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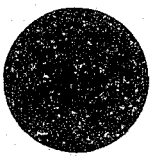

REVIEW OF 1987 CHILD ABUSE AND NEGLECT CASE LAW

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Introduction

This report is a review of recently published judicial opinions from Federal and State courts concerning child abuse and neglect issues. These cases encompass numerous areas of the law in their consideration of issues that ultimately affect our families; our social service, law enforcement, and educational systems; and eventually our society as a whole.

The traditional forums for deciding child protection cases have generally been State criminal and juvenile courts, with a few cases of constitutional significance reaching the Federal courts. As will be seen, the Federal courts have been increasingly called upon to decide these cases, as litigants seek the protections of the Constitution in areas that had once been the province of the States. In addition, as matters such as tort liability and custody/visitation in the divorce context continue to arise, State civil and domestic relations courts are called upon to decide these cases. Even within the traditional forums for child maltreatment matters, the criminal and juvenile courts, new issues are being considered as new laws and governmental responses to the problem of child abuse and neglect are being developed and applied.

The purpose of this report is to highlight recent trends in case law and provide insight into judicial developments in the area of child welfare. The cases discussed were selected for their significance from the January through December 1987 editions of the ABA Juvenile & Child Welfare Law Reporter. On a monthly basis, this publication of the American Bar Association's National Legal Resource Center for Child Advocacy and Protection provides abstracts of important cases affecting a wide range of child welfare issues. From these abstracts, those cases with greatest impact on the law of child abuse and neglect have been selected for review.

Federal Court Jurisdiction

Our constitutional framework assures certain specified protections of the law. To insure that these protections are available to all citizens, the Federal courts may be used as a forum for the assertion of individual civil rights in certain cases when claim of infringement by State action is made, especially as provided for under the 1964 Civil Rights Act (42 U.S.C. 1983 et seq.). However, by longstanding practice, as established in Younger v. Harris (91 5.Ct. 746; 401 U.S. 37 (1971)), the Federal courts have traditionally abstained from the consideration of cases in which adequate remedies may be found in State courts. Thus, the initial inquiry of a Federal court may be its own jurisdiction or authority to decide the particular case.

The issue of Federal jurisdiction over claims arising in the context of child maltreatment has been discussed in recent cases, but there is a wide divergence of opinion on this issue. Generally, these cases involve claims of deprivation of civil rights, notably the rights to due process and equal protection of the law, by State officials, such as law enforcement officers, prosecutors, or child protective service (CPS) workers.

In Brunken v. Lance, the Seventh Circuit Court of Appeals has held that Federal courts do not have jurisdiction over certain due process claims. In this case, a father suspected of sexual abuse was not given notice of a shelter care hearing in which temporary custody of the child was awarded to the State social services agency. Although the lower Federal court had heard and decided this case, awarding the father nominal damages and injunctive relief, Federal Appeals Court, based on Younger, remanded the case for dismissal, holding that the lower court should have abstained from hearing this claim. Citing the legal doctrines of collateral estoppel and res judicata, which prevent courts from hearing cases that have already been thoroughly litigated and finally decided, the Federal District Court for the Western District of Wisconsin similarly held in Dowell v. Polk County that the parents' challenge to foster care placement should not be heard in Federal court. A civil rights action in Federal court should not substitute for the State appeals process or retry factual issues already decided in State court, the Dowell court observed.

However, in Czikalla v. Malloy, the Federal District Court for Colorado refused to abstain from hearing three consolidated civil rights cases filed by parents alleging that State social service workers had unconstitutionally removed their children from their homes. The Czikalla court noted that semiannual foster care review hearings for the children were the only State court course of action available to the plaintiffs and as such presented a forum inadequate for litigating the parents' constitutional claims. Additionally, although the children had access to the courts via the foster care review hearings, the availability of a remedy in State court would not bar their bringing a Federal claim under the Civil Rights Act. Therefore, the court found that it had the legal authority to hear and, as discussed below, render decisions on motions based on these claims.

Thus, the essential elements considered in determining Federal jurisdiction over child protection cases appear to be whether State law, practice, or procedure works to deprive individual claimants of fundamental, constitutional rights, and whether those claimants have adequate recourse for the assertion of those claims in State courts or a statutory right to be heard in Federal court as provided by the Civil Rights Act or other Federal law. The next discussion focuses on a developing area in child protection law, that of the civil liability of State agencies, officials, and mandatory reporters in the performance of their child protection-related duties.

Third Party Liability of Investigators, Reporters, and Other Officials

The law of child protection necessarily involves a balancing of rights and interests: the rights of the parents to family integrity, privacy, and the due process of law; the rights of children to a safe and secure home; and the interests of the State in assuring children that safety and security. State legislators have long struggled with the problem of enacting laws that consider this balance, and now the courts, especially the Federal courts, are grappling with the application of those laws to individual circumstances.

The cases discussed below all concern civil actions by parents against those acting in some capacity on behalf of the State or pursuant to State laws concerning the investigation; taking of children into protective custody, or required reporting of child abuse and neglect. These suits generally allege that those official duties were performed in such a manner as to deny the parents a fundamental right or otherwise constituted official misconduct. Thus, the courts

are called upon to examine the individual situations presented in each suit to determine if the defendant officials acted in the manner prescribed by law.

After a court considers jurisdictional questions, inquiry shifts to whether there are factual determinations to be made by judge or jury, or whether a question or rule of law precludes such determination. In these cases, the defense of governmental immunity, a traditional defense that prevents those acting in an official capacity from being harrassed by unfounded suits being brought to trial, is raised. Below is the body of recent cases that consider for whom and for what action governmental immunity is available.

Liability of law enforcement officials. In determining if suits alleging violation of civil rights or other misconduct in the performance of law enforcement duties for child protection will be tried, the courts consider, upon defense motion, whether the officer is entitled to governmental immunity and to what degree such immunity exists. A determination that an individual official is entitled to absolute immunity serves to preclude suit entirely and results in dismissal of the case. Further inquiry, however, may be required if the determination is made that the defendant official is entitled only to qualified immunity, for an examination of whether the particular action--taking a child into protective custody, entry into the home, or arrest of the parent--was reasonably within the scope of official duties or otherwise performed in accordance with law.

Absolute immunity for the performance of prosecutorial duties was granted to a county prosecutor in Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987), which arose from the criminal investigation of an alleged child sexual abuse ring. After charges were dropped against parents who had been investigated for their involvement in the ring, the parents filed a Federal civil rights action in Federal court against the Jordan, Minnesota, county attorney and other law enforcement officials. In dismissing the suit, the Eighth Circuit Court of Appeals held the prosecutor absolutely immune, deciding that her actions in determining who to charge and in preparation of the cases for trial were well within the scope of her responsibilities as a prosecutor.

The grant of absolute immunity, however, hinges on the actions taken and not on the office held per se. In Robinson v. Via, Nos. 86-7476 and 86-7516 (2d Cir. June 17, 1987), the Second Circuit Court of Appeals examined the actions taken by an assistant State's attorney and police officer in investigating the alleged sexual abuse of the plaintiff's daughter. During the interview with the child, the mother appeared and a dispute broke out, resulting in the defendants removing the child to the police barracks and successfully suing for protective custody. While determining that the State's attorney was absolutely immune from liability for civil rights violations for filing the protective custody petition and actions taken thereafter, the court found that the investigation of child abuse did not fall within the prosecutorial function and thus those actions would be further scrutinized. The court also noted that absolute immunity is applied in these Federal civil rights actions only if there is a common law or traditional counterpart to the privilege asserted or if the defendant could show that the challenged activity was so sensitive as to require a total shield from liability. These were not found in this case.

The Robinson court continued its inquiry, having determined that the defendants were eligible only for qualified immunity, so that their removing of the child from the parent's custody would be scrutinized for "objective reasonableness."

Under this test, as defined by the court, whether a violation of rights occurred depends upon whether there was a known constitutional or Federal right involved, whether a known exception to the right existed, and whether it was objectively reasonable for the defendant to believe that these rights were not being violated. Applying this test, the court found that there was insufficient evidence that the prosecutor had used excessive force in removing the children and therefore dismissed the suit against him.

In applying the same doctrines of qualified immunity and objective reasonableness to the actions of the police officer in removing the child in Robinson, the facts remained disputed, necessitating a trial on the merits of the officer's actions. Such a trial was not necessary, the Kansas Supreme Court found in Stremski v. Owens, ___Kan.___, 734 P.2d 1152 (1987) where on the face of the facts alleged by the plaintiff mother the police had probable cause to take the child into protective custody. In this case, the mother and grandmother had been contacting the police in an ongoing quarrel concerning the child's care and custody. After telephone calls from both the mother and grandmother to the police concerning the other's purported wrongs against the child, the mother telephoned to complain that the grandmother had kidnaped the child. Fearing an imminent middle-of-the-night confrontation between the two women, the police took the child into protective custody, transporting her to a shelter care facility. In dismissing the mother's suit for civil rights violations and tortious misconduct against the police, the court held that the officers involved properly exercised their discretion in the way the matter was handled.

Warrantless entry into the home was the violation alleged in White v. Pierce County, 797 F.2d 812 (9th Cir. 1986) by a father who was physically subdued by deputy sheriffs after refusing to permit his 7-year-old to be examined for possible abuse. In dismissing the father's civil rights action against the deputies, the Ninth Circuit Court of Appeals agreed that, while warrantless arrests are not usually permissible under the Fourth Amendment's ban on unreasonable search and seizure, the deputies' actions were reasonable in the circumstances of this case. The deputies had been called to the home to investigate a CPS report that the child had several large welts on his back. Given the father's adamant refusal to let the child be examined, the court found that the deputies had understandable reason to believe that the child could have been removed or injured if the deputies had left to obtain a warrant. Although their examination revealed that the child had not been abused, their warrantless entry into the home to make that determination was justified.

An arrest of parents for criminal neglect led to the officer being found personally liable for civil rights violations in BeVier v. Hucal, 806 F.2d 123 (7th Cir. 1986). The children in this case suffered from severe diaper rash, for which the parents had obtained medical care and the services of another babysitter for more attentive care while they were at work. The officer, seeing the children outside, did not question the babysitter at length or heed the advice of the CPS investigator who explained that the situation was not abusive and that there were alternatives to arrest before arresting the parents when they returned from work. In affirming the jury's award of over $16,000 in damages for false arrest, the Seventh Circuit Court of Appeals held that the officer had no probable cause to believe that the parents had intentionally and willfully neglected their children. Even qualified immunity would not shield the officer from liability, the court ruled, because no reasonably well-trained officer would have found probable cause to arrest, viewing the circumstances objectively. (This case can be contrasted with the criminal case of Brown v. State, 725 S.W.2d 801

(Tex. Crim. App. 1987), where the police had probable cause to arrest when a physician suspected the defendant of abuse, the defendant admitted the child was injured while in his care, and fresh bloodstains were found in the defendant's apartment.)

Child protective service. Civil liability for CPS agencies and workers can also stem from actions taken in the investigation, removal, and filing of petitions in child abuse and neglect cases. In addition, these workers and agencies may face claims based on the failure to take the steps later found to be necessary to prevent the death or serious injury of a child. As with law enforcement officials, the courts look at the reasonableness of the actions taken and the duties imposed by law on the individual worker in deciding these claims.

As noted earlier, a Federal court in Czikalla v. Malloy, 649 F.Supp. 1212 (D. Colo. 1986) refused to abstain from hearing a civil rights action brought by parents against State social workers and found that the workers were entitled to qualified rather than absolute immunity in the removal of children from the home. Relying on another case discussed above, Myers v. Morris, the Federal District Court for Minnesota in Doe v. Hennepin County, Civil 4-84-115 (D. Minn. July 1, 1987) applied the holding that State officials are entitled to qualified immunity if they arguably could have probable cause to believe that children were being molested. Thus, mere bad judgment by CPS investigators, who in this case were secretly working with police investigators following a report of abuse, is not enough to sustain a civil rights action. Again relying on Myers, the court determined that the agency's failure to contact the family, provide protective services within 24 hours, or afford the parents the option of voluntary placement, all social service mandates under State law, did not amount to a deprivation of constitutional rights, for no rights were conferred by these laws or their regulations.

The actions of CPS and child protection officials were similarly approved by the Ninth Circuit Court of Appeals in Meyers v. Contra Costa County Department of Social Services, 812 F.2d 1154 (9th Cir. 1987), which found that a CPS worker had absolute prosecutorial immunity in investigating and initiating a dependency petition against a father following a complaint of child abuse from the mother. The worker had also instructed the father to stay away from his home before the petition was filed, and counselors with the Family Conciliation Court had agreed with the mother to deny the father access to their son. While the instruction to the father to stay away from the boy was not accorded absolute immunity, such instructions did not clearly violate the father's constitutional rights. Consequently, the father's civil rights action against the worker could not be maintained. Absolute immunity was also accorded to the conciliation court counselors, the court ruled, because they had acted in a quasi-judicial manner, and judicial immunity is absolute.

The 11th Amendment to the U.S. Constitution prohibits legal actions against State officials acting in their official capacities as State officials. Thus, the Seventh Circuit Court of Appeals noted in Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) that plaintiffs could not be awarded money damages in an action directed at State officials in their official capacities. Two families had challenged the Illinois Department of Children and Family Services' policy of visual inspection of the bodies of suspected abuse victims under established assessment protocols, one asking for an injunction against such examinations and the other requesting money damages. In reviewing these challenges, which claimed that this policy constituted an unreasonable search and violated the right of privacy, the

court affirmed the trial court's refusal to grant an injunction, noting that the harm to the public, the possibility of putting even one child in jeopardy, outweighed the need to end the practice before there could be a judicial determination as to whether the inspections were searches performed in a reasonable manner. Money damages were also not available against the officials sued in their individual capacities, the court concluded, for their actions were justified and reasonable within the scope of their qualified immunity.

Questions of nonfeasance, or the failure to take appropriate or effective action, may also arise in child protective service. In Department of Health and Rehabilitative Services v. Yamuni, 498 So.2d 441 (Fla. App. 1986), the Florida Court of Appeals rejected the defense of sovereign immunity claimed by the State CPS agency in response to a mother's suit alleging that the amputation of her child's arm was the result of failure to investigate and take protective action after a report of suspected abuse. In finding that this case could be tried on its merits, the court found that sovereign immunity is available only if there is a claimed breach of a specific statutory or common law duty to the public. Florida's child protection laws specifically mandate that the CPS agency promptly investigate and take protective action for child protection. Referring to this State law, the court noted that the alleged negligent acts were discretionary rather than operational, in that they were essential to the realization of a governmental policy and required the exercise of judgment in furthering that policy. Therefore, the agency was not protected by sovereign immunity.

The D.C. Court of Appeals agreed with the Florida court that child abuse reporting laws create a special duty for CPS agencies. In Turner v. District of Columbia, No. 85-634 (D.C. Oct. 28, 1987) the court held that the District of Columbia was potentially liable for negligence in the starvation death of an infant in his father's care, after the mother had reported her suspicions of maltreatment and the father's history of drug abuse and violent behavior. The investigating CPS worker did not pursue the report after three visits to the father's apartment did not find the father at home.

While sovereign immunity protects public officials from suits based on a general duty to the public as a whole, such immunity is not invoked when there is a special mandatory duty owed to a specific class of persons. Finding that D.C.'s child abuse reporting laws created this special duty, the court opened the way for the mother's suit against the city.

State law has also been invoked to protect CPS officials from nonfeasance actions, as in Mattingly v. Casey, 24 Mass.App.Ct. 452, 509 N.E.2d 1220 (1987). In that case, the CPS agency did little to investigate reports from an 8-year-old's school that her various injuries were not accidentally inflicted. The girl was eventually beaten to death by her mother. In affirming the dismissal of the father's action against the school and CPS, the Massachusetts Appeals Court was bound by Commonwealth law at the time of the child's death in 1976 that stated that public officials could not be held liable for acts of nonfeasance or omissions of acts that should have been performed; only deliberate acts of misfeasance were actionable. While criticizing the public officials involved, the court lambasted the father for bringing the action, finding that he had abdicated his duty to protect the child and then sought monetary gain as a result of his daughter's death.

A constitutional claim brought in Federal court resulting from ineffective CPS action was dismissed by the Seventh Circuit Court of Appeals in DeShaney v. Winnebago County Department of Social Services, 812 F.2d 298 (7th Cir. 1987). A caseworker regularly visited the child's home for approximately 1 year after the father and the county CPS agency had entered into a written agreement concerning the child's care following a hospital report of non-accidental injuries for which there was insufficient evidence of abuse. The caseworker did not report her observation of the boy's injuries seen during these visits, and the child eventually suffered brain damage as a result of a beating by the father. The mother's claim against the agency and caseworker alleged that the caseworker's and agency's inaction in protecting the child amounted to a denial of the child's constitutional rights. The court disagreed, holding that the agency was not directly responsible for the child's injuries and therefore did not deprive him of constitutionally protected rights. Private conduct rather than State action, the court found, resulted in the injury and thus a constitutional claim could not be maintained.

Schools. School systems and their individual superintendents, principals, school board members, and other administrative personnel have been defendants in civil actions arising from incidents of sexual abuse committed by teachers against students. These suits generally allege negligence in the hiring, training, and supervision of employees as the basis of liability. As will be seen, the courts apply the same legal principles to these cases as they apply to third party liability suits against other public officials.

In Bennett v. United States, 803 F.2d 1502 (9th Cir. 1986) the Ninth Circuit Court of Appeals refused to apply the doctrine of sovereign immunity in a suit filed by a group of parents, whose children had been sexually assaulted by a teacher, against the U.S. Department of the Interior's Bureau of Indian Affairs under the Federal Tort Claims Act. The BIA, responsible for the operation of Indian boarding schools, had hired a teacher, then evading a criminal sex offense charge in Oklahoma, without investigating the teacher's background. While finding that the officials involved could not be held responsible for their employee's assaults, which occurred outside the school, the court did find that these officials could be found liable for their own negligence in failing to check the teacher's background when such an investigation might have prevented the assaults.

In a case arising from the homosexual relationship between a teacher and student, however, the Wisconsin Court of Appeals affirmed the dismissal of a suit alleging that the school had been negligent in hiring and had thus violated the student's constitutional rights. This court, in Kimpton v. School District of New Lisbon, ___Wis.2d___, 405 N.W.2d 740 (1987), noted that the practice of hiring teachers is a discretionary function that would not subject the school district to suit under Wisconsin law. Further, alleged negligence in hiring did not violate a constitutional guarantee as protected under the Civil Rights Act, so that an action under section 1983 of the act could not be maintained. Finding that school officials had no prior knowledge that the teacher would initiate such a relationship, the court ruled that there was no evidence of gross negligence or deliberate indifference to support the suit.

Similarly, the Michigan Court of Appeals in Rosacrans v. Kingon, ___Mich. App.___, 397 N.W.2d 317 (1986) found defendant school officials immune from civil liability claimed pursuant to sexual assaults on a junior high school student by his teacher at a shopping mall and the teacher's home. Citing the test to de-

termine the applicability of the governmental immunity doctrine used in Department of Health and Rehabilitative Services v. Yamuni, a CPS case discussed above, in which the determining factor was whether the acts in question were "discretionary-decisional" or "ministerialoperational," the court here ruled that the school officials' actions in hiring teachers did not violate some law or policy they were required to follow and were, therefore, discretionary in nature. Thus, the officials in this case, unlike the CPS workers in Yamuni were entitled to governmental immunity. Further, the court held, the fact that the assaults occurred away from school absolved the officials from any duty to supervise the teacher. In a similar case, Hill ex rel. Webb v. Allen, 495 So.2d 32 (Ala. 1986), defendant school officials were found to be entitled to discretionary function immunity. In a final note related to school administration, Mitchell v. Ledbetter, 496 So.2d 996 (Fla. Dist. Ct. App. 1986), the court held that officials involved in an administrative review of teacher's sexual misconduct need only establish a case by a preponderance of evidence, with corroboration of the victim's testimony unnecessary.

Physicians as reporters. Civil actions by parents against physicians who, as mandatory reporters of suspected child maltreatment, file what later are determined to be unfounded reports have also been the subject of recent appellate court decisions. Unlike the courts considering actions directed at public employees, however, the courts considering these cases have uniformly upheld the immunity conferred to mandatory reporters by the same laws that require them to report.

A California Appeals Court in Storch v. Silverman, 2d Civ. B015977 (Cal. App. Oct. 21, 1986) defended that State's statutory immunity provision in upholding the dismissal of an action for medical malpractice and the intentional infliction of emotional distress filed by parents after three doctors and a hospital filed a mistaken report of sexual abuse. The grant of such immunity under California law is absolute, and is based on the legislative determination that promoting the reporting of any and all incidents of child maltreatment is a compelling State interest. Similarly, an Illinois Appeals Court upheld that State's reporter immunity law in Lehman v. Stephens, ___Ill. App.3d___, 499 N.E.2d 103 (1986), where the defendant doctor and hospital were able to establish by affidavit their good faith belief that their infant patient's fracture was not accidently caused. Although this determination was later found to be erroneous, the defendants adequately established a reasonable basis for believing that the child had been abused, meeting the "good faith" requirement for applicability of such immunity under Illinois law. Against the parents' assertion that the State law operated to deny due process as guaranteed by the constitution, the court noted that while the parents did have a strong interest in family privacy and integrity, the State had a compelling interest in protecting children from abuse, an interest that was reasonably furthered by the reporter immunity law.

Other Actions Affecting Reporters of Child Maltreatment

Disclosure of reporters' identities. The same State laws that require designated professionals and others to report child abuse and neglect and grant immunity from civil and criminal liability for such reporting may also permit CPS agencies receiving such reports to keep the reporters' identities confidential. Such practice was challenged as an unconstitutional denial of access to the courts in Freed v. Worcester County, ___Md. App.___, 518 A.2d 159 (1986) by parents who sought to take legal action against unknown reporters for an unsubstantiated report. The Maryland Court of Special Appeals upheld the State CPS

agency's refusal to disclose the reporter's identity, citing the immunity for reporting provision in State law as indication of the legislative intent to protect reporters from lawsuits. While Maryland law permits such disclosure, it does not require it and thus the CPS refusal to release that information was in keeping with the intent of the legislature. This policy does not limit access to the courts in violation of the parents' civil rights, the court found, for the parents were free to use any other lawful method to discover the reporter's identity and pursue their claim.

The Minnesota Court of Appeals took a different approach to this issue in Guetter v. Brown County Family Services, 401 N.W.2d 117 (Minn. App. 1987), but in that case the motivation for seeking the reporter's identity was quite different. In Guetter, the CPS agency was appealing a trial court order to release the name of the reporter to a 71-year-old priest who had been the target of a criminal and CPS investigation into a report of sexual abuse of children under his care and was attempting to clear his name. Minnesota law did make provision for the court-ordered release of such information, but did not provide statutory criteria upon which the courts could base a release order. The court rejected the agency's contention that it could then determine the conditions under which such information would be released and upheld the lower court's order requiring release.

Failure to report. Although most States provide criminal penalties for failure to report as required under child protection laws, prosecutions under these generally misdemeanor provisions are rare. For this reason, Smith v. State, No. C85-1599 (Nev.Dist.Ct., Sept. 10, 1986) is noteworthy. In this criminal case, a junior high school guidance counselor appealed her conviction for failure to promptly report a student's confidence that she had been sexually assaulted once 4 years previously by a stepfather who was at that time residing in Mexico. In reversing the conviction, the Nevada District Court found that the counselor's report 7 days after talking to the student was sufficiently immediate to meet the ultimate purpose of the law. The laws requiring child maltreatment reporting are intended to insure the safety and security of children. With the perpetrator out of the country, the child was not in immediate danger and the teacher used laudable discretion in making the report.

Statute of Limitations on Tort Liability of Perpetrators

The Supreme Court of the State of Washington was asked to consider a novel question in Tyson v. Tyson, 107 Wash.2d 72, 727 P.2d 226 (1986): Can the statute of limitations, which specifically limits the time in which legal actions may be brought, be extended in cases in which the victim of childhood sexual abuse had psychologically suppressed memory of the abuse? No, the court replied, for in this case, which arose when a 26 year-old woman entered therapy and was prompted to remember sexual assaults committed by her father when she was between 3 and 11 years of age, there were no means of independently verifying her allegations. State law permitted civil actions for intentional torts committed against children to be filed by plaintiffs in their own behalf within 3 years of the age of majority, 18. The purpose of this provision and other defined time limits for the filing of lawsuits is to provide potential defendants with a set time in which their actions or omissions could be actionable. In reviewing other cases in which the time limit had been extended, the court found that, in those instances, objective evidence of the acts alleged remained despite the passage of sometimes substantial periods of time. Such objective evidence was not available

in this case, for the expert testimony of treating psychologists was nonetheless subjectively based on therapeutic rather than evidentiary considerations.

Other Constitutional Issues--Daycare Licensure

The courts have also been asked to decide civil rights actions based on the denial of day-care facility licenses. In Calhoun v. Department of Health and Rehabilitative Services, 500 So.2d 674 (Fla. App. 1987) the Florida District Court of Appeals upheld the constitutionality of a newly enacted State law that prohibited the issuance of day-care licenses to convicted felons. The plaintiff, who had operated a center for 7 years, had been convicted on drug charges 8 years before the license renewal law became effective. The protection of children in out-of-home care is well within the constitutionally permitted range of State law, the court held, and the operator could apply for a pardon from the Governor to overcome any unfairness in the application of this law.

A Federal District Court similarly rejected a civil rights action against the New Mexico Human Services Department brought by a day-care center Rice v. Vigil, 642 F.Supp. 212 (D.N.M. 1986). The center had been effectively closed for 10 days during an investigation of possible sexual abuse, during which time Federal stipends for children at the center were suspended. Although the center was exonerated at an administrative hearing on the matter and the funding reimbursed and restored, a civil rights action was filed against the State agency. This action was dismissed, however, for lack of a constitutionally protected interest and in view of the opportunity for due process at the administrative hearing.

Juvenile Court--Evidentiary Issues

State child abuse and neglect laws that provide for the identification of maltreated children and establish social service systems for troubled families contemplate that disputes arising under these laws will be heard in family or juvenile courts. While juvenile courts, as courts of special jurisdiction over children, have been in existence in the United States since the turn of the century, it has only been within the past 20 years that these courts have been specially designated as the forum for deciding disputes involving child abuse and neglect. The juvenile court, with its mandate to use its broad equitable powers in the best interests of the child, is seen as an alternative to the criminal justice system, with its emphasis on deciding guilt or innocence beyond a reasonable doubt.

However, recent cases show that juvenile courts are increasingly becoming involved in issues that had once been the province of the more adversarial criminal courts. Matter of Welfare of J.W., 391 N.W.2d 791 (Minn. 1986) (Jan) in which the Minnesota Supreme Court upheld the juvenile court's order that a petition alleging dependency of a couple's own children be admitted as a sanction for their invocation of the fifth amendment privilege against self-incrimination in the death of a nephew in their care, illustrates this development. In more specific terms, the cases described below offer further examples of evidentiary issues now considered in juvenile courts.

Standards of evidence in juvenile court. The greatest power held by the juvenile courts is the authority to sever parental rights. The use of this authority, termed "the death sentence for the family" by one U.S. Supreme Court Justice, is not based on the highest standard of proof, that of beyond a reasonable doubt, as constitutionally mandated in the criminal courts. While the U.S.

Supreme Court determined in 1982 in Santosky v. Kramer 455 U.S. 745 (1982) that due process required clear and convincing evidence before parental rights could be terminated, juvenile courts today are still struggling with the standards of evidence to be used in making determinations in termination cases and other matters.

On the basis of Santosky, an Illinois Appeals Court ruled in In Interest of Enis, ___Ill.App.3d.___, 495 N.E.2d 1319 (1986) that the Illinois Adoption Act was unconstitutional because it permitted the termination of parental rights based on a preponderance of evidence, the lowest standard of proof, in cases involving multiple findings of physical abuse. However, the preponderance of evidence was all that was needed in In the Interest of T.H., ___Ill.App.3d___, 499 N.E.2d 988 (1986) according to the same court. In the latter case a father challenging a juvenile court's determination that he had sexually abused his daughters was held not to be entitled a more stringent standard of evidence, in that his physical liberty was not in jeopardy in a civil child abuse proceeding. Similarly, a California court found in Mary Anne S. v. Joseph S., No. D003413 (Cal. App. September 18, 1986), that the father's constitutional right of confrontation was not infringed by his exclusion from a juvenile court hearing concerning his daughter's sexual abuse; that right was not applicable to juvenile court proceedings under that State's laws.

Due process is satisfied by proof by preponderance, a Washington court has found in In re Dependency of Chubb, ___Wash. App.___, 731 P.2d 537 (1987). The lesser standard of evidence was also the court's basis for approving the admission of a social worker's testimony concerning a sexually abused toddler in In the Matter of Nicole V., ___A.D.2d___, 510 N.Y.S.2d 567 (1987), for while such hearsay may not be admissible in criminal courts, under the lesser standard of juvenile proceedings, that testimony could be heard.

Expert testimony. Under general rules of evidence applicable in criminal courts, the testimony of qualified experts is permissible only if that expert is explaining a matter not usually within the knowledge of the jury or judge and is speaking within the scope of the witness' expertise rather than to the factual issues to be determined by the factfinder. Such expert testimony must be on matters generally accepted in the scientific community. On this basis, a California appellate court ruled in In re Sara M., No. 3 Civ. 25738 (Cal.App. 1987) that expert testimony concerning the "sexual molestation syndrome" was not admissible, even in a juvenile court proceeding. However, an Iowa appeals court in In the Interest of D.L., 401 N.W.2d 201 (Iowa Ct. App. 1986) found that although the juvenile court had improperly admitted expert testimony concerning the "abusive parent profile," there was sufficient other evidence to support the finding that the child was in need of assistance. Expert testimony, in the form of a response to a hypothetical question, also should have been admitted by the lower court and a sexual abuse petition sustained in In the Matter of Ryan D., ___A.D.2d ___, 512 N.Y.S.2d 601 (1987), according to a New York appellate court, where the response was corroborative of the child's out-of-court statements.

Privileged communications. Confidences between patients and certain professionals are generally privileged in criminal courts, as will be discussed. However, juvenile courts considering this privilege are more inclined to cite statutory waivers to the privilege as in In re M.C., 391 N.W.2d 674 (S.D. 1986), in which a South Dakota court applied an exception to the statutory physician-patient privilege for communications between a mother and her psychotherapist, in dependency and neglect proceedings. Similarly, a Kansas court

found in In Interest of K.G.O., 738 P.2d 98 (Kan. Ct. App. 1987) that court-ordered therapy rendered inapplicable any psychologist-client privilege claimed by a father in termination proceedings.

Prior bad acts. Direct evidence of a defendant's poor character, propensity to commit a crime, or criminal record is generally not admissible in criminal courts, with various exceptions. This principle does not always transfer to juvenile courts, whereas in In re Jason S., ___Conn. Supp.___, 516 A.2d 1352 (1986) [April], evidence of a paramour's prior child abuse conviction was found to be admissible in a neglect proceeding. Similarly, evidence of the neglect of three other children In re Cruz, N.Y.L.J., July 14, 1986, at 13, Col. 2 (1st Dept.) was found to be sufficient evidence to sustain a finding of neglect of a newborn infant. Also, in In re Stewart, ___N.C. App.___, 347 S.E.2d 495 (1986) [Feb.] evidence that there had been prior grounds for the termination of parental rights was deemed admissible and in Matter of Welfare of M.A., 408 N.W.2d 227 (Minn. Ct. App. 1987) such a termination was affirmed where it was determined that the child's severe behavioral problems related to prior abuse.

However, not all prior bad acts may be sufficient to sustain juvenile court intervention in the family. For example, in In re L.S., 234 Cal.Rptr. 508 (Cal.Ct.App. 1987) evidence of a conviction on sexual assault charges against unrelated minors was not enough to support finding of depravity and unfitness in a dependency action. In the same light, evidence that the parent may have smoked marijuana during the child's visit did not alone support a neglect petition in In re Rebecca W., ___A.D. 2d___, 504 N.Y.S.2d 928 (1986).

Polygraph evidence. The use of lie detector evidence in juvenile court proceedings is rare compared to the use and discussions of the accuracy and reliability of such polygraphs in criminal court. A California appellate court found in In re Kathleen W., 235 Cal.Rptr. 205 (Cal. Ct. App. 1987) that the failure to hear offered polygraph evidence was prejudicial error. Further, a New York family court held that due process and fundamental fairness required that the parent in an abuse action be permitted to present lie detector testimony in In re Jennifer M., N.Y.L.J., Aug. 7, 1986, at 14 Col. 2 (Fam. Ct. Kings County) [Feb.].

Anatomically correct dolls. Child victims of sexual abuse are usually reluctant to discuss their victimization. To overcome this disadvantage mental health professionals working with such children have begun letting the children play with anatomically correct dolls to facilitate therapy. Juvenile courts have been dealing with issues related to this form of therapy, specifically the admission of testimony by the therapist concerning the child's play with the dolls. Because this therapy is relatively new, the characterizations of such evidence raises new questions in the law and for the courts.

The acceptance of the use of the dolls and the therapeutic interpretation of the child's play with the dolls does not necessarily carry over from treatment to the courtroom. A California appellate court in an abuse adjudication agreed with a father who had challenged the admission of a doctor's opinion about the meaning of his daughter's play with the dolls in In re Amber B., 236 Cal.Rptr. 623 (Cal. Ct. App. 1987). The court ruled that the doctor's expert testimony did not meet an established test for qualifying experts: that the use of the dolls be proven to be generally accepted as reliable by the scientific community. This

ruling was again reiterated in In re Christine C., 236 Cal. Rptr. 630 (Cal. Ct. App. 1987).

Another evidentiary question raised in the use of anatomically correct dolls is whether the child's play with the doll is an out-of-court statement or hearsay. Hearsay evidence is generally not favored in the law, with numerous exceptions, and its admission can constitute reversible error as in Orangeburg Co. Dep't of Social Serv. v. Schlins, 354 S.E.2d 388 (S.C. 1987). The South Dakota court in In the Matter of C.L., 397 N.W.2d 81 (S.D. 1986) took what appears to be the minority view that the child's spontaneous demonstration with a doll when interviewed was not an assertion and thus the social worker's description of the incident was not hearsay. A concurring opinion in this case rejected this characterization, but found enough additional evidence to render the admission of that testimony harmless. However, a Missouri appellate court also characterized this type of testimony as something other than hearsay in M.D. v. M.E.E., 715 S.W. 2d 572 (Mo. Ct. App. 1986) by finding that it was not error to admit such testimony where the purpose of admitting was to show that the children had sexual knowledge beyond their years, rather than to prove the truth of the matter asserted.

More in keeping with the preferred judicial characterization, a Michigan court in In re Freiburger, ___Mich. App.____, 395 N.W.2d 300 (1986) found that the social worker's description of the child's play was hearsay, but nonetheless admissible under the exception for statements made for treatment or diagnosis. An Illinois court also defended the admission of such testimony in juvenile court proceedings in In the Interest of K.L.M., ___Ill. App.3d___, 496 N.E.2d 1262 (1986) against the contention that such evidence violated a defendant's right of confrontation, noting that this due process right was not strictly applicable in civil juvenile court proceedings.

Hearsay. Although the juvenile courts have traditionally been held to a lesser standard of evidence in making determinations, the more adversarial nature of these courts today is seen in the South Carolina Court of Appeals ruling in South Carolina Department of Social Services v. Doe, 355 S.E.2d 543 (S.C. App. 1987). In this sexual abuse case, the trial court judge had fashioned his own "best interests" hearsay exception test, allowing into evidence the hearsay testimony of third parties to whom the 3 1/2-year-old child had related the details of the offense. The appeals court reversed the finding of sexual abuse based on this evidence, noting that State case law or statute did not provide a child abuse hearsay exception and pointing to the custody dispute between the parents and the lack of medical evidence to indicate that this testimony was not adequately reliable.

Videotapes. Matter of Deeren, 405 N.W.2d 189 (Mich. Ct. App. 1987) raises another evidentiary issue more often encountered in criminal proceedings. The Michigan Court of Appeals in this case held that a videotape of the child describing her sexual abuse could be used in evidence during the adjudicative, or factfinding, phase of a termination of parental rights hearing.

Juvenile court dispositions when the perpetrator is unknown. In re Christina T., ___Cal.App.3d___, 229 Cal.Rptr. 247 (1986) addresses an important issue juvenile courts will face as their proceedings become more adversarial: What is the appropriate disposition when it is established that the child has been abused, but the identity of the perpetrator is undetermined? The trial court in

that case dismissed the petition alleging sexual abuse because the 4-year-old alternately named her divorced father and her mother's paramour as the abuser and all the other evidence in support of the petition was purely hearsay. The California Court of Appeals found that the lower court should not have dismissed the case, having ascertained that the child was abused. Once that determination is made, the court held, there is a presumption that the parents' homes are unfit and the child is in need of care. This presumption may be rebutted by either parent, although in this case rebuttal evidence was not offered by either parent. The proper resolution, the Court concluded, is to proceed to a dispositional hearing at which the best interests of the child can be determined.

Juvenile Court Jurisdiction

Not only is the nature of juvenile court proceedings changing, but the scope or authority of the courts appears to be broadening. In In re Ruiz, 27 Ohio Misc.2d 31 (Common Pleas 1986), for example, an infant born addicted to drugs had been found to be within the jurisdiction of the juvenile courts under Ohio's child abuse and neglect laws. (Note, however, that in In re J.S., ___Wis.2d__, 404 N.W.2d 79 (1987), the juvenile court was not permitted to involuntarily commit a mother for drug treatment.)

Further example of the broadening of juvenile court authority in the interest of child protection is seen in In the Matter of Angela R., No. 9304 (N.M. App. November 13, 1986), in which the juvenile court could order therapy for a 3-year-old involved in a disputed custody/sexual abuse case even though there had been no finding of abuse. In addition, juvenile court jurisdiction has been "revived" in In re Valerie H., ___Md.___, 527 A.2d 42 (1987), where an 18-year-old was made eligible for continued court-ordered social services although her case had been previously closed.

Adults under juvenile court authority. The broadening of juvenile court jurisdiction does not necessarily extend to all adults alleged to have abused children. In Department of Human Services v. Boley, 358 S.E.2d 438 (W.Va. 1987), a West Virginia CPS agency attempted to use the juvenile court to prosecute a teacher for the abuse of a student under State child protection laws. The court in this case found that abuse cases not involving a parent or parent substitute are not appropriate juvenile court cases. Similarly, a New York Family Court found in In re Jessica C., ___Misc.2d___, 505 N.Y.S.2d 321 (Fam.Ct. 1986) that a babysitter performing services outside the child's home was not a "person legally responsible" for the purposes of jurisdiction in child abuse proceedings.

Further limits on the juvenile court's authority are seen in such cases as In the Matter of Welfare of N.W., 405 N.W.2d 512 (Minn. Ct. App. 1987), in which it was found that the juvenile court's rejection without hearing of the father's proposed treatment plan in a sexual abuse case violated due process. Also, strict compliance with the notice requirements of Federal law was required of the family court in In the Matter of L.A.M., 727 P.2d 1057 (Alaska 1986), where it was held that State courts must adhere to the letter and spirit of the Indian Child Welfare Act in abuse-related termination of parental rights cases. And, in In the Interest of D.J.B., 718 S.W.2d 132 (Mo. App. 1986), a Missouri appellate court found procedural and jurisdictional defects in original neglect proceeding so contaminated the subsequent termination proceeding as to require reversal.

Juvenile court/criminal jurisdiction. Because most child maltreatment is also actionable under criminal laws, both the juvenile and criminal justice systems

may be involved in a given case. In In re Neil C., ___Md.___, 521 A.2d 329 (1987), it was held that proceedings in juvenile court may continue even after the alleged abuser has been acquitted from criminal charges. The separation of the two court systems is also seen in cases such as People v. District Court for the 17th Judicial District, ___Colo.___, 731 P.2d 652 (1987), in which the Colorado Supreme Court upheld the juvenile court's protective order preventing police from questioning therapists concerning parents' statements during court-ordered counseling sessions.

Divorce, Custody, and Visitation

Child abuse has been an element in a series of cases relating to the dissolution of marriage and the attendant issues of custody and visitation. Depending upon the jurisdictional scheme of the State and the facts of the individual case, these cases may be heard in domestic relations courts, or referred to juvenile courts for disposition.

Evidentiary rules, specifically New York's statutory exception to the rule against hearsay, was found to be applicable to custody proceedings in Favour v. Koch, ___A.D.2d___, 508 N.Y.S.2d 320 (1986). Similarly, in In the Matter of Fox, 504 So.2d 101 (La. App. 1987), the custody petition of the grandmother, with whom the 5-year-old had lived until her mother's remarriage, was properly rejected when the evidence of sexual abuse by the stepfather was purely hearsay.

Visitation is an issue in a number of these cases, such as Neustein v. Neustein, 503 So.2d 439 (Fla. Dist. Ct. App. 1987), in which it was found in a dissolution proceeding that the trial court did not abuse its discretion in permitting a father restricted visitation with his 3-year-old daughter, despite allegations of possible sexual abuse. Similarly, a New York court found that, without a showing of risk to the child, a father accused of sexual abuse was entitled to visit in Matter of Beverly SS, 517 N.Y.S.2d 618 (N.Y.App.Div. 1987). In In re Welfare of G.C., 394 N.W.2d 830 (Minn. App. 1986), a case involving allegations of sexual abuse, the family court had the authority to order psychological examinations and treatment for the father, without issuing findings concerning the validity of those allegations, before allowing him unsupervised visitation. This judicial flexibility in such cases is also seen in Jane P. v. John P., 515 N.Y.S.2d 365 (N.Y. App. Div. 1987) in which the court halted overnight visitation with the father based upon less than a preponderance of evidence of sexual abuse. The judicial criterion for determinations in all of these cases is found in the holding in M.E.D. v. J.P.M., 350 S.E.2d 215 (Va. App. 1986) that award of visiting privileges must be guided by the child's and not the parent's best interests.

Criminal Court--Evidence and Other Child Witness Issues

There have also been major developments in criminal case law related to child abuse prosecutions, especially as statutory changes enacted to facilitate the prosecution of such cases are tested in court.

Child abuse hearsay exemption. As discussed earlier, testimony concerning out-of-court statements going to the truth of the matter asserted or hearsay is generally inadmissible into evidence, with numerous exceptions. One of the exceptions, available in 27 States by statute or case law, as of May 1987, allows a special hearsay exception for a child victim's out-of-court statements of abuse. This exception, generally created by law in the jurisdictions in which it is

available, has been successfully challenged as unconstitutional in the highest court of at least one State.

In State v. Robinson, ___Ariz.___, 735 P.2d 801 (1987), the defendant had been convicted of sexual misconduct with two young victims, based upon the testimony of parents, counselors, and others who had talked with the children. This evidence was allowed by the trial court under Arizona's statutory child abuse hearsay exemption. The Supreme Court of that State, however, agreed with the defendant that this exception conflicts with judicially promulgated rules of evidence in violation of the separation of powers doctrine of the U.S. Constitution. However, the Court also adopted the Arizona Court of Appeals findings (State v. Robinson, ___Ariz.___, 735 P.2d 798 (Ariz.App. 1987)) in permitting the disputed testimony to be heard under traditional exceptions to the rule against hearsay.

However, Florida's child abuse hearsay exception law has been found not to be unconstitutional on its face in Glendening v. State, 503 So.2d 335 (Fla. App. 1987). Citing the U.S. Supreme Court decision in Ohio v. Roberts, 448 U.S. 56 (1980), the Florida court found the requirements for admission of child abuse hearsay in that State met the standards needed to satisfy the confrontation clause in the U.S. Constitution.

Other cases concerning the statutory child abuse hearsay exception include State v. Sammons. 47 Wash.App. 762, 737 P.2d 684 (1987), in which the Washington Court of Appeals agreed with the defendant that the statutorily prescribed procedure for assessing the reliability of hearsay statements had not been complied with at trial, and People v. Arguello, ___Colo.___, 737 P.2d 436 (1987), which held that the child-victim's testimony from two previous trials was admissible at a third trial when the State's good faith efforts to produce the victim to testify were unsuccessful.

Numerous recent cases have upheld the admissibility of child-victim hearsay under traditional exceptions to the rule against hearsay. These include United States v. DeNoyer, 811 F.2d 436 (8th Cir. 1987), in which the child's hearsay was admitted under the exception that permits statements made in the treatment and diagnosis of illness or injury to be heard, and King v. State, 508 N.E.2d 1259 (Ind. 1987), in which the child's hearsay was admitted as an excited utterance. The excited utterance exception permits the admission of hearsay spoken immediately after a startling event, which is seen as tending to be reliable and truthful, because the speaker would not have had the opportunity to reflect on his words. This exception has been extended in child abuse cases to allow for a child's differing perception of time, as seen in People v. Merideth, ___Ill. App.3d___, 503 N.E.2d 1132 (1987), in which statements made 7 hours after the event were admissible; Commonwealth v. Densten, 503 N.W.2d 1337 (Mass.App. Ct. 1987), in which the statements made 17 days later by a special needs 9-year-old were admissible; Commonwealth v. Adams, 503 N.E.2d 1315 (Mass. App. Ct. 1987), in which the statements were considered a fresh complaint 4 months after the attack; and People v. Clark, 238 Cal.Rptr. 230 (Cal. Ct. App. 1987), in which the hearsay was seen as a fresh complaint 7 months later.

Recent cases approving related exceptions include Nash v. State, ___Md. App.___, 519 A.2d 769 (1987), in which the "state of mind" hearsay exception was used to admit a social worker's testimony concerning the victim's reaction when the social worker first visited the child, and Nusunginya v. State, 730 P.2d 172 (Alaska Ct. App. 1986), in which the victim's statement to her cousin that her

father raped her was admitted as a first complaint and as prior consistent statement. The primary test for the admission of child hearsay in these and other similar cases is the certainty that the statements admitted are reliable and truthful, as established in cases such as State v. Jackson, ___Wash. App.___, 730 P.2d 1361 (1986) and State v. Hancock, ___Wash. App.___, 731 P.2d 1133 (1987).

Videotaped evidence and testimony. New laws affecting changes in the rules of evidence in child abuse prosecutions have also been enacted concerning the videotaped depositions and testimony of the child victims. As with the child abuse statutory hearsay exception, the courts are scrutinizing the application of these laws.

The videotaped evidence used in State v. R.C., 494 So.2d 1351 (La. App. 1986) and Romines v. State, 717 S.W.2d 745 (Tex. Crim. App. 1986) was found in both cases to be inadmissible, the former on the grounds that the procedures prescribed by law were not properly followed at trial to assure the right of confrontation; and the latter on the grounds that the Texas law itself did not adequately preserve this right. The Texas Supreme Court agreed in Long v. State, No. 87-25 (Texas July 1, 1987) that the State's videotape law was unconstitutional. Similarly, videotaped evidence has been found inadmissible in Gaines v. Commonwealth, 728 S.W.2d 525 (Ky. 1987) and State v. Seever, 733 S.W.2d 438 (Mo. 1987), where the videotape was found to be an improper enhancement.

Courts in other States, however, have upheld their States' videotape statutes, as seen in New Hampshire in State v. Heath, ___N.H.___, 523 A.2d 82 (1986) and Minnesota in Sullivan v. State of Minnesota, 818 F.2d 664 (8th Cir. 1987). The determination of whether videotaped evidence will be admissible in a given State appears to be based upon whether the statute authorizing its usage assures due process, the right of confrontation, and other constitutional guarantees to defendants both in its application and on its face.

Other criminal law issues. A variety of recently reported cases concern other criminal law issues related to child abuse prosecutions, such as the admissibility of evidence of the victim's character, privileged communications, and expert testimony. Generally the courts permit such evidence to be admitted if the law and the procedure used in its application strike the delicate balance assuring the validity of the evidence and the rights of the accused. In the realm of new child abuse criminal laws, those concerning child pornography have also been subjected to constitutional scrutiny in cases such as State v. Meadows, 28 Ohio St.3d 43, ___N.E.2d___ (1986); State v. Burke, ___Neb.___, 408 N.W.2d 239 (1987); Cinema I Video, Inc. v. Thornburg, ___N.C.App.___, 351 S.E.2d 305 (1986); United States v. Freeman, 808 F.2d 1290 (8th Cir. 1987); U.S. v. Fenton, 654 F.Supp. 379 (D. Pa. 1987); and Duncan v. State, 2d Civ.No. B022283 (Cal. App. March 3, 1987), which have all found that State and Federal laws directed against child pornography are constitutionally sound.

Thus, new forums and new laws are being developed as lawmakers and the courts grapple with the child abuse and neglect issues within the framework of our constitutional and legal systems. Further developments, especially in evidentiary and child custody matters as considered in various judicial forums, may be expected in the coming years.