²

Each State has its own grounds for terminating parental rights. Generally, however, States agree that their courts should examine whether it is appropriate to return the child to his/her parent within a reasonable period of time and whether termination of parental rights is in the child's best interests.

In considering the advisability of returning the child, courts apply the precise grounds set forth in the State law. In most cases, these laws include some or all of the following factors:

- ✍ extreme parental disinterest;
- ✍ parental failure to improve the conditions that led to the child's removal;
- ✍ extreme or repeated neglect or abuse;
- ✍ parental incapacity to care for the child; and
- ✍ extreme deterioration of the parent-child relationship.

Extreme parental disinterest may be found by a judge not only in situations where the parent has literally abandoned the child, but also where the parent fails to communicate with or visit the child, says he/she does not care about the child, or is willing to give up the child. A parent may also exhibit disinterest when he/she repeatedly and needlessly leaves the child with others for long periods of time, fails to make efforts (such as cooperating with the agency, participating in treatment, and accepting services) to have the child returned, and fails to financially support the child although able to pay.

The judge should only find that a parent has failed to remedy the conditions that caused the child's removal if:

- ✍ the case plan was properly developed and implemented by the agency; and
- ✍ the parent failed or refused to take the steps required in spite of the agency's diligent efforts.

Parental incapacity may also convince a judge to terminate parental rights. However, even if a mentally or physically disabled parent (including those addicted to drugs or alcohol) cannot care for his/her child, termination will not generally be granted without evidence showing that agency reunification efforts (e.g., through providing drug treatment) have failed. It is important to note that the mere fact of parental disability should not be enough to terminate parental rights; the judge will need proof that this disability actually prevents the parent from adequately caring for his/her child (diagnosis) and that the parent is unlikely to improve in the future (prognosis).

Parental rights may also be terminated when a parent repeatedly or severely abuses or neglects his/her child. Isolated acts of abuse will not generally justify termination, since intervention and treatment may succeed in reforming the parent, making termination unnecessary. Prolonged and severe patterns of abuse, however, may warrant a decision to terminate. Some patterns, or even single acts, of physical or

sexual abuse are so outrageous as to make reform of the parent unlikely, and in such cases rehabilitation efforts may not be required before parental rights are terminated. For example, a parent who has killed one child might lose the parental rights to siblings without rehabilitative efforts being required.

In some States, when the parent–child relationship has deteriorated to an extreme degree, the judge may also decide to terminate parental rights. Past abuse or neglect may have irreparably damaged the bond between parent and child, making reunification impossible. Usually, however, a judge will not terminate parental rights unless there are additional indicators that the child cannot be returned home safely (e.g., those other factors discussed above). In cases based on the breakdown of the parent–child relationship alone, judges are more likely to seek some alternative permanent placement for the child.

Almost all States require proof not only that sufficient grounds exist to show that the child cannot be returned to the parent but also that termination is in the child’s best interests. Termination will further the best interests of the child if it will result in a more permanent or stable placement for the child. This is usually established for the court by showing that if parental rights are severed, the child’s chances for adoption or permanent legal guardianship are good and that adoption is the best plan for the child rather than other options, such as guardianship or long-term foster care.

It is important to note that the purpose of terminating parental rights is not simply to improve the child’s living conditions. Thus, the court should not merely weigh the biological parent’s lifestyle or financial status against that of a prospective adoptive parent, if there is one. Rather, the court’s inquiry should focus on whether it will be possible to safely return the child home within a reasonable time, regardless of whether the child might be “better off” in the custody of someone else.

Standard of Proof

Given the serious consequences of terminating parental rights, the Supreme Court in the *Santosky*⁵³ decision has held that evidence that supports termination must be clear and convincing (rather than merely a preponderance of the evidence). This burden of proof is higher than that required in a civil abuse or neglect case where termination is not sought, because the result in a termination case is permanent.

APPEALS

As with any type of proceeding, once a civil child abuse or neglect case has been decided by a judge, it may be appealed by any of the parties (including the child). The appellate process is an important part of our legal system and protects against judicial mistakes and abuses of discretion. Unfortunately, the mechanics of making an appeal are time consuming. The delay may postpone permanent placement for the child, interfere with implementing the case plan, or unjustifiably intrude into family integrity. In some States, the appellate process is expedited for child protection cases. In addition, many States provide that the case plan may proceed, and a court ordered placement be continued, while the appeal is pending.⁵⁴

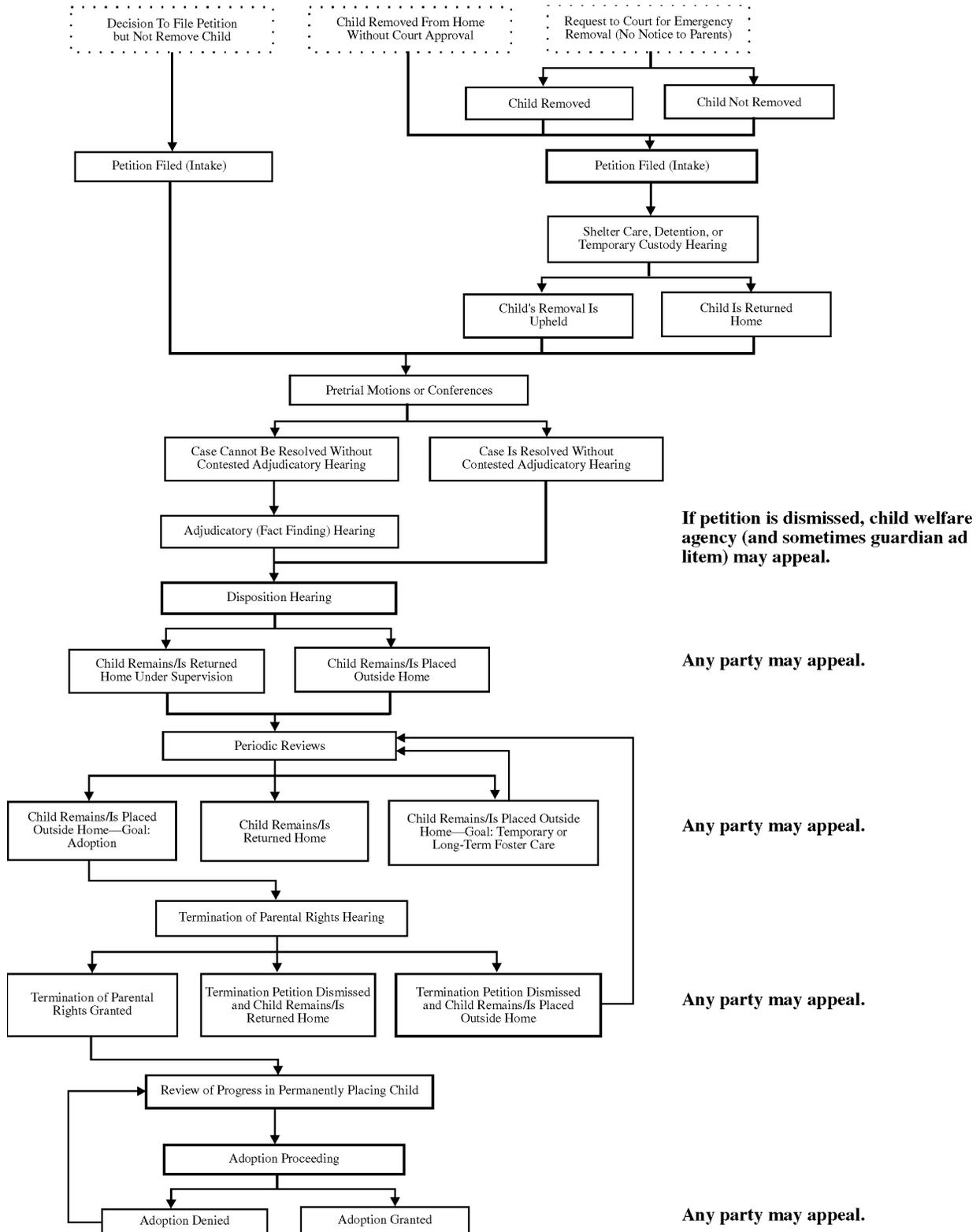
SUMMARY OF CIVIL CHILD PROTECTION COURT PROCESS

Because the civil child protection court process varies so widely from State to State, the flow chart following this page illustrates just one possible example of how a child maltreatment case might move through the courts. Some States may not require all of the stages or permit all of the options included in the chart. Others may require stages or permit options that are not included in the chart. Options or stages that differ according to State include:

- ✍ **Emergency Removal:** Not all States allow children to be removed from their homes without court permission.

- ⌘ **Filing Petition:** In some States, the petition is filed at the same time that the emergency removal hearing is held.
- ⌘ **Pretrial Conference:** Many States do not require pretrial conferences.
- ⌘ **Periodic Reviews:** While some States require *all* reviews to be conducted by the court, the chart depicts a State where the initial review is performed internally by the child welfare agency. Thus the first *court* review shown on the chart is essentially a permanency review to determine the ultimate direction of the child's case. If, after review, the child is returned home, some States will not require any further reviews to be conducted. Many States will require continued reviews, however, when the child has been placed in long-term foster care.
- ⌘ **Termination of Parental Rights:** In some States, a petition to terminate parental rights may be filed at any time after disposition. The chart depicts only the more common practice of filing for termination of parental rights after the permanency review.
- ⌘ **Post-Termination Review:** Not all States require a review hearing after parental rights have been terminated. In some States, as illustrated in the chart, a review is held after the termination of parental rights to determine what progress has been made in achieving a permanent placement for the child.

Figure 1 COURT PROCESS FLOWCHART



Note: At any stage in the court process, the case can be dismissed and the child returned or left home.

THE CRIMINAL COURT PROCESS

Conduct that rises to the level of child abuse or neglect can also constitute a crime depending on State law and the facts of the particular case. Some examples of crimes that apply to certain types of child maltreatment include assault, criminal neglect, sexual contact, sexual intercourse, sodomy, carnal knowledge, lewd and lascivious acts, or molestation.

ARREST

Usually, the criminal case against persons engaging in this conduct begins with an arrest. An arrest involves taking a suspect into police custody for the purpose of charging that person with particular conduct that constitutes a crime. Police can make an arrest when they have sufficient information indicating that the person has violated the law. Upon being taken into custody, the accused person is booked (i.e., fingerprinted, photographed, informed of the charges, and permitted to use the telephone).

BAIL

Within a short time after having been taken into custody, the person makes a brief appearance before a judicial officer (i.e., judge, magistrate, or court commissioner), where he/she is advised of the charges and of his/her rights.

Bail is also set at this time. The suspect will be informed of the conditions he/she must meet in order to be released from police custody until his/her case has been decided at trial. These conditions are imposed to ensure that the person will show up at the time of trial. Bail should not be used solely as a means of keeping an accused person in custody.

There are various types and conditions of bail. In perhaps the most common, the judicial officer releases the defendant on his/her own recognizance (i.e., the defendant promises he/she will appear in court when the trial is scheduled). However, the judicial officer may also set a money bail at a certain dollar figure, which the defendant generally pays by cash or surety bond. As a condition of bail, if appropriate, the judge has the power to require that the defendant have no contact with the child in question in a maltreatment case.

THE CHARGING DECISION

Many instances of child maltreatment that rise to a level of criminal behavior are not prosecuted for a number of reasons.

First, acts of child maltreatment may not be given sufficient consideration by criminal prosecutors if they are not fully informed of all the facts surrounding the particular incident(s) as serious enough to warrant the filing of criminal charges. Second, the prosecutor may judge that the case cannot be successfully prosecuted. The successful prosecution of a criminal case is more difficult than obtaining a favorable judgment against a defendant in a civil case. In a criminal case, the burden of proof is higher and the rules of evidence, which may exclude some relevant evidence and thus protect the accused, are more stringent and rigidly applied.

Third, the criminal prosecution might make the accused resentful and uncooperative, thereby interfering

with efforts to rehabilitate the family within the context of a related civil action or the child protective services process and consequently further damage the parent–child relationship.⁵⁵ In addition, a criminal prosecution is often even more traumatic for the victim than a child protection proceeding. The criminal court judge and personnel may be less familiar with handling child witnesses, and the criminal system itself less accommodating. (See “The Child As a Witness.”) For example, in many States, the child is required to testify in court, in the defendant’s presence, to support the prosecution of a child abuse-related crime. Where multidisciplinary teams are used, the prosecutor making the decision whether to bring criminal charges may have the benefit of input from a social worker and/or a mental health professional to help him/her in assessing these factors.

It must also be remembered that criminal courts do not have the authority to order treatment for members of the defendant’s family, nor do they always have access to support services for that family.⁵⁶

PRELIMINARY HEARINGS

Once the decision has been made to charge the defendant, he/she will usually have the right to a preliminary hearing. The purpose of a preliminary hearing is to have criminal charges reviewed by a judge, who will determine whether the suspect should be held for trial. This ensures that there is sufficient evidence legally to support the charges. Both parties are represented by lawyers and witnesses are called (usually only by the prosecution) and cross-examined. Depending on the State, if the judge finds that there is enough evidence, the case will be bound over to the trial court or to the grand jury. Unless a grand jury indictment is required by State law, the defendant will be formally charged by a document called an information, and must then be arraigned (i.e., given the opportunity to plead guilty or not guilty). In some States, the prosecutor may elect to present the case directly to a grand jury hearing instead of at a preliminary hearing.

GRAND JURY REVIEW

If required by State law, a grand jury will evaluate whether there is enough evidence to support felony charges at trial. In some States this takes place for felonies only; in others, it may occur for misdemeanors as well. Unlike the preliminary hearing, the grand jury proceeding is conducted in private, and only the prosecution presents evidence. Neither the defendant nor his/her counsel have the right to be present at such a proceeding. If the evidence is sufficient, the grand jury will issue a document called an indictment (describing the charges and approving their prosecution), and the defendant will be arraigned. If the evidence is not sufficient, the charges will be dismissed.

DISCOVERY

As in civil cases, discovery refers to the process of obtaining information from the opposing party and sometimes other sources. During the discovery process in a criminal case, the defendant may have access to a CPS agency’s records, if their contents may be useful to his/her defense. In some States, the defendant and his/her attorney will not be allowed to examine the complete agency files, but rather the judge will first review the file in private and provide the defendant with only those portions that relate to the defense.⁵⁷

PLEA BARGAINING

Once the prosecutor's office has decided to file criminal charges against an alleged child abuser, plea negotiations may begin. The prosecutor and the accused's attorney will discuss a possible settlement of the case without a trial. Avoiding a trial may be especially desirable when the victim is a child, because the child will experience anxiety while the trial is pending, and would very likely be required to testify and be cross-examined with the defendant present.

Certain plea bargain options offer the defendant an incentive to seek rehabilitation or to reform his/her behavior in other ways. For example, the defendant's probation may be subject to his/her continued participation in treatment, or prosecution of the charges may be deferred, with dismissal conditioned on the defendant's good behavior for a specified period.

Of course, just as in civil settlements, there may also be negative consequences to a plea bargain. Child victims may feel betrayed or disbelieved, or may feel unsafe, depending on the sentence. Particularly in the criminal context, plea bargaining with a child abuser may convey the impression, to the public as well as to the perpetrator and the victim, that child abuse is not as serious as other crimes.

TRIAL

If no plea bargain is reached, the case will go to trial. Criminal trials are different from civil trials: the rules of evidence are applied strictly, and the prosecutor has a heavy burden of proof (i.e., the evidence must prove guilt beyond a reasonable doubt).

SENTENCING OF CONVICTED OFFENDERS

There has been a trend toward enacting more severe criminal penalties for child abusers, depending on the nature of the offense committed, the age of the victim, the extent of injury (physical or emotional), and other factors that might warrant a harsher sentence (e.g., if the defendant was in a position of trust, such as a babysitter, teacher, or day care provider, when he/she committed the abuse). Several States have enacted laws imposing very harsh sentences for offenses with exceptionally aggravated circumstances; in other States, enhanced discretionary sentences may be imposed by judges, based on the particular facts of each case.

APPEALS

If the prosecution fails to prove the accused's guilt at trial, the defendant is acquitted. The prosecution may not appeal an acquittal because the U.S. Constitution does not permit a defendant to be tried twice for the same crime. Of course, a defendant may appeal if he/she is convicted at trial. An appeals court will only review the record of the trial for errors of law or insufficiency of the evidence; the trial court's specific findings of fact cannot be challenged by the defendant.

OVERVIEW OF THE DOMESTIC RELATIONS COURT PROCESS

In addition to civil child protection proceedings and criminal actions, allegations of child abuse or neglect may also arise in a domestic relations case. As with child protection cases, domestic relations matters are civil (not criminal) proceedings. However, a domestic relations case involves a dispute between two private parties, usually the child's parents, and cannot be initiated by the State.

CUSTODY, GUARDIANSHIP, OR VISITATION RELATED PROCEEDINGS

When a parent knows or suspects that his/her child is being abused or neglected by the child's other parent (or by someone in the other parent's home), he/she may choose to seek a variety of remedies from the domestic relations court. First, if the parents are married to each other, they may file for divorce. Second, if the parents are in the process of a divorce or separation action, one parent may request that he/she be awarded sole custody of the child based on the child's allegations of abuse or neglect by the other parent. Once custody has been awarded, the judge normally will permit the noncustodial parent to have reasonable visitation periods with the child. The custodial parent may ask the judge to order that these visits be supervised (by a friend, relative, or appropriate private or public agency) or even that visitation be denied entirely because of prior abuse or neglect by the noncustodial parent.

When custody has already been determined by a prior court decision and visitation already arranged, a parent may reapply to the domestic relations court for a modification of its previous order. Proof of parental child abuse may warrant a complete change in custody from one parent to the other, the elimination of all visitation, or a restriction of the present terms of visitation (e.g., supervised visits or elimination of overnight visits).

In recent years, there has been a growing concern that false allegations of abuse or neglect are sometimes made by parents to gain the advantage in a custody dispute.⁵⁸ At this point only limited studies have addressed this issue and none support the claims of widespread fabrication; therefore, any allegations of child maltreatment that arise during a custody struggle must be taken seriously. Such allegations are best assessed by neutral, independent evaluators, to ensure that they are properly assessed without bias.

In some custody disputes, the child may be appointed a lawyer (or guardian ad litem) to represent his/her interests separate from the interests of either parent. Many experts specifically recommend that children be represented in custody cases involving allegations of maltreatment.

SERVICES AVAILABLE TO DOMESTIC RELATIONS COURTS

Mediation

Many domestic relations courts provide mediation services for families involved in custody-related disputes. Mediation, which is conducted by a neutral person, attempts to focus divorcing parents on the needs of their children in their efforts to reach a mutually agreeable custody arrangement. In some States, mediation is mandatory if the parents cannot arrive at a custodial agreement on their own. Other States authorize their domestic relations court judges to order parties to mediation, if they think it might be productive. The child's participation in mediation services varies considerably.

While mediation is often helpful, it may not be appropriate in some cases when abuse is alleged. If one of the parents has also been abused by his/her spouse, the imbalance of power between the parties may make productive mediation impossible. The child's interests must be adequately protected by the nonabusing parent in order for mediation to be effective. Otherwise, a mediated resolution may place the child in greater jeopardy. In addition, even where spouse abuse has not occurred, mediation of child abuse claims may be inadvisable for another reason: mediators often favor joint custody. If a mediator encourages joint custody in every case, the result could be disastrous for the abused child. Therefore, mediation can be an extremely powerful and effective tool in resolving disputes. Whether mediation is appropriate depends on the facts and circumstances of each case.

Mental Health and Family Evaluations

As with the specialized juvenile courts, many domestic relations courts have mental health professionals available to perform evaluations of any family over which they have jurisdiction. These evaluators may be members of the court staff or private practitioners, and their degree of experience with child maltreatment varies widely among jurisdictions. An evaluation involves an assessment of the family (including, for example, visits to both parents' homes and interviews with the parents, the child, and any other source of information, such as teachers and guidance counselors), followed by a full report and recommendations to the court. If the judge requires, psychological testing may also be conducted in the course of a court-ordered custody evaluation.

TRANSFER OF CASES TO JUVENILE COURT

When a domestic relations case involves allegations of parental child abuse or neglect, it may be appropriate to transfer the case to the juvenile court. The unique characteristics of the juvenile court make it better able to protect the child and address the family's needs. A variety of support and preventive services are available to the juvenile court, to which the domestic relations court generally does not have access. Moreover, in many States juvenile court proceedings are less formal and adversarial than other courts', thus protecting the child from further trauma from participating in the legal process. Families involved in juvenile court proceedings may also benefit from special privacy protections. Thus, a custody or visitation dispute in family court may be transferred, under some circumstances, to the juvenile court. Unless prohibited by State law, this might be accomplished by order of the family court directing that a petition be filed in juvenile court. Some courts will suspend the custody action in family court until the juvenile court child protection petition has been adjudicated.⁵⁹

OTHER COURT ACTIONS INVOLVING MALTREATED CHILDREN

CHILD MALTREATMENT ALLEGED IN DOMESTIC VIOLENCE CASES

Sometimes allegations of child maltreatment will arise in the context of a domestic violence case where spouse abuse or another intrafamily offense is claimed. When an adult member of a family is abused, the children in the home are often abused as well.⁶⁰ Moreover, a child may suffer significant emotional harm from witnessing the battering of his/her parent.

All States have laws allowing abused persons to obtain orders of protection in a civil proceeding. A protection order is a court directive designed to prevent family violence by imposing certain restrictions or requirements on the abuser. This may be in force even before the case is brought to the attention of the CPS caseworker or, where the victim/spouse is fully cooperative, it may be used as an alternative to bringing a criminal, domestic relations, or juvenile court case.

Specifically, a protection order may require that the abuser move out of the victim's home, refrain from abusing the victim, avoid all contact with the victim, participate in treatment or counseling, or pay the victim support. However, all of these remedies are not available in every State. In many States, other remedies may be ordered as well. It is also not unusual for courts to have the authority to impose additional terms or conditions which it deems necessary for the victim's protection.

While a protection order is one important tool to prevent domestic violence, it may present a number of enforcement problems. Once an order is violated, it may be too late to protect the victim. Any consequences the abuser may feel will only be experienced *after* the damage has been done. Moreover, studies have shown that law enforcement officers are often reluctant to become involved in family matters by enforcing protection orders. This problem, however, has been addressed in a growing number of jurisdictions by requiring that officers receive special training in handling domestic calls.

TORT SUITS AGAINST PARENTS AND OTHER PERPETRATORS

Some States allow maltreated children to sue their parents in private civil lawsuits for financial compensation. A child may have a legal claim against his/her parent for physical or sexual abuse or even possibly for emotional abuse. In most States, parents have the right to use physical force on their children as a form of discipline or punishment. This right, however, is limited to reasonable force. If a parent's conduct is unreasonable, it may be considered assault or battery by the courts. When determining whether a punishment is reasonable, a judge will look at the conduct being punished, the child's age, the injury caused, and other relevant factors. Children have also been permitted to sue their parents for intentional emotional harm.⁶¹

Each State has a specific time period, usually 2 to 3 years, during which a legal claim must be filed. These legislatively created time limits are called statutes of limitations. When the person bringing a lawsuit is a child, the time period usually does not begin until he/she reaches the age of majority.⁶²

SUITS AGAINST AGENCIES OR OTHER INSTITUTIONS FOR ALLEGED FAILURE

TO PROTECT A CHILD FROM ABUSE

If an agency fails to investigate or intervene to protect a child when there is reason to suspect abuse or neglect, that agency could be sued in a civil court action. A child who is injured at home or in foster care may sue on his/her own behalf through a guardian.

The targets of these suits are generally the individual caseworker, his/her supervisors, and the State and/or local child welfare agency. The action usually seeks financial compensation for injuries suffered by the child which were caused, allegedly, by the defendants' negligence (i.e., their failure to adequately protect the child) or willful misconduct. The Supreme Court ruled in the *DeShaney*⁶³ case that a child does not have a Federal constitutional right to be protected by the State from abuse, even when the State or county child welfare agency has reason to believe that that child is in danger. However, this ruling applies in Federal courts only and does not prevent State courts from finding that, under the facts of a particular case, the State owes a duty to the child in question. The *DeShaney* case also does not apply to abuse that occurs once the child is in the State's custody.

In some States, caseworkers and State or local agencies are given at least partial governmental immunity (protection) from being successfully sued in civil court. Immunity is most often given for acts of negligence and not for purposeful, intentional harm.

CLASS ACTION SUITS SEEKING DECLARATORY OR INJUNCTIVE RELIEF

When agency misconduct or inaction is on a broader scale, a group or class of interested individuals may bring a class action. These actions usually claim agency problems such as violations of Federal law, understaffing, or failure to provide adequate services or treatment. The remedies sought in class actions against agencies are usually not awards of money to individuals, but are declaratory or injunctive relief.

Declaratory relief is a statement (declaration) by the court that identifies the rights of and resolves the issues between the parties. This statement is issued by court order, which is binding on all parties.

Injunctive relief is a directive, also issued by court order, forbidding or requiring the defendants to take certain action. This type of court intervention is often used in an attempt to improve the working of the child welfare system rather than to compensate particular victims. Sometimes these cases are settled by detailed consent decrees that enumerate actions the child welfare agency will take in the future.

CHILD ABUSE-RELATED CASES HEARD IN FEDERAL COURT

Remedies for Sexually Exploited Children Under Federal Child Sexual Exploitation Laws

Under Federal law, the production, distribution, and interstate or international transportation of pornographic material involving children, as well as the transporting of a child across a State line for the purpose of committing an unlawful sexual act, are crimes. The possession of three or more pieces of sexually explicit material depicting a child has also recently become a crime. When a person violates these Federal child sexual exploitation laws, not only can he/she be criminally prosecuted in the Federal courts, but he/she may also be sued by the child victim for civil money damages. A child with personal injuries caused by a violation of these Federal laws may recover at least \$50,000 from the offender, plus the costs of bringing the suit and his/her attorney's fees.⁶⁴

Other Federal Cases

Certain child abuse cases are heard in Federal court only. These involve the violation of some Federal statutes, such as the Federal child sexual exploitation laws, or a crime committed on Federal land such as military reservations or national parks. Also, any civil suit seeking more than \$10,000 in damages where the parties are from different States may be brought in Federal court (e.g., those compensatory lawsuits described in the section on “Tort Suits Against Parents and Other Perpetrators”), as may suits in which the plaintiff alleges a deprivation of his/her Federal rights.

Court Actions Involving Native American Children (The Indian Child Welfare Act)

Under a Federal law called the Indian Child Welfare Act,⁶⁵ child welfare proceedings that involve Native American children are treated differently from other child welfare cases. If the child lives on a reservation, his/her case must be decided by tribal courts (instead of State courts). Cases involving many Native American children who do not live on the reservation can be transferred to the tribal courts. These children must actually be enrolled as a member of an Indian tribe or be eligible for membership and have a biological parent who is a tribe member.

When a foster care placement or termination of parental rights proceeding for a Native American child are brought before the State courts, that child, his/her Native American custodian, and his/her tribe have the right to intervene or become involved as parties. This enables them to request that the case be transferred to the Indian tribal court. The child’s parents (or Indian custodian) and his/her tribe are also entitled to notice of the State court action, so that they can appear and respond to the charges or intervene and request a transfer if appropriate. This notification requirement is enforced very strictly by the courts, and a case may even be dismissed if it is shown that proper notice was not given to those who were entitled to it under the law.

Before a Native American child may be removed and placed in foster care, active efforts must be made to keep the family together. Once the judge has found that these efforts have failed, he/she must then decide whether continued custody by the parent would cause the child serious harm. (See “Termination of Parental Rights Hearings/Standard of Proof” for explanation of burden of proof in other civil termination of parental rights cases.)

The standard or burden of proof in a termination of parental rights case involving a Native American child is higher than in most termination cases heard in State courts. The evidence must show beyond a reasonable doubt that continued parental custody would be likely to cause the child serious harm.

When a Native American child is placed in foster care, certain preferences must be followed: the child’s extended family, his/her tribe, and other Native American families or foster homes (in that order) have priority over others in determining placement.

In 1990, Congress enacted the Indian Child Protection and Family Violence Act (Public Law 101-630, Title IV, 104 stat. 4544). This Act, among other things, authorizes Federal funds to the Bureau of Indian Affairs for a variety of purposes, including to help tribes establish CPS programs and develop multidisciplinary child abuse investigation and prosecution teams.

Military Cases

For several decades, the military has been seriously addressing the problem of child abuse and other forms of family violence. The Department of Defense has clearly identified the prevention of child abuse as a priority and has encouraged cooperation between military and civilian authorities.⁶⁶

Military courts have jurisdiction over active Service members, but will only handle offenses that occur on a military base or naval vessel or are otherwise Service-connected.⁶⁷ When abuse occurs outside the military base (for example, when a military family lives in civilian housing), the Service member will be subject to civilian court jurisdiction and may, therefore, be tried in State courts.⁶⁸ A child abuse or neglect case in the military will generally proceed in a manner similar to that in a civilian court. Nevertheless, it is important to realize that military courts have their own rules and procedures which may, at times, differ from civilian courts. For further information on the procedures followed by the military community, see another manual in this series entitled *Protecting Children in Military Families: A Cooperative Response*.

COORDINATION OF CRIMINAL AND CIVIL CASES INVOLVING THE SAME CHILD AND/OR FAMILY

Sometimes, when a child has been abused, that child and his/her family will be involved in several court proceedings simultaneously. A divorce-related custody dispute and a child protection matter may both concern the same instances of child maltreatment; a criminal charge may be filed at the same time that a child protection matter is being heard in juvenile court. These actions should be coordinated. The parties and judges in each separate action should keep informed of the steps taken by the other courts with jurisdiction over the family, and timetables should be synchronized for all proceedings. It is especially important for the prosecutor in a criminal case to understand decisions made in civil court with respect to the child's placement. This may affect the child's ability to testify at the criminal trial or even to aid the prosecutor in the preparation of the case.

Specifically, criminal and civil cases can be coordinated by:

- ✍ synchronizing investigations by law enforcement and child protective services agencies;
- ✍ coordinating pretrial orders regarding contact or prohibiting contact between the suspected abuser and the child;
- ✍ coordinating dispositional and sentencing options sought by the petitioner (in a civil case) and the prosecutor (in a criminal case); and
- ✍ setting up guidelines for when a child abuse or neglect case should be referred to the police.⁶⁹

PRETRIAL CASEWORKER PREPARATION

In a judicial proceeding, the caseworker may be the primary source of information about the family involved. Therefore, the caseworker must be sure to document accurately the services provided to the family, visits and interviews conducted, and the response of family members to agency efforts. Since not all information is allowed for use in court (e.g., opinions, speculation, conclusions), the caseworker should take great pains to record his/her observations in factual rather than conclusory terms.

For example, when describing a home visit, the caseworker should not write “the child was neglected,” or even “the house was messy.” Instead, he/she should describe what he/she saw, heard and smelled: “I found the child dressed only in a T-shirt. She was extremely dirty and foul-smelling. The house was not heated and was infested with cockroaches. The cupboards and refrigerator were empty. In the kitchen, garbage overflowed from the trash can onto the floor and was swarming with roaches and flies.” This type of documentation is not only more likely to be admitted into evidence by a judge, but is also more persuasive than a mere conclusory statement.

Because the caseworker has access to so much information about the family, he/she is a crucial witness at trial. While the prospect of preparing for trial may be frightening, a thorough review of the family’s case record and a conference with the agency’s attorney is usually sufficient to prepare a witness to testify. It is up to the attorney to advise the caseworker of what to expect in court and to answer his/her questions. The caseworker and the attorney should review the caseworker’s testimony together, which will allow any confusion or problems to be addressed *before* trial.

During the caseworker’s involvement in any given case, he/she will come into contact with a number of lawyers and sometimes lay advocates. Communication and cooperation between the caseworker and the agency attorney are important throughout the legal process, including deciding whether to go to court, drafting the petition, preparing to testify, and evaluating the dispositional options. Both lawyers and caseworkers should keep in mind the following tips for maintaining a healthy working relationship:

- ☞ Be accessible and interact regularly. For example:
 - return phone calls promptly;
 - schedule regular visits by the attorney to the agency offices (if the attorney works “in-house,” he/she could even set aside a few minutes each day to visit caseworkers’ offices to talk informally); and
 - establish a system to designate at least one attorney to be available each day to handle caseworker questions.
- ☞ Define attorney and caseworker roles clearly.
- ☞ Encourage attorney participation in agency activities such as case conferences and foster care reviews.

- ✍ Establish guidelines for decision making and procedures for resolving disagreements between caseworkers and attorneys.
- ✍ Provide an opportunity for caseworkers to evaluate attorney performance.⁷⁰

The caseworker may also be consulted by the child's attorney, guardian ad litem, and/or court appointed special advocate, if they have been appointed, as part of their fact gathering process. He/she may also be called upon to consult with potential expert witnesses and members of a multidisciplinary child protection team.

Additionally, the caseworker may have to explain the court process to the child and the family. What is often a mystifying process, even to those who are familiar with it, may seem overwhelming to family members who are personally involved. It is important for the caseworker to be familiar with the process and procedures of a child protection legal proceeding. This will help the family and the child understand what has taken place and know what to expect.

PROVING CHILD MALTREATMENT IN COURT

This section applies to both civil and criminal cases. However, some significant differences between the two types of proceedings exist; these differences will be noted throughout the discussion.

THE PROCESS OF PROVING MALTREATMENT

To succeed in a child maltreatment case, sufficient evidence must be presented to the court to prove that:

- ✍ the child has been harmed or threatened with harm; and
- ✍ in a civil trial, the parent either inflicted an injury on the child or failed to protect the child from harm; or, in a criminal trial, the defendant was the perpetrator of this harm.

These elements may be proved by direct evidence alone, such as the child victim's testimony; but usually additional evidence, such as expert testimony, is needed to establish the facts to a sufficient degree of certainty.

When the alleged offender asserts some type of defense or extenuating circumstances (e.g., reasonable use of parental discipline), it is his/her burden to establish this defense, and rebuttal evidence then may be introduced.

THE RULES OF EVIDENCE

Why They Exist

The rules of evidence control what information may be introduced in court to convince the judge to reach a particular decision. Because some types of testimony, documents, and records are less reliable and more prejudicial than others, special evidentiary rules are necessary to allow the judge to consider some evidence in his/her fact-finding process, while excluding other evidence from consideration.

How Evidentiary Rules Affect the Caseworker

Anyone who investigates or gathers facts in a child abuse case should have a general understanding of the rules of evidence. Although in most States few cases in a CPS caseload actually go to court, it is important to treat all investigations as if they might. The manner in which a caseworker should practice (i.e., conduct investigations, take notes, and preserve tangible evidence) is significantly affected by these rules.

Types of Evidence

There are several types of evidence that may be admissible in court. The caseworker should be able to sort out the information contained in his/her case narrative/dictation according to the type of evidence it represents.

- ⌘ *Direct* evidence is evidence which is based on personal knowledge or observation; generally, testimony by an eyewitness to an event.
- ⌘ *Real or demonstrative* evidence usually takes the form of documents, photographs, or x rays. It is an object (rather than testimony) that is offered to persuade the judge of the facts in question. The rules of evidence require that before real or demonstrative evidence may be presented to the judge, a foundation must be laid that establishes the relevance and authenticity of that object. This is generally accomplished by the testimony of someone who has had control over the object. (See “Getting Records Into Evidence.”)
- ⌘ *Circumstantial* evidence is often used when no or little direct or real evidence is available; it is indirect evidence from which certain inferences can be drawn. This would include testimony by a neighbor who heard a child crying and an adult shouting, or by a teacher who noticed that the parent often smelled of alcohol and slurred his/her speech. The judge will not take this as absolute proof of abuse or neglect, but together, these details may create a *probability* that the abuse or neglect occurred. Although circumstantial evidence is the least persuasive type of evidence, it is particularly useful in child abuse cases, where eyewitnesses and clear evidence of inflicted physical injury are rare. Expert witnesses may also provide circumstantial evidence by testifying in court. (See “Expert Testimony.”) For example, expert testimony that a child’s injuries are inconsistent with the parents’ explanations for them may be permitted to infer that the child is, in fact, a battered child.

For example, a caseworker’s narrative/dictation on a child abuse investigation might contain the pieces of information listed below.

1. A teacher kept a log of the days that the child came to school with bruises.
2. A neighbor heard a child’s screams.
3. A pediatrician reported the case after examining the child and found multiple bruises, both old and new, on his/her back and buttocks. The doctor says that the location, number, and severity of the bruises, as well as the presence of old bruises in the same place, suggest that the child’s injuries did not occur accidentally, but rather were intentionally inflicted.
4. Medical records.
5. Photographs of the bruises taken by a police officer called by the doctor.
6. The child said that his/her parent beat him/her with a belt.
7. A belt.

A classification of the evidence should look something like this:

- ⌘ *Direct evidence*: the child’s testimony.
- ⌘ *Real or demonstrative evidence*: the teacher’s log (supported by his/her testimony); the medical records (supported by the doctor’s testimony); the photographs (supported by the officer’s testimony); and the belt.

All of this evidence might not be used in court, but caseworkers (aided by their attorneys) will want to sort out and consider it all initially. Once a caseworker has categorized all his/her information, the strengths and weaknesses of the case will become clearer. With the attorney's help, the caseworker may be able to fill in any gaps in the evidence by further investigative work and case preparation.⁷¹

Relevant and Material Evidence

To be usable in court, evidence must be material and relevant. Evidence is material when it has a logical connection to any of the issues that need to be proved in the case. It should be clear from a particular State's law exactly what must be proved. For example, whether a parent cheated on his/her income taxes would be immaterial to any issue in a child abuse case. Evidence will be relevant when it increases the likelihood that a particular fact in question occurred. For example, the fact that, prior to the incident in question, the parent failed to provide his/her child with adequate medical care is irrelevant to the question of whether he/she molested that child. Evidence must also be competent. This means that the evidence does not violate any rules of evidence and is not more prejudicial (unfairly harmful or beneficial) than it is probative (tending to prove or disprove) on any given issue.

THE HEARSAY RULE

Although relevant evidence is generally admissible, some relevant evidence that is thought to be unreliable will be excluded from judicial consideration. One such evidentiary rule is the rule against hearsay. Hearsay is a statement made outside the courtroom that is presented in court by someone other than the original speaker to prove the truth of the original speaker's statement. So, the hearsay rule sometimes prevents a witness from testifying about what another person said. In other situations, because the purpose of repeating the statement in court is not to prove the truth of the statement, hearsay may be admissible.

For instance, a witness would not be permitted to testify that he/she heard another person say "I am the President," to show that that person was, in fact, the President. Such testimony could be used, however, to show that the speaker was mentally unstable. In a child abuse case, it is not uncommon for a witness to be told by the child's teacher, neighbor, or relative that "the child gets beaten up at home all the time." However, because of the hearsay rule, that witness may not testify that "Mr. X told me that the child gets beaten up at home all the time," to prove the abuse. If Mr. X has something to say about the child's home life, the judge will want to hear directly from Mr. X, so that Mr. X can be questioned fully, cross-examined, and observed on the witness stand.

There are a variety of exceptions to the hearsay rule which permit the use of some hearsay in court. The underlying reason for these exceptions is that some hearsay statements, when made under certain circumstances that suggest that they are especially trustworthy, are reliable enough to be used in court. The rule against hearsay is tricky, and sometimes lawyers and judges have difficulty applying it correctly.

The following are among the hearsay exceptions most commonly used in child abuse and neglect cases.

Admissions of a Party

When a person accused of some type of wrongful conduct makes an out-of-court admission, it may be testified to by another under an exception to the hearsay rule. For example, an allegedly abusive parent might confess to an investigating caseworker: "I know I hit her too hard but I won't do it again." Although the parent may deny in court that he/she ever made such a statement, the caseworker would be permitted to recount it under this hearsay exception. The reason for this exception is that an admission is considered

reliable hearsay, since an alleged wrongdoer (for example, an abusive parent) has nothing to gain from making up such a damaging statement. In addition, the parent probably would not say something contrary to his/her own interests if it were not true.

Excited Utterances

An out-of-court statement that is made spontaneously under extreme emotional excitement is also admissible as an exception to the hearsay rule. The excited utterance is viewed as trustworthy because the speaker's excitement is thought to prevent him/her from reflecting long enough to fabricate a story. For example, in a child abuse case, courts will usually look at the length of time between the startling event and the child's statement when deciding whether it is an excited utterance. However, the time lapse alone is not determinative; it is just one factor among many that the court can consider.

Some States apply a more relaxed standard for admitting excited utterances when they are made by children. Very young children, particularly if they are victims of sexual assault, may be found to remain under the influence of the assault for an extended period of time.⁷² Thus, for example, the statement of a 4-year-old made several hours after he/she was raped may be considered sufficiently reliable to be admitted as an excited utterance, given the child's very young age, the degree of trauma to which he/she was exposed, and the level of excitement under which he/she made his/her statement. However, a court might find that the same statement, made by an adult rape victim, does not qualify as an excited utterance, since an adult (or even an older child) might be capable of reflecting on and fabricating a story during a time lapse of that length. Even when similar statements are made by children of similar ages and under similar circumstances, courts in different States vary widely as to what they will consider an excited utterance by a child.

Records

What Records Are Admissible?

Regularly kept records fall into another hearsay exception. Although records are technically hearsay because they contain second-hand information, their contents will be considered reliable and therefore admissible when they are kept regularly, systematically, and routinely. It is this regularity of the record-keeping process by persons with a duty to supply accurate data that ensures trustworthiness. This foundation is generally established in court by the testimony of the recorder, or even by the clerk or records custodian, depending on the nature of the record in question. This exception applies to both business records, such as hospital and medical records, and official records, such as police reports, social services casework files, and school records.

Particularly in cases of child maltreatment, in which the content of a caseworker's file is often essential for a successful court case, the manner in which these files are maintained is important. Case records will not be admitted under the records exception to the hearsay rule unless the judge is convinced that they are accurate. Thus, a caseworker's dictation/narrative/ progress notes should be detailed and thorough. The facts recorded must be either based on the caseworker's personal knowledge or he/she must have had a duty to verify the truth of those facts. However, not everything in dictation/narrative/progress notes may be admissible in court. Opinions and conclusions may be excluded, so the caseworker should use only facts.

Getting Records Into Evidence

The attorney who seeks to use a document or record as evidence in court must (if opposing counsel or the judge insists upon it) establish its authenticity, i.e., that the document is actually what it is claimed to be. This may be accomplished by:

- ✍ testimony of any witness who knows that the document is what it appears to be or who is familiar with the handwriting on the document;
- ✍ testimony of an expert witness that the document is consistent with other documents that have already been authenticated in that case; and
- ✍ comparison by the judge or jury of the document with already authenticated documents.

Statements Made for the Purpose of Diagnosis or Treatment

Out-of-court statements made to doctors and other medical personnel may be used in court if they are made for the purpose of diagnosis or treatment and concern a current medical condition. In some States, this exception could extend to a patient's description of past symptoms and even to the cause of the patient's injury and the identity of the perpetrator. For example, a child's report of abuse to a doctor, including his/her description of details and sometimes his/her identification of the abuser, might be admitted in a child abuse case. The rationale for this exception is that patients are generally truthful when their health is at stake, because they seek the most appropriate medical care possible.

However, when an out-of-court statement is made to medical personnel expressly for litigation purposes, this rationale does not apply. Thus, statements made to a doctor in the context of a court-ordered evaluation, for example, are not admissible under the medical diagnosis/treatment hearsay exception.

The Residual Exception

In many States, courts are given the discretion to allow the use of hearsay statements that do not fit precisely into a traditional hearsay exception. This catch-all or residual exception permits the admission of hearsay, in the interests of justice, which has circumstantial guarantees of trustworthiness. Some common guarantees of trustworthiness include:

- ✍ spontaneity of the statement;
- ✍ degree of certainty expressed by child;
- ✍ child's age, intelligence, and maturity level;
- ✍ child's use of age-appropriate terminology;
- ✍ nature of statement's details, which are outside the normal experiences of a child that age;
- ✍ lack of motive to lie; and
- ✍ statement not elicited by leading questions.⁷³

Nevertheless, some hearsay that could be properly admitted under a State's residual exception may not be allowed in criminal cases because it violates the confrontation clause of the Constitution. The confrontation clause gives criminal defendants the right to face and challenge their accusers in court. When, instead of in-court testimony by the child victim in person, his/her accusatory statements are repeated in court by someone else, the defendant does not technically get to *face* his/her accuser. The defendant cannot see the child (and the child is not forced to see the defendant), and the defense lawyer does not get a chance to cross-examine the child. Because of this, the Supreme Court has imposed some conditions on allowing hearsay statements into court.

Under the recently decided *Wright*⁷⁴ case, a hearsay statement that does not fall within one of the traditional hearsay exceptions (but is admitted under the residual exception instead), must be found by a judge to be *more reliable* than other admissible hearsay. Courts must look at the totality of the circumstances that surround the making of the statement in order to determine whether that statement is sufficiently trustworthy to protect an accused abuser's constitutional rights under the confrontation clause.

In other words, courts will consider all of the indications of trustworthiness that are present for a given statement, including those listed above, but no *one* factor should disqualify a child's statement on its own.

Special Statutory Exceptions for Child Sexual/Physical Abuse Victims

In recent years, many States have created, by statute, special exceptions to the hearsay rule especially for out-of-court statements made by a child victim of sexual and physical abuse. This is particularly necessary when the child's hearsay statements do not fall within an existing exception. Although the wording of these special exceptions varies from State to State, they all require that the child be found unavailable to testify in court and that his/her statements be particularly trustworthy. A child's unavailability need not be literal; he/she may be deemed unavailable to testify under these exceptions if he/she would be traumatized by testifying in court. Judges will generally require that evidence (often expert testimony) be presented to show that a child's in-court testimony would cause him/her harm.

The special hearsay exception for child abuse victims is a significant evidentiary reform. It rejects the notion that a child's complaints of abuse are inherently suspect and that they require strict corroboration by additional evidence. The Supreme Court has recognized that the trustworthiness of a child's hearsay statement depends on *all* of the circumstances surrounding that statement rather than a set of rigid preconditions.⁷⁵ Perhaps more important, this special exception recognizes the unique need in a child abuse case for allowing the victim's statements to be used, since in most of these cases, there are no eyewitnesses to the abuse, nor are there usually observable physical injuries to the child.

PRIVILEGED COMMUNICATIONS

Statements made to doctors, lawyers, and others in their professional capacity are generally considered privileged and cannot be disclosed in court, unless the patient or client consents to such disclosure. The purpose of this legal rule is to encourage those who seek professional assistance to communicate freely and openly with their service providers without fear of public exposure or legal repercussions.

The scope of these privileges and the particular professional relationships to which they apply varies. In some States, privileges are abrogated by statute in child protection proceedings. In addition, all States have abuse reporting laws that mandate the reporting of suspected child abuse, often even when the reporter's suspicion originates from privileged communications (although lawyers are not usually mandated reporters).

Conversations between husbands and wives are also privileged in most types of cases, which sometimes prevents one spouse from testifying against another. However, in a case alleging child maltreatment, this privilege is generally not applied. Any abuse or neglect is deemed to have already destroyed the family harmony the privilege was designed to protect; moreover, the safety of a child is at stake.

OPINION EVIDENCE

Expert Testimony

Opinion testimony by a person deemed by the court to be an expert is generally permitted. The admissibility of expert testimony depends on four factors:

- ✍ whether the subject matter of the testimony is outside the average judge's or jury's knowledge or experience;
- ✍ whether the state of the art of that field permits an expert opinion;
- ✍ whether the witness qualifies as an expert on that subject matter; and
- ✍ whether the basis of the expert's opinion is reasonably reliable.

The nature of child abuse and neglect has been found by many courts to be unfamiliar to the average person. Accordingly, expert testimony on the subject of child abuse or neglect may be allowed by some courts to explain a child's behavioral patterns and to interpret physical injuries.

When a party to the case intends to call an expert witness to give opinion testimony, the attorney for that party will question the witness in order to establish that he/she qualifies as an expert. The opposing party then has the opportunity to cross-examine that witness to test whether the expert is in fact qualified to testify as such. This process, known as voir dire, inquires into the witness' credentials, including formal education, practical experience, training, familiarity with authoritative literature in the field, and reputation in the field. A witness will qualify as an expert if he/she has sufficient experience, training, skill, or knowledge with respect to the particular subject matter to which the testimony relates. Courts may be less impressed with the witness' title or degree than with his/her actual familiarity with the subject and ability to assist the court in reaching its decision. No one factor will qualify or disqualify a witness as an expert. Judges usually base this decision on whether the witness' credentials, as a whole, make his/her opinions helpful to the fact-finding process.

Even when the witness is not an expert, he/she may be permitted to express his/her opinion about conditions that are commonly experienced by the average person (e.g., "the child seemed frightened" or "the child acted angry"). The decision of whether to admit opinion testimony by a lay witness is discretionary with the trial judge. It generally is decided based on whether the testimony is likely to be helpful to the fact-finding process.

Scope of Permissible Expert Testimony

The basis of an expert's opinion must be information of a kind that is relied upon by other experts in the same field. An expert may neither give an opinion based on speculation or guessing, nor based on novel scientific principles.⁷⁶

An expert witness *may* (depending on the State) be permitted to corroborate a claim of child abuse by testifying that the alleged victim's psychological and behavioral patterns are similar to those of other children known to have been abused, whom the expert has examined. Again, depending on the State, expert testimony regarding syndromes may also be allowed. Such testimony involves the expert's description of a cluster of factors that have been identified with child abuse and have become known, collectively, as a syndrome. The witness (or another witness) will then explain how the child's condition is consistent with these factors. Some syndromes commonly raised in child abuse and neglect cases are described below.

- ⌘ **Battered child syndrome** describes a pattern of injuries generally found to indicate physical child abuse.
- ⌘ **Failure to thrive syndrome** describes a growth rate in an infant that is subnormal or departs from an established pattern. When failure to thrive is not caused organically (i.e., from biological causes), it is associated with child neglect.
- ⌘ **Child sexual abuse syndrome** describes common characteristics or behavior patterns found in sexually abused children.
- ⌘ **Child sexual abuse accommodation syndrome** describes a victim's response to sexual abuse by accommodation, delayed reporting, and recantation.
- ⌘ **Munchausen syndrome by proxy** describes characteristics in a parent who, in order to have his/her child subjected to repeated and possibly harmful medical procedures, fabricates a child's medical history, tampers with a child's laboratory tests, or actually causes a child's health problem.

(The last two syndromes listed above are still the subject of significant controversy.)

While some courts allow syndrome testimony about child victims, expert testimony that the alleged perpetrator has certain traits that conform to the profile of a child abuser is not generally permitted and never permitted in criminal cases.

There are certain rules that limit the scope of an expert's testimony. An expert will rarely be permitted to testify, for example, that he/she believes the child is telling the truth about the alleged abuse, even after the child's truthfulness has been attacked in court. It is the exclusive function of the judge or jury to evaluate the credibility of witnesses. In addition, particularly in criminal cases, most States still prohibit expert testimony as to the ultimate issue (i.e., whether the child was, in fact, abused), since this too is considered within the role of the judge or jury alone.

CHARACTER EVIDENCE

Generally, character witnesses are not permitted in court. However, the judge has the discretion to allow the alleged abuser to present evidence concerning a pertinent trait of his/her own character or of the character of the victim. Character evidence regarding either the abuser or the victim may only be used by the petitioner or prosecutor as rebuttal if the issue of character was already raised by the defendant.

When character evidence is allowed by the judge, it may only relate to the general reputation of the subject of the testimony. For example, an allegedly abusive mother might be permitted to introduce testimony by her neighbor that she is a protective mother who is gentle with her children. A character

witness may not testify to specific good or bad acts performed by the accused or the victim on direct examination unless character is an element of the case. Thus, the neighbor/witness above could not ordinarily recount the mother's numerous acts of generosity and kindness. Once that witness has testified, however, specific acts may be inquired about on cross-examination.

PRIOR ACTS EVIDENCE

Evidence of misconduct by the defendant that occurred prior to the abuse alleged in court occasionally may be admissible. Such evidence, which may take the form of a previous criminal conviction or testimony that the defendant committed certain bad acts, is often objected to by the defendant's attorney as prejudicial. However, sometimes past conduct is so similar or related to the maltreatment alleged that it may be admitted by the judge to show that the abuser had an overall *plan* to abuse, a *motive* to abuse, or the *intent* to abuse. Bad acts committed in the distant past may not ordinarily be used to show that the parent *probably* committed the abuse currently in question. For example, when a father is being tried for the sexual abuse of his 4-year-old daughter, evidence that he had molested another of his children might be allowed to show that the more recent incident was a part of the father's plan or that it was intentional. However, evidence that he had sexually assaulted a coworker 15 years before would probably not be admissible, since it is not sufficiently similar or related to the abuse of his young daughter to reveal his plan, motive, or intent.

STIPULATIONS

Evidence of any fact will be allowed in court if the opposing party stipulates to (admits) its truth. Only evidence of disputed facts will be subject to exclusion under the rules of evidence.

RULES OF EVIDENCE AND THE NONLEGAL PROFESSIONAL

Obviously, the rules of evidence are complicated and the nonlegal professional will not need to know all of them. Even lawyers, with their years of specialized legal training and experience, cannot always predict which evidence will be allowed by a particular judge. The caseworker's job is to provide the lawyer with *all* of the information in his/her possession before the hearing, allowing the lawyer and the judge to worry about technical evidentiary questions. It is important to remember that while caseworkers are not ultimately responsible for choosing evidence, the more they know about the rules of evidence, the more they will understand and be able to prepare a case.

HOW MUCH EVIDENCE IS REQUIRED?

The amount of evidence required in a hearing is called the standard or burden of proof. These standards vary, depending on the type of proceeding.

At a shelter care or temporary removal hearing, the standard of proof is usually probable cause. Probable cause means that the judge has enough evidence to create the probability in his/her mind that the child would be in significant danger if he/she remains home until the case is tried. If the judge thinks there is a real chance that the child will be hurt if returned home, this standard allows him/her to place the child in shelter care.

In most States, civil adjudicatory hearings generally apply the preponderance of the evidence standard. The preponderance standard requires that there be more evidence in favor of the abuse or neglect than against it. A commonly used illustration of this concept is "tipping the scales." If the scales tip slightly to one side, there is a preponderance of evidence on that side. Or if 51 percent of the evidence presented in

court favors one side of the case, then that side of the case has been established by a preponderance of the evidence.

A burden of proof that is higher than the usual civil preponderance standard is used in some States for civil adjudications and in almost all States for termination of parental rights hearings. This burden of proof is clear and convincing evidence. Clear and convincing evidence is present when almost all of the judge's doubts have been resolved.

Finally, criminal courts will not find an accused person guilty unless his/her guilt has been proved beyond a reasonable doubt. Because it is so difficult to eliminate *all* reasonable doubts in the mind of a judge or jury, this standard of proof makes criminal cases the hardest type to win.

Although a specified amount of evidence is required for one side or the other to prevail, this does *not* mean that a certain number of witnesses or other pieces of evidence are required. Rather, the burden or standard of proof refers to the degree of certainty created in the mind(s) of the trier(s)-of-fact based on the persuasiveness of the evidence. For example, a party might satisfy his/her burden of proof by presenting just two convincing witnesses, even if his/her opponent has presented many more.

TESTIFYING IN COURT

Proper preparation by the caseworker, as discussed above, will make his/her job much easier when it is time to testify in court. However, good note taking and open communication with the agency attorney will not necessarily make a caseworker an effective witness. How well caseworkers communicate on the witness stand is as important as pretrial preparation.

COURTROOM DRESS AND DEMEANOR

The impression given to the judge during testimony is crucial. The following checklist should help:

- ✍ The witness should dress professionally and conservatively. Usually, business suits or jackets and ties for men and dresses or skirts and blouses for women are appropriate.
- ✍ The witness should conduct him/herself in a businesslike and efficient manner (again, professionally). Before and after he/she testifies, he/she should not congregate with others or laugh, joke, or talk to show that he/she appreciates the importance of the court proceedings and takes them seriously. The witness should *always* be respectful in court.
- ✍ During his/her testimony, the witness should sit up straight, speak loudly and clearly, and look directly at the questioning attorney or the judge. He/she must remember that a message is conveyed by his/her *nonverbal* language (e.g., tone of voice, facial expression, hand gestures, body position, and eye contact). The witness should not slump or fidget.
- ✍ The witness should be sincere, objective, and dignified. He/she should not appear biased or defensive and should remember not to take cross-examination as a personal attack.⁷⁷

DIRECT, CROSS, AND REBUTTAL EXAMINATION

A witness may be questioned in several stages. First, on *direct* examination, the attorney who is using the witness as a part of his/her case will question that witness. This type of questioning is generally open-ended, allowing the witness to fully explain the answers, for the purpose of presenting the judge with evidence to support that party's position.

For most witnesses, testifying on direct examination is easier than on cross-examination. Preparation includes reviewing and organizing one's notes and meeting with the agency's attorney. Direct examination usually follows the following pattern:

- ✍ The witness's name will be called and he/she will approach the witness stand.
- ✍ He/she will take an oath, swearing to answer truthfully.
- ✍ The attorney who called the witness will probably ask:
 - the witness's name, occupation, and place of employment;

- length of time he/she has worked at his/her current job, his/her job title, and the type of work he/she performs;
- the witness’s job qualifications;
- how he/she knows the child and the respondent and for how long;
- what happened at specific time(s) and place(s); and
- any other pertinent questions.

While most direct examinations follow this type of pattern, caseworkers should not prepare a script or memorize their testimony. Spontaneous testimony is much more believable than “canned” testimony. In addition, witnesses are easily rattled or confused if the unexpected occurs (e.g., objections from opposing counsel, questions or interruptions by the judge). However, it may be helpful for prospective witnesses to practice some potentially difficult areas of their testimony with their attorney.

Once a witness has been questioned directly, he/she is subject to *cross-examination* by the opposing attorney. Cross-examination is designed to impeach the witness and expose any weaknesses in his/her testimony. It involves close-ended questions that generally require a yes or no answer; more complete, explanatory answers are usually not allowed. Leading questions (that suggest an answer by the very form in which they are asked) will be permitted on cross-examination. Being cross-examined will probably be the most difficult part for the witness. This does not mean, however, that witnesses should be overly anxious about cross-examination. Most attorneys will not continuously harass a witness until he/she breaks down and admits to biases and mistakes. Typically, the defense attorney tries, on cross-examination, to cast doubt upon the thoroughness of an investigation, the witness’ interpretation of the facts, and perhaps whether the witness’ judgment and actions were clouded by his/her feelings about the parents. If a caseworker has been careful and professional, he/she should be confident that the case has been handled properly.

It is important for witnesses not to take the cross-examination questions personally and to remember that the defense attorney is merely doing his/her job. He/she probably neither dislikes the witness nor thinks him/her incompetent. All lawyers *must*, regardless of their personal feelings, *zealously* represent their clients. Legal ethics *require* them to do everything in their power (within the limits of the law) to accomplish their clients’ goals. If a witness views cross-examination as a personal attack, then he/she will seem defensive and unprofessional to the judge, an impression to be avoided at all costs.

Lawyers often use common techniques on cross-examination. An understanding of these tactics will make it easier for the witness to keep his/her poise when answering a question. These tactics involve both the form and the purpose of the question.

Cross-examination questions often take the following forms:

- ⌘ **Leading Question.** A leading question suggests by its wording that the answer should be either yes or no. For example, in a neglect case where one of the allegations is that the baby was left home without adult supervision, the defense attorney might ask: “Isn’t it true that the baby’s 14-year-old sister was in the home whenever the mother went out?” Usually, a witness is allowed to explain an answer when only a yes or no would be misleading. If this is the case (as it would be in the example), professionals should begin their response by saying “that question requires an explanation,” rather than answering “yes” and then trying to

explain. If the defense attorney insists on a yes or no answer and interrupts the witness, he/she may turn to the judge and ask if he/she may continue. Judges vary in terms of how much explanation they will allow on cross-examination. Witnesses should not worry if they are not permitted to explain, or if, in the heat of the moment, they answer with an elaboration.

The other attorney can still repair the damage on redirect examination, when a *complete* answer can be given. Interrupting a witness' answers is probably the defense attorney's favorite weapon, and he/she will rarely ask a question on cross-examination that does not lead the witness to answer with an abrupt yes or no.

- ⚡ **Rapid Fire Questions.** The defense attorney may ask a string of leading questions in rapid succession, hoping to confuse or upset the witness. Since each question requires an answer, the witness has equal control over the pace. As with any question, pause to think about it before answering.
- ⚡ **Compound Question.** A witness may be asked a question that contains multiple questions. For example, "You saw the father hit the child and the baby fell down the stairs, isn't that true?" This should prompt an objection by the other attorney. If he/she does not object, however, the witness should tell the defense attorney that he/she does not understand the question and that it requires a two-part answer. A witness does *not* have to answer any questions that are in compound form.

Some defense attorneys may use certain *styles* to throw witnesses off:

- ⚡ **Badgering.** This is where the attorney stands close to the witness' face and shouts.
- ⚡ **Lulling the Witness.** This is where the attorney gives the witness a false sense of security by being overly friendly and familiar.
- ⚡ **Staring at the Witness.** After the witness has answered a question, some attorneys will pause and stare at him/her, as if expecting him/her to say more.

Witnesses should remain calm if the defense attorney uses any of these styles, and they should focus on their reason for being in court, which is to give testimony. There should be an objection if defense counsel's manner becomes too belligerent or disruptive.

The defense attorney's questions on cross-examination often have one of the following *purposes*:

- ⚡ To show *prejudice or bias*. Defense counsel will try to discredit the witness' credibility by insinuating that the witness is biased or hostile toward his/her client. For example, he/she may suggest that because the parent was uncooperative or failed to show up for an appointment when promised, the caseworker is holding a grudge. The answer should simply meet such suggestions with the truth. Child protection caseworkers are used to dealing with uncooperative clients. If this is true for the witness, he/she should simply explain that his/her personal feelings about the parent did not influence his/her decisions.

Case dictation/narrative/progress notes may also be used by defense counsel to show bias. The caseworker may be asked to read his/her dictation aloud in court. It will seem more objective (less biased) if the practice is followed, as discussed in the chapter on "Pretrial Caseworker Preparation," of entering *observable facts*, rather than recording generalizations, conclusions, and judgments. For example, a notation that "the parent is uncooperative and

rude whenever I visit the house” will convey more bias in court than if the caseworker had listed the specific uncooperative or rude behavior. The following notation would enhance one’s credibility as an impartial witness: “On June 2, 5, and 8 at 1:00 p.m., I went to the parent’s home, knocked on the door, and identified myself and the purpose of my visit. Each time, the parent slammed the door in my face and shouted ‘I don’t need any social worker to tell me how to raise my children!’”

- ⌘ To show *inexperience*. The defense attorney may try to impeach witnesses by challenging their ability to perform their jobs. If the witness is a new caseworker, defense counsel might draw attention to the witness’ lack of experience. He/she also might highlight the fact that the caseworker does not have an advanced degree in social work. The witness should be honest and not exaggerate his/her experience or fabricate degrees. However, the witness should not minimize his/her experience or other qualifications either. A caseworker may have only been on the job for 6 months, but may have handled an impressive number of cases. Also caseworkers are in court to testify the facts: what they did, saw, and heard. If they avoid offering opinions and judgments (which might require a certain degree of experience to be meaningful), their lack of experience should not weaken the case.
- ⌘ To show *inconsistency*. Another tactic to discredit witnesses is to find previous statements they made that are inconsistent with their testimony (e.g., from notes or from a deposition). The child welfare agency’s own attorney can always rehabilitate the witness’ testimony on redirect examination by showing that the earlier statements were taken out of context or based upon less information than the witness’ current testimony. The defense attorney may also try to show that the witness is inconsistent by repeatedly asking him/her the same question, rephrasing it each time, in hopes that he/she will contradict him/herself. The agency attorney may object to these questions as having been asked and answered.
- ⌘ To show *poor judgment or practice*. Witnesses should recognize that there may be honest differences of opinion, based upon the same facts. The defense attorney may try to get them to admit that the parent’s view has some merit, or that they overlooked some important facts in their investigation. Witnesses should try to avoid conceding a point (e.g., saying “that’s possible”). Instead, they should stick to the facts and let the judge decide whose position is correct.⁷⁸

If the attorney who presented the witness feels that rebuttal is necessary, *redirect* examination may be conducted but will be limited to those issues raised on cross-examination. Any issue the witness did not get a chance to explain on cross-examination can be cleared up or answered more fully on redirect. Finally, any issues raised on redirect may be addressed by *recross-examination* of the witness.

GUIDELINES FOR TESTIFYING IN COURT

The following general guidelines apply to all stages of questioning (direct, cross-, redirect, and recross-examination), and will improve the overall quality of a witness’ testimony:

- ⌘ The witness should be prepared. He/she should have a thorough knowledge of the case record. This will make him/her more confident and more helpful to the judge, and his/her level of persuasiveness will also be increased.
- ⌘ The witness should listen carefully to each question and pause to think before he/she answers. He/she should not let the questioning attorney rush him/her.

- ⌘ If the witness does not understand a question, he/she should ask the attorney to repeat it, clarify it, or rephrase it.
- ⌘ The witness should answer only the question he/she was asked and should not volunteer additional information or discuss tangential subjects.
- ⌘ If the witness does not know the answer to a question, he/she should not be afraid to answer “I don’t know.” Admitting that he/she does not know something will often enhance his/her credibility. Guessing at an answer or qualifying it with an “I think so” may leave the witness open for impeachment later.
- ⌘ The witness should not give an opinion unless it is requested. He/she should testify to the *facts* within his/her own personal knowledge and experience. He/she should be specific; if possible, giving exact times, dates, and numbers. Events should be described step-by-step, rather than through narrating long stories.
- ⌘ The witness should avoid taking sides. His/her job is to present evidence as truthfully and accurately as possible; it is the attorneys who must advocate for one side or the other.
- ⌘ The witness should maintain proper courtroom decorum (as discussed in “Courtroom Dress and Demeanor”). He/she should dress appropriately and show respect for the judge.
- ⌘ The witness should speak a little louder, slower, and more distinctly than he/she usually speaks. The answer must be verbal; he/she should not shrug his/her shoulders or nod his/her head (all answers need to be heard and recorded by the court reporter).
- ⌘ The witness should use appropriate language, not slang or professional jargon.
- ⌘ The witness should always tell the truth.⁷⁹

PROFESSIONALS AS WITNESSES IN SEXUAL ABUSE CASES

Few professionals who work with sexual abuse cases enjoy testifying in court. The key to quality testimony and emotional survival in court is thorough preparation. The professional should know the facts of the case, his/her opinion about the facts and the case, the essential points that should be communicated in the testimony, the weaknesses of his/her presentation, and the questions he/she may be asked on cross-examination. The professional can expect to spend 2 to 3 hours of preparation for every 1 hour on the stand.

Know the Facts of the Case

Most sexual abuse cases have a history. Professionals should memorize the names, ages, and grades of the children; when adults met, were married, and divorced; what the specific sexual abuse allegations are and the context of their occurrence; and the particulars of other important events in the case. He/she should be aware of gaps in his/her knowledge about the case.

This kind of preparation will help the professional provide testimony that appears to be informed and precise. It will protect him/her from leafing through the case record looking for information, which may make him/her look as if he/she does not have a full command of the case. It will help the professional

avoid being tripped by the opposing side by unanticipated questions that call upon factual knowledge. It may even afford the professional the opportunity to correct the opposing attorney when he/she is incorrect or imprecise in his/her presentation of the facts.

Have an Opinion

There is one major difference between a material witness and an expert witness: the expert may give opinion testimony in a substantive area (e.g., sexual abuse). A person becomes an expert by virtue of her/his education or experience; however, it is much easier to be qualified as an expert if he/she possesses a doctorate. It is the judge who decides whether the witness qualifies as an expert.

A professional who is testifying as an expert witness in a situation of possible sexual abuse should have formed an opinion about the case. The opinion may relate to a number of issues; appropriate issues will depend upon his/her profession. The most common issue for sexual abuse cases is whether the child has been sexually abused. However, in most instances, the professional will not be allowed to testify to that directly, but will instead testify about whether the child's behavior fits the sexually abused child disorder (presents a symptom picture consistent with having been sexually abused)⁸⁰ or the child sexual abuse accommodation syndrome (has responded to the experience of sexual abuse by accommodation, denial of the abuse, delay in reporting, and recantation after disclosure).⁸¹ (See the section on opinion evidence in a previous chapter in this manual entitled "Proving Child Maltreatment in Court.") Other issues to have an opinion on are where the child should be placed, what sort of treatment is needed, whether the abusing parent should be incarcerated, or what kind of visits are indicated.

The issue of partisanship can be a very troubling one for witnesses, especially because the courtroom is so adversarial. It is important to appreciate that the entirety of the opinions usually will not completely support the positions of any of the attorneys involved. For example, in a divorce case each of the opposing attorneys will want the professional to highlight the positive attributes of his/her client and the negative attributes of the parent on the other side. The professional will probably see positives and negatives in both parents, even if he/she has decided that one has been sexually abusive. A useful position is to recognize that the professional is partisan to his/her opinion about the case, not toward one side or the other.

Moreover, because the professional's opinion will be considered, for example, about positive and negative aspects of both parents, there is no reason not to share these despite the objection of one or the other attorney. Presenting a balanced picture of family members will enhance the professional's credibility as an unbiased expert.

The professional must not only be prepared to give his/her opinion, but also be able to explain the basis for the opinion. Generally, the basis of an opinion includes factual material about the case and a methodology for analyzing the material.

Consider the following example: A mental health professional's opinion that the child exhibits symptoms consistent with having been sexually abused (or has been sexually abused) is based upon the fact that the child has reported repeatedly that his "uncle tried to suck pee out of my wiener," that the boy indicated that he would be poisoned if he told, and the fact that he was found initiating a 3-year-old to penis sucking.

The methodology described to the court could be an evaluation of whether any indicators of sexual abuse were present and an inquiry based on the criteria for determining the veracity of an allegation. The facts of the case and the methodology for interpreting them would be presented to the court.

The Essential Points of the Testimony

People's lives and behavior are very complex. The courtroom is poorly suited for communicating these complexities. The professional's discipline and its subtleties may be quite foreign to the fact-finder, whether it be a judge or a jury. Furthermore, the attention span of the fact-finder may be limited.

Therefore, it is best to decide in advance the essential points that the professional would like to communicate to the court. Sometimes a written list is useful. Usually there will be one attorney who is more sympathetic or who has called the professional to testify. The professional can let the attorney know what questions he/she should be asked to communicate these essential points. It is also a good strategy to look for opportunities while testifying to emphasize these points during both direct examination and cross-examination.

The Weaknesses of the Position and Cross-examination

In most cases, the goal of cross-examination is to try to elicit material supportive of the attorney's client. Any elucidation of the true facts of the case that occurs during this process is secondary. If the professional's opinion reflects poorly upon the attorney's client, the attorney will use cross-examination to try to discredit the professional and his/her testimony.

The professional may not be able to anticipate all of the questions of cross-examination, but the more that are anticipated, the better the testimony. For these questions, the professional should decide ahead of time what the best response will be and should prepare to give it.

There are two types of challenges experienced during cross-examination, those that attack the professional and those that attack the professional's testimony. Within these two categories are subcategories. Attacks aimed at the professional as an individual will relate to his/her credentials, possible personal biases, and his/her personal life. For example, common queries made of child advocates are: how many cases did the professional confirm and disconfirm sexual abuse or how many times has he/she testified on behalf of the accused.

Challenges to the professional's testimony may include the following: inadequacies in his/her fact-finding, facts he/she did not know, facts he/she did not consider in forming his/her opinion, and misinterpretation of the data.

Before going to court, the professional should think through the case carefully and consider possible challenges and responses. In addition, he/she should talk with the attorney for help in identifying possible weaknesses in the testimony. The professional should remember that it is not the attorney whom the professional should persuade—it is the judge or jury.

OBJECTIONS BY ATTORNEYS AND THE JUDGE'S RESPONSE

During the adjudicatory phase of a case, the attorneys for the parties involved may object to the admission of certain evidence. An objection occurs when the attorney formally asserts to the court his/her legal opinion that a piece of evidence is not proper for the judge or jury's consideration. The judge may decide to sustain or overrule an objection immediately or the attorneys may be asked to defend their respective positions on the admissibility of that evidence before the judge rules. When an objection is overruled, the witness must answer the question originally asked. A sustained objection prevents the witness from responding to that question.

THE CHILD AS A WITNESS

COMPETENCY

To provide trustworthy evidence to courts, the legal system requires that all witnesses who testify in court must be competent. Some States impose a specific age requirement for child witnesses. Under Federal law and in many States, all witnesses, even young children, are presumed competent to testify. The test for competency requires that the witnesses have sufficient intelligence, understanding, and ability to observe in order to recall and communicate information, comprehend the seriousness of taking an oath, and appreciate the necessity of telling the truth. When the witness is a child, the judge or attorneys may question the child in what is known as a voir dire process. The purpose of this process is to ascertain that the child:

- ✍ knows the difference between truth and lies;
- ✍ is prepared to testify truthfully; and
- ✍ is capable of observing, remembering, and verbally describing events.

Once the judge has determined the child's competency, that child may testify regardless of his/her age.

Recent research has indicated that even very young children may have the memory skills needed to testify.⁸² Children as young as 3 or 4 years of age have been able to recall past experiences and articulate them.⁸³ However, a child may have trouble recalling events spontaneously and may need some cueing of his/her memory. This is sometimes done, both in court and during out-of-court interviews with the child, with leading questions. While the propriety of using such questions with children is highly controversial, the Supreme Court, in the *Wright*⁸⁴ case, has recognized the need for using leading questions when interviewing child abuse victims in some cases. The Court held that a child's response to a leading question in an interview should not be considered unreliable automatically; rather, all of the circumstances surrounding the child's statement should be taken into account.

JUDICIAL AUTHORITY TO MAKE A CHILD WITNESS MORE COMFORTABLE IN THE COURTROOM

A child (particularly one who has been the victim of maltreatment or who must testify against a family member or friend) may become anxious, upset, or afraid when testifying in court, especially in the presence of his/her abuser. Accordingly, judges have the authority to take steps to assist the child witness through the process. The child may feel more comfortable if the courtroom itself looks less formal and imposing. For example, providing the witness with a child-size chair, rearranging the furniture, or hanging the child's drawings on the wall may put the child at ease. Having the judge wear street clothes instead of robes may also help the child feel more relaxed. Before trial, the judge may also want to introduce him/herself to the child and allow the child to explore the courtroom, sit in the witness chair, and try out the microphone. Judges have more latitude to take these or similar steps in civil cases than in criminal cases.

SEQUESTRATION OF WITNESSES

Witnesses are usually required to stay out of the courtroom when they are not testifying. The purpose of this rule is to prevent witnesses from changing their testimony based on what they hear from other witnesses on the stand. In cases involving children, this rule of sequestration may be relaxed. A young witness may need the presence of some familiar person to make the child feel more comfortable when testifying. Without the support of such a person, the foreign and often confusing experience of testifying in court may become terrifying. This may make the child virtually unable to communicate and may actually injure the child emotionally as well. Thus, some States give judges the authority to allow a parent or therapist to remain in the courtroom during the child's testimony, even though he/she will also be called as a witness.

SPECIAL LEGISLATIVE PROVISIONS FOR THE PROTECTION OF CHILD WITNESSES

Many States have passed special laws to protect child witnesses in the courtroom. Most of these laws have focused on the problem of requiring a child victim to testify in his/her abuser's presence. At least in criminal cases, the alleged abuser has a constitutional right to confront his/her accuser (the child) under the sixth amendment. When this protection was included in the Bill of Rights, the assumption probably was that most defendants would be confronting complainants of equal capacity. It is doubtful that our constitutional founders envisioned situations in which children would be testifying against adults, particularly instances in which the adults would have a history of power and control over the children.

Because of the perception that there is an unequal balance of power in the courtroom, measures have been instituted that are meant to alter that balance and generally protect children from the direct and indirect pressures of adults who may have abused them. These include the following:

- ⌘ Allowing someone else to testify on the child's behalf. This is the tender years exception, noted previously, and generally allowable only in civil cases and when the judge has made a finding related to the child's incapacity to testify in the presence of the offender.
- ⌘ Having the child testify through closed-circuit television.
- ⌘ Using a videotaped deposition of the child in lieu of court testimony.
- ⌘ Having the child speak to the judge in chambers.
- ⌘ Having a screen placed between the child and the offender.
- ⌘ Having a support person. This person may be allowed to be in the courtroom with the child or the child may testify while sitting on the support person's lap.

There are also provisions allowing such aids to testimony as anatomically explicit dolls.

The availability of these special measures varies depending upon State statutes, the kind of litigation involved (criminal proceedings generally being less likely to permit these provisions), the stage of the court process (child witness protections being more likely to be allowed at preliminary hearings), and the judge's ruling, since the use of many of these protections is at the judge's discretion.

Some other legislative reforms for child witnesses include the following:

- ⌘ relaxation of courtroom formalities, for example, not wearing judicial robes;
- ⌘ alteration of the courtroom environment, for example, not requiring the child to testify from the witness stand;
- ⌘ recesses during the child's testimony to avoid unnecessary strain on the child; and
- ⌘ the exclusion of the media and the public from the courtroom during the child's testimony. (In criminal cases, this reform may conflict with the accused's right to confrontation and with the press' and public's first amendment rights.)⁸⁵

CONSTITUTIONAL CHALLENGES TO SPECIAL TREATMENT FOR CHILD WITNESSES

Legislative and judicial efforts to ease the anxiety of child witnesses have often been considered unconstitutional or simply unfair by those who are accused of, and must defend against, allegations of child maltreatment. These efforts have been challenged because they may appear to violate the alleged offender's right to confront and cross-examine witnesses. (See "Right To Confrontation and Cross-Examination.")

In the *Craig*⁸⁶ case, the Supreme Court recently approved Maryland's one-way, closed-circuit television procedure for taking the testimony of a child abuse victim. This procedure permitted the defendant's lawyer to be present and to cross-examine the child and provided for electronic communication between lawyer and defendant. The Court based its decision on its finding that the statute's closed-circuit television procedure had built-in safeguards for ensuring the testimony's reliability (e.g., by cross-examination), and that the statute required a showing of necessity before the special procedure could be used. For such a procedure to be necessary and thus not violate the confrontation clause, it can only be used after it is shown that:

- ⌘ the procedure is necessary to protect the welfare of that particular child;
- ⌘ the child would be traumatized by the defendant's presence during his/her testimony (not merely by the courtroom experience); and
- ⌘ the level of the child's emotional distress from testifying in the defendant's presence would be significant (i.e., more than just nervousness, excitement, or reluctance to testify). When a child's hearsay statement is used in court under a special statutory hearsay exception, the accused abuser is also denied the opportunity to confront the child victim face-to-face. However, the admission of a child's hearsay statement will not be unconstitutional as long as the judge finds it to be especially reliable. Specifically, reliability of a hearsay statement will be evaluated based on all of the circumstances surrounding the making of that statement. The Supreme Court rejected the notion that any one factor or test makes a statement untrustworthy. For example, in the *Wright* case, the fact that the child's statements were elicited by leading questions and that the interviewer failed to videotape the interview, did not automatically invalidate the statements. The Supreme Court took all of the circumstances surrounding the child's statements into account in determining whether the hearsay violated the confrontation clause.

Others have argued that special procedures for child testimony violate the accused's right to a public trial and to attend criminal trials, since both closed-circuit television testimony and videotaped testimony are conducted in private, outside the presence of the accused and sometimes his/her lawyer.

LEADING QUESTIONS, ANATOMICAL DOLLS, AND OTHER AIDS TO SECURING CHILD TESTIMONY

As previously described, many courts relax the normally strict courtroom procedures when a child testifies. Leading questions are sometimes permitted on direct examination to encourage full disclosure by the child. The use of anatomically detailed dolls may also be allowed to improve the child's ability to communicate on the stand, particularly with very young children whose language skills are limited.⁸⁷

CHILDREN AS WITNESSES IN SEXUAL ABUSE CASES

Special protections for child witnesses may be particularly necessary in cases involving child sexual abuse.

A characteristic that differentiates sexual abuse litigation from legal proceedings in other types of maltreatment is the central role played by the victim witness. In physical abuse, the legal case usually turns to physical evidence and medical testimony. In neglect, observations of the child, her/his environment, and circumstances related to child care will be fundamental to proving the case. However, sexual abuse is a private act, usually witnessed only by the victim and the offender. Furthermore, there is physical evidence in only a small proportion of cases. As a consequence, the burden of proving the case usually falls on the victim; the child's assertions are the primary basis for proving the case.

PREPARING THE CHILD TO TESTIFY

Children, like adults, need help in presenting themselves persuasively in court. Victim-witness advocates perform this role, but in communities without such services or in situations not handled by the advocates, others may also perform this need. These may be police officers, CPS caseworkers, or therapists.

There are three parts to the process:

- ✍ familiarizing the child with the setting;
- ✍ familiarizing the child with the court process; and
- ✍ refreshing the child's recollection.

The Setting

If possible, take the child to the courtroom so he/she can become familiar and hopefully comfortable there.

Point to where all the relevant parties will be sitting, including the alleged offender; have the child sit in the witness box; and introduce the child to the judge. If this is not possible, a set of Projective Story Telling Cards,⁸⁸ can be used which depicts scenes related to testimony in court. Alternatively, the professional can draw a picture or pictures of the court with the child's assistance and label aspects of the courtroom and players. The picture(s) can be given to the child to take home and study. In addition, there are books and videotapes, especially prepared for children, that show the court and describe the process of testimony.

The Court Process

The child should be informed of the specific steps in the court process including the following:

- ✍ swearing in;
- ✍ providing identifying information;
- ✍ direct examination; and
- ✍ cross-examination.

It is helpful to explain to the child that the defendant's attorney will probably try to confuse and trick the child. If the professional knows that certain procedures will be used to assess the child's competency, the child should be told what these are, but not the answers. Advice should be given about how to handle questions the child does not understand or know the answer to. The child should be told to respond with an "I don't understand the question" or "I don't know." Objections and what to do when they are made should be explained (the child should be told to wait until the judge tells him/her what to do).

The Child's Recollection

As is the practice with adults, children should be informed about what they will be asked. If there are some specific issues that are likely to be raised on cross-examination, the child should be told.

It is not a good idea to tell the child what responses are expected of him/her. Such instruction might be perceived as leading. However, the professional can refresh the child's recollection in a variety of ways. There may be an audio or videotape of the child's previous statements regarding the abuse. The child can be allowed to watch and/or listen to these. Alternatively, there may be a transcript of previous testimony or a report the professional can review with the child. The child may have drawn pictures of the events that occurred, which have become part of the case record. These can be reviewed with the child or the professional can simply ask the child to recount what the child recalls of the abuse and its circumstances and prod the child's memory if there are any lapses.

Additional Suggestions for Preparing Children to Testify

Remember that others may also take an active victim/witness advocate role, particularly the guardian ad litem. The child can never have too many advocates. His/her best interests require that every step possible be taken to minimize stress associated with the courtroom experience.

A few other suggestions for preparing the child to testify include:

- ✍ Contacting those close to the child and enlisting their cooperation in supporting the child before and after the courtroom experience.
- ✍ Telling the child, well in advance of the trial, that his/her alleged abuser will be in the room during his/her testimony.

- ✍ Alerting the agency's attorney to possible arrangements that would lessen the child's anxiety during his/her testimony (see "Judicial Authority To Make a Child Witness More Comfortable in the Courtroom" and "Special Legislative Provisions for the Protection of Child Witnesses"). States differ on their procedures for making such arrangements. In some courts, the attorney will have to ask the judge through a formal pretrial motion; in other States, the judge will automatically permit some special treatment for a child witness.

THE IMPACT OF THE FEDERAL CHILDREN'S JUSTICE ACT AND THE VICTIMS OF CHILD ABUSE ACT

The Federal Children's Justice Act makes financial assistance available to States to encourage reforms in the handling of child abuse cases. Under the Act, the use of State multidisciplinary task forces is promoted to identify and implement improvements in the legal system. The Act also commits the Federal Government to improving coordination among agencies and programs that deal with child abuse issues, as well as to a general increased involvement in identifying and evaluating effective approaches to child abuse cases.

The Federal Victims of Child Abuse Act also authorizes funding for multidisciplinary programs, as well as for a variety of other technical and training programs to improve the handling of child abuse cases by the courts. The Act specifically provides child victims with a number of rights and protections in cases that are heard in Federal courts. These include allowing, under some circumstances, testimony by two-way, closed-circuit television, videotaped depositions, adult support persons for child witnesses, restrictions on delays in court, and the appointment of a guardian *ad litem*.

GLOSSARY

Adjudicatory Hearings - held by the Juvenile/Family Court to determine whether a child has been maltreated or whether some other legal basis exists for the State to intervene to protect the child. Each State has its own terms and definitions in the jurisdiction provisions of its law. Depending on the State, a child may be subject to the Juvenile Court's authority if he/she is abused, battered and abused, abused or neglected, sexually abused, maltreated, dependent, deprived, abandoned, uncared for, in need of aid, in need of services, or in need of assistance, to name a few.

CASA - court-appointed special advocates (usually volunteers) who serve to ensure that the needs and interests of a child in child protection judicial proceedings are fully protected.

Child Protective Services (CPS) - the designated social service agency (in most States) to receive reports, investigate, and provide rehabilitation services to children and families with problems of child maltreatment. Frequently, this agency is located within larger public social services agencies, such as Departments of Social Services or Human Services.

Disposition Hearing - held by the Juvenile/Family Court to determine the disposition of children after cases have been adjudicated, such as whether placement of the child in out-of-home care is necessary and what services the children and family will need to reduce the risk and address the effects of maltreatment.

Emergency Hearings - held by the Juvenile/Family Court to determine the need for emergency out-of-home placement of a child who may have been a victim of alleged maltreatment. If out-of-home placement is found to be unnecessary by the court, other measures may be ordered to protect the child. These might include mandatory participation by a parent in a drug abuse treatment program or a parenting skills class or regular supervision by a caseworker. These hearings must be held between 24 and 72 hours of any emergency placement, depending on State law, once an emergency custody order has been issued.

Family Preservation/Reunification - established in law and policy and the philosophical belief of social services agencies that children and families should be maintained together if the safety of the children can be ensured.

Guardian *ad Litem* - a lawyer or lay person who represents a child in Juvenile/Family Court. Usually this person considers the best interest of the child and may perform a variety of roles, including those of independent investigator, advocate, advisor, and guardian for the child. A lay person who serves in this role is sometimes known as a court-appointed special advocate or CASA.

Good Faith - the standard used to determine if a reporter has reason to suspect that child abuse or neglect has occurred and to assess the basis for a decision to petition the court. In general, good faith applies if any reasonable person, given the same information, would draw a conclusion that a child may have been abused or neglected.

Immunity - established in all child abuse laws to protect reporters from civil lawsuits and criminal prosecution resulting from filing a report of child abuse and neglect. Immunity is provided as long as the report is made in good faith. This protection also applies to those who make decisions to petition the court. If the basis for the decision is based on good faith, immunity applies. Depending on each State's law, this immunity may be absolute (complete) or qualified (partial).

Juvenile and Family Courts - established in most States to resolve conflict and to otherwise intervene in the lives of families in a manner that promotes the best interest of children. These courts specialize in areas such as child maltreatment, domestic violence, juvenile delinquency, divorce, child custody, and child support.

Multidisciplinary Team - established between agencies and professionals to mutually discuss cases of child abuse and neglect and to aid decisions at various stages of the child protection system case process. These teams may also be designated by different names, including child protection teams, interdisciplinary teams, or case consultation teams.

Out-of-Home Care - child care, foster care, or residential care provided by persons, organizations, and institutions to children who are placed outside of their families, usually under the jurisdiction of Juvenile/Family Court.

Petition - a document filed with the court that is used to initiate a civil child protective proceeding. The petition contains the essential allegations of abuse or neglect that make up the petitioner's complaint about a particular child's situation. It does not include all of the detailed facts available to the petitioner to support these allegations.

Preponderance of Evidence - the burden of proof for civil cases in most States, including child maltreatment proceedings. The attorney for CPS or other petitioner must show by a preponderance of evidence that the abuse or neglect happened. This standard means that the evidence is more credible than the evidence presented by the defendant party.

Protection Order - may be ordered by the judge to restrain or control the conduct of the alleged maltreating adult or any other person who might harm the child or interfere with the disposition.

Reasonable Efforts - as required by State law, the State child welfare agency must make reasonable efforts to keep the family together or, if the child has already been removed, to reunify the family. Before a State may receive Federal financial support for the costs resulting from a child's removal from home into out-of-home care, a judge must determine that reasonable efforts have been made to keep the family together. Similarly, placement may not be continued with Federal support without a finding by the judge that such efforts have been made to reunite the family.

Review Hearing - held by the Juvenile/Family Court to review dispositions (usually every 6 months) and to determine the need to maintain placement in out-of-home care and/or court jurisdiction of a child. Every State requires State courts, agency panels, or citizen review boards to hold periodic reviews to reevaluate the child's circumstances if he/she has been placed in out-of-home care. Federal law requires, as a condition of Federal funding eligibility, that a review hearing be held within at least 18 months from disposition, and continuing at regular intervals to determine the ultimate resolution of the case (i.e., whether the child will be returned home, continued in out-of-home care for a specified period, placed for adoption, or continued in long-term foster care).

Termination of Parental Rights Hearing - a legal proceeding to free a child from a parent's legal custody, so that the child can be adopted by others. The legal basis for termination of rights differs from State to State but most consider the failure of the parent to support or communicate with the child for a specified period (extreme parental disinterest), parental failure to improve home conditions, extreme or repeated neglect or abuse, parental incapacity to care for the child, and/or extreme deterioration of the parent-child relationship. In making this finding, the court is determining that the parents will not be able to provide adequate care for the child in the future by using a standard of clear and convincing evidence. This burden of proof is higher than a preponderance of the evidence which is used in civil abuse or neglect cases where termination is not sought.

NOTES

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9. Public Law 96-272.
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34. *Ibid.* at 58–59.
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