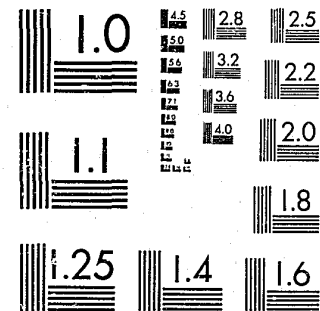


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CHILD PROTECTION:

THE ROLE OF THE COURTS

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THE USER MANUAL SERIES

This manual was developed and written by Hortense R. Landau, Marsha K. Salus, and Thelma Stiffarm with Nora Lee Kalb. It was edited and produced by Kirschner Associates, Inc., Washington, D.C., under Contract No. HEW-105-77-1050.

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Hortense R. Landau
Marsha K. Salus
Thelma Stiffarm
with
Nora Lee Kalb

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ACQUISITIONS

Hortense R. Landau has been on the staff of the New York Society for Prevention of Cruelty to Children for the past thirty years; she is currently Executive Director. Ms. Landau holds a J.D. degree from New York University School of Law and is also a Certified Social Worker. Her extensive professional affiliations include: Association of the Bar of the City of New York, New York Women's Bar Association, Manhattan Inter-Hospital Child Protection Committee, American Human (Association), and The Mayor's Task Force on Child Abuse and Neglect.

Marsha K. Salus, ACSW, is a Senior Associate at Kirschner Associates, Inc. Prior to this, Ms. Salus was a Senior Social Worker in Child Protective Services for Fairfax County, Virginia, where her responsibilities included coordination of the County Parent-Aide Program, provision of casework services, and training of various professional groups in the area of child abuse and neglect.

Thelma J. Stiffarm is currently on the staff of the Native American Rights Fund where she is Director of the Tribal Energy and Social Development Office Project. Prior to her work with the Native American Rights Fund, Ms. Stiffarm served as Deputy Director of the American Indian Law Center in Albuquerque and as a consultant to the U.S. Commission on Civil Rights' National Indian Project. Ms. Stiffarm holds a J.D. degree from the University of New Mexico; her special interest area is Indian juvenile law.

Nora Lee Kalb has a J.D. degree from the Antioch School of Law in Washington, D.C., as well as a Masters in Social Work from the Atlanta University School of Social Work. Ms. Kalb has a broad range of direct and administrative experience in the area of child welfare and juvenile justice, having worked as both a caseworker and later as a director of several national research and demonstration projects in both fields. Ms. Kalb has also evaluated state and local child welfare programs, and has assisted in the preparation of National Standards for Foster Family Services for the Children's Bureaus, U.S. Department of Health, Education and Welfare. More recently, Ms. Kalb has worked on various aspects of the Draft *Federal Standards for Child Abuse and Neglect Prevention and Treatment Programs and Projects*.

Kirschner Associates, Inc., staff who were responsible for editing and producing this manual included Steven Hoglund and Gretchen L. Schultze, Research Associates, and Robert A. MacDicken, Project Administrator.

James A. Harrell, Project Officer for the National Center on Child Abuse and Neglect, provided technical consultation, revisions and editing.

The following are members of the Advisory Panel for Contract No. HEW-105-77-1050:

Diane D. Broadhurst
Education Consultant

Donald Bross
National Center for the
Prevention and Treatment of
Child Abuse and Neglect

I. Lorraine Davis
Wisconsin Department of
Public Instruction

Jeannette Hendrix
Louisiana Office of Family
Services

James L. Jenkins
U.S. Air Force

Hortense R. Landau
New York Society for Prevention
of Cruelty to Children

Dwaine Lindberg
Minnesota Department
of Public Welfare

John Flores Mendoza
Judge, Clark County, Nevada

Nancy Ormsby
Quinco Consulting Center

Nancy Polansky
Psychiatric Nurse

Barbara Pruitt
Los Angeles Police Department

Thelma Stiffarm
Native American Rights Fund

E. Peter Wilson
Philadelphia SCAN Center

J. L. Wyatt
District of Columbia
Department of Human Resources

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PREFACE

Child Protective Services (CPS) has the legal mandate to investigate suspected child abuse and neglect and to provide services to families experiencing child maltreatment problems. Court intervention may be necessary at any point in the child protection system.

The juvenile court is required to determine whether abuse/neglect exists in certain cases, and it has the authority to determine what services are needed to remedy the problems. The essential function of the juvenile court is to protect the child in a manner that guarantees due process to all family members. Unfortunately, relationships between professionals working in the field of child maltreatment and the juvenile courts are sometimes strained; it is not uncommon for professionals to feel suspicious of and intimidated by the court process. These relationships can be ameliorated through CPS workers' increased understanding of juvenile court process and procedures, and through court personnel's increased understanding of the child protective process.

This manual is designed to provide users of the juvenile court with an understanding of the process and procedures of the court in hearing and deciding one particular group of cases--cases of child abuse and neglect. It is hoped that the use of this manual will improve the relationship of professionals with the court, and that it will enhance their abilities to effectively use the court in the interests of maltreated children and their families.

Although this manual describes the general framework of the court process, professionals who come into contact with the juvenile court must refer to state statutes for specific procedural requirements and processes in their jurisdictions.

Child Protection: The Role of the Courts is one in a series of manuals based on the *Draft Federal Standards for Child Abuse and Neglect Prevention and Treatment Programs and Projects*. (A list of the Standards related to the judicial system will be found in the Appendix.)

OVERVIEW OF CHILD ABUSE AND NEGLECT

DEFINITIONS OF CHILD ABUSE AND NEGLECT

The words "child abuse" and "child neglect" mean different things to different people. It is important to have a widely accepted definition of these terms because they describe the situations in which society should and must intervene, possibly against parental wishes, to protect a child's health or welfare. But defining these terms raises the most controversial issues in child abuse and neglect work because these definitions determine the conditions which constitute reportable circumstances and they establish when society, child protective services, and possibly the courts, can intervene in family life.

Definitions of child abuse and neglect seem to many to be both too broad and too narrow. It is difficult to draft legislation which is specific enough to prevent improper application and yet broad enough to cover situations of harm to a child which necessitate societal intervention. As a result, there are many different approaches to defining "child abuse" and "child neglect." One comprehensive approach is found in the Draft Model Child Protection Act, developed by the National Center on Child Abuse and Neglect:

- (a) "Child" means a person under the age of 18.
- (b) An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his/her parent or other person responsible for the child's welfare.
- (c) "Harm" to a child's health or welfare can occur when the parent or other person responsible for the child's welfare:
 - (i) Inflicts, or allows to be inflicted, upon the child, physical or mental injury, including injuries sustained as a result of excessive corporal punishment; or
 - (ii) Commits, or allows to be committed, against the child, a sexual offense, as defined by state law; or

- (iii) Fails to supply the child with adequate food, clothing, shelter, education (as defined by state law), or health care, though financially able to do so or offered financial or other reasonable means to do so; for the purpose of this Act, "Adequate health care" includes any medical or non-medical health care permitted or authorized under state law; or
 - (iv) Abandons the child, as defined by state law; or
 - (v) Fails to provide the child with adequate care, supervision, or guardianship by specific acts or omissions of a similarly serious nature requiring the intervention of the child protective service or a court.
- (d) "Threatened harm" means a substantial risk of harm.
- (e) "A person responsible for a child's welfare" includes the child's parent; guardian; foster parent; an employee of a public or private residential home, institution or agency; or other person responsible for the child's welfare.
- (f) "Physical injury" means death, disfigurement, or the impairment of any bodily organ.
- (g) "Mental injury" means an injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in the child's ability to function within a normal range of performance and behavior, with due regard to the child's culture.

Having a workable definition of child abuse and neglect is of major importance in determining the necessity of court intervention. Specific statutory definitions of the types of behavior that constitute child maltreatment provide a framework for CPS and court decisionmaking.* Thus, they provide criteria for "what proof" or "what information" is necessary to persuade the court that the alleged events did occur.

*Adapted from material developed by Douglas J. Besharov for: *The Abused and Neglected Child: Multidisciplinary Court Practice*. New York: Practicing Law Institute, 1978.

Many state child abuse and neglect statutes are broad, allowing for examination of the facts in each case situation. However, critics challenge such statutes as being vague, permitting misuse and decisionmaking based on personal views. In addition, vague statutes increase the possibility of intervention which may be harmful to the child. Thus, statutory definitions must be specific enough to provide guidelines for intervention.

CHILD PROTECTION PROCESS

Most states have established distinct child protective services (CPS) units as the key agencies in their child abuse and neglect response systems. CPS units are set up specifically to ensure the protection of abused and/or neglected children. Although the CPS unit has the legally mandated responsibility for ensuring that assessment and treatment programs are responsive first to the needs of abused and neglected children, and then to the needs of their families, other professionals and private citizens may be involved in the child protection process.

The components of the CPS process include:

- Identification/Reporting: Identification is the step at which situations of child maltreatment come to the attention of professionals and private citizens.

Reporting is the stage at which the individual who suspects child abuse or neglect reports to the legally mandated agency, usually CPS.
- Intake/Investigation: Intake is the process of receiving initial reports of possible child maltreatment, obtaining accurate and sufficient information from the reporter and (if legal within a particular community) gathering collateral information concerning the family from other sources.

Investigation constitutes the initial intervention with the family and involves information-gathering to corroborate or dismiss a report.
- Assessment/Planning: Assessment is the process of gathering information concerning the abused or neglected child and family members and evaluating the family's abuse- and/or neglect-related problems, the internal

strengths they can draw upon to solve these problems, and the types of services they require to do so.

Planning consists of the development of a plan to establish a safe environment for the child and, if at all possible, to maintain the family as a unit. The parts of this process include: setting realistic goals for services; formulating objectives; identifying service alternatives and selecting specific services based on the problems and needs of the family, objectives set and availability of services in the community.

- Implementation of the plan: This is the stage in which the case plan is implemented. Services may be provided directly by CPS or the family may be referred to other community agencies.
- Use of the court: Because of the nature of child abuse and neglect cases, court action to protect children may be initiated at any point in this process.
- Termination/Follow-up: Treatment efforts are assessed to determine if they should be continued, changed, or terminated. If a decision is made to terminate the case, it may still be appropriate to follow up on the family subsequently, or to make another referral for services. In some cases, the parent/child legal relationship may be terminated and the child may be successfully adopted, yet the parents still require treatment.

The problems of child abuse and neglect are such that a variety of professionals will be involved in many of the phases of the child protection process, such as identification/reporting, assessment/planning and implementing the plan.

II

THE COURT SYSTEM AND CHILD ABUSE AND NEGLECT

The court is an integral element in the child protective service delivery system, and thus involvement with the court may occur at any point in the child protective response process. There are, however, certain points within this process at which court intervention may be more likely to take place. For example, it is most likely that the court will become involved during the assessment and planning phases.

DECIDING WHETHER TO GO TO COURT

One of the greatest difficulties CPS workers or attorneys may face is deciding when to go to court. Serious and/or continual physical abuse, of course, clearly warrants the use of the court's authority for the child's protection. However, in many cases, particularly those involving neglect, the decision regarding whether to go to court is less clear-cut.

Court action should be considered to remove a child temporarily or permanently from the home or to obtain adequate treatment if:

- The child is in imminent danger
- Attempts at treatment have been unsuccessful, and the parents have made no progress toward providing adequate care for the child; the child thus remains in a very unhealthy home environment, even though every possible avenue for ameliorating the situation has been explored.

Beyond these general guidelines, court intervention may be required in cases where: families refuse to cooperate with the investigation and there is cause to suspect that a situation of abuse and neglect exists; families are unwilling to accept needed services although their child is in substantial danger; the investigation indicates the need for removal of the child; the family is eligible for services only if the child is a dependent of the court. Court intervention may also be required if the family is already under authority of the court and a modification of the court order is necessary, or if it is necessary to terminate the parental rights of the natural parents.

Going to court has a number of negative aspects aside from the more obvious problem of procedural complexity. Court proceedings, even in juvenile or family court, tend to be adversarial in nature and can result in disruption of the client/family and family member/family relationship. An unsuccessful attempt to involve the court in child protection matters, for example if the court finds insufficient evidence to warrant its intervention, can lead to the family's rejection of agency assistance in the future; the parents may feel that they have been found "not guilty" and thus are not in need of help.

There are some positive aspects to court involvement. For example, it puts the parents "on notice" that their abusive or neglectful behavior is unacceptable and must change. In addition, the court may order the parents to use services they may have been unwilling to become involved in previously.

Establishment of a system for in-depth review of the full case record by the local child protective agency is essential to ensure that judicial proceedings are initiated when necessary. Experienced supervisory personnel must be available to review case records, to indicate areas of weakness in the case record, and to make suggestions regarding alternatives to court action. There may be areas in the record which need to be reinforced to meet agency guidelines, CPS work requirements, and accepted recordkeeping practices.

If there is a CPS decision to file a petition initiating court action, there may be additional review of the record by an attorney who may or may not be part of the CPS agency, by the county attorney, perhaps, or by some other legal authority. This review process varies from state to state. The function of the attorney in reviewing the record is to ensure that its factual content is properly prepared for presentation of the petition and ultimately the case. After reviewing the record, the attorney may recommend delaying the initiation of court action pending the gathering of additional information by CPS. The sole purpose of this additional review is to ensure that the request for a petition is not premature or unwarranted, and that the best possible case is subsequently presented at the time of the hearing.

THE COURT SYSTEM

There are two types of courts--criminal and civil. Either or both courts may be involved in a child abuse and neglect case. Juvenile

courts are civil courts and thus may not have the rigidity of practice and procedure which usually exists in a criminal court. Child abuse and neglect is usually dealt with in the juvenile court process where the focus is upon the welfare of the child in the total context of the family. The name of the court varies from state to state. It may be called the "children's court," the "family court," or the "domestic relations court." However, the title "juvenile court" will be used as a generic term throughout this manual.

In some states, the juvenile court is a separate court or a division distinct from the total court system, although the trend is toward a unified court system. Variations in the organization of the court system in no way change the unique purpose and responsibility of the juvenile court.

Courts have two major concerns when dealing with child abuse and neglect cases. The first is protection of the child; this is usually accomplished through civil procedures in a juvenile court. The second is criminal prosecution of the abusive or neglectful parent.

Criminal Court*

Criminal prosecution of abusive or neglectful parents may be instituted under criminal statutes that deal with such actions as assault, battery, contributing to the delinquency of a minor, sexual abuse, or homicide. Some states have created a separate crime of child abuse or cruelty to children. Regardless of the specific statute, in a criminal prosecution for child abuse or neglect, the defendant is entitled to the full protections guaranteed by the Fourth, Fifth and Sixth Amendments of the Constitution, including right to jury, strict adherence to rules of evidence, right to cross-examination, right to appointed counsel, right to a public and speedy trial, and the highest standard of proof (that is, beyond a reasonable doubt). Similarly, the criminal investigation of child abuse or neglect is subject to the strict constraints imposed by the Constitution. These are put into effect by the exclusionary rule, which states that evidence obtained in violation of constitutional provisions may not be used for criminal prosecution.

Criminal prosecution may result in such penalties as probation or incarceration in a penal institution, but criminal courts have no

* Adapted from material developed by Barbara A. Caulfield in *The Legal Aspects of Protective Services for Abused and Neglected Children*, U.S. Department of Health, Education, and Welfare, 1978.

authority to make orders concerning the child victim. Thus, criminal prosecution is directed at deterring or rehabilitating the defendant rather than at ensuring the safety of the child.

Juvenile Court

The authority and jurisdiction of the juvenile court emanate from state law. In most states, the juvenile court has exclusive responsibility or jurisdiction over many family- and child-related legal problems. The juvenile court has jurisdiction over minors in delinquency cases, status offenders (children in need of supervision and runaways), and children who are maltreated, dependent, or neglected. The maximum age at which an individual is still considered a minor varies from 16 to 18 years depending on the state, and the court may have continuing jurisdiction until age 21. (However, in the vast majority of states, it is age 18.)

The juvenile court, when hearing cases of child abuse and/or neglect, is a civil court. In this role, the primary responsibility or purpose of the court is to protect the minor(s) from further risk of abuse or neglect. Juvenile courts have a range of dispositions available to them which are intended to protect the child and to rehabilitate the child and the family; the most extreme is permanent removal of the child from the home and termination of parental rights. Others include temporary removal while the parents undergo therapy, or leaving the child with the family under court or CPS supervision. Some states have statutes which provide that when the child is allowed to remain in the home after an adjudicatory finding of abuse or neglect, the parent is required to participate in a counseling program designated by the court or to conform with any other orders of the court.

Unlike the criminal process, procedures and rights granted to participants in juvenile court process vary widely from state to state and are currently in flux. Civil court process is less "formal" than criminal court process; strict adherence to criminal court procedures is usually discouraged. Juvenile court process is set forth by the law which established it, but beyond this law the court's processes are also determined by the legal safeguards guaranteed in the Constitution of the United States, the requirements of each state constitution, and the precedents established by case law. Precedents include court decisions from higher state courts, federal courts, and the United States Supreme Court.

Although juvenile court proceedings for child abuse or neglect vary throughout the United States, the Constitution guarantees some basic rights of due process which state courts must implement. It

is important to remember, however, that the content and procedure of abuse and neglect hearings remain relatively unsettled; procedural requirements and rights of various parties differ from state to state.

Rights of Due Process*

Due process rights establish the procedures the court must follow to legally "hear and determine" the issues before it. The procedures which are guaranteed by due process include:

- right to privacy
- proper notice of the proceeding
- impartial hearing of the case
- right to counsel (in some states)
- right of confrontation and cross examination
- right to a jury trial (in some states)
- right of family integrity (in some states).

It is important to remember that, although due process rights are not uniform throughout the country, they apply to both parents and children. The basic guarantees of due process apply to child abuse or neglect actions in the following ways.

Right to Privacy

Agency personnel involved in child abuse and neglect investigations frequently voice concern that investigative methods may violate the client's legally protected right to privacy. This makes it essential for CPS workers to be aware of relevant privacy rights which courts uphold and to recognize the potential impact of these rights on agency investigations.

The worker can use the following general guidelines to determine the permissible bounds of investigative methods:

*Adapted from B.A. Caulfield. *The Legal Aspects of Protective Services for Abused and Neglected Children*. Washington, D. C.: U.S. Department of Health, Education, and Welfare, Office of Human Development Services, 1978.

- Would a reasonable person in the same circumstances find the worker's conduct objectionable?
- Is the worker's conduct malicious?
- Is the investigation limited to acquiring the necessary information?
- Is there a less intrusive means of acquiring the necessary information?
- Is there an overriding public interest in the acquisition of the information sought?

Invasions of privacy that may occur in a child abuse or neglect investigation may include: questioning parents as to what particular sexual acts they perform in their marriage; seeking information from a parent's employer about his or her performance when the information has no relevance to the investigation; and entering someone's house and looking through cabinets and drawers when no one is home.

While this area of the law is still in a developmental stage, it can generally be said that the criterion used to decide whether or not legal action can be brought for invasion of privacy is whether it would be highly objectionable to a reasonable person. For example, breaking into a house might be justifiable if there has been a report that a three-year-old has been abandoned with both legs broken.

Some invasions of privacy are held not actionable (that is, do not provide grounds for legal action) because the courts find an overriding public interest in obtaining the information. For example, some states have specific statutes that allow the CPS worker to talk with a child without the parent's permission. In addition, some states allow photographs of the child's injuries to be taken without parental permission.

Proper Notice of the Proceeding

Parents must be given timely and substantive notice of abuse and/or neglect hearings so that they may address the allegations being made against them; the parents should receive a copy of the complaint or petition so that they are informed of the charges made. Notice requires that parents be informed that a hearing is to take place, when it will be held, and what the proposed subject matter will be. Notice must be provided to any parents whose

rights might be affected by the proceeding, whether or not they are respondents. Even in cases where the parents are not married, the U.S. Supreme Court has found that the father has a substantial interest at stake. It is not clear whether the child has the same right to notice as the parents.

Right to a Hearing

A hearing is required before a child can be removed from the home without parental consent, except in emergency situations. (If emergency action is taken, a hearing must be held afterward.) Some states allow for the removal of the child with parental consent alone. In these states, the parents may waive the right to a hearing for themselves and for the child as well.

Right to Counsel/Guardian *ad Litem*

The right to counsel in juvenile proceedings for parent and/or child varies on a state to state basis. Several courts have recently held that right to counsel in abuse and neglect proceedings is required by due process and equal protection provisions of the Constitution. When the outcome of a delinquency hearing may be confinement of the juvenile, counsel is mandatory. Some states grant a general statutory right to counsel without indicating the types of proceedings the statute includes. Whether or not the right applies to other than delinquency hearings remains unclear under such statutes.

When a child comes before the court, the court is obligated to ensure that the child's safety and interests are protected.* To do this the court may appoint a third party, a guardian *ad litem*. Almost all states have statutes which provide that a guardian *ad litem* be appointed for the child. The appointment of the guardian *ad litem* is intended to provide the child with independent legal representation, and thus with protection that could not be provided by attorneys representing the state or the parents. In most states the guardian *ad litem* must be an attorney, but this is not always the case.

The court may appoint the guardian *ad litem* at any time in the hearing process, but it is generally accepted that he or she should

*This material on guardians *ad litem* is adapted from: B.G. Fraser. "Independent representation for the abused and neglected child: the guardian *ad litem*." *California Western Law Review*, 13(1): 1976-1977.

be appointed when the child first receives notice of legal proceedings or when the child's interests are first threatened.

As an advocate for the child, the guardian *ad litem* assumes four functions:

- investigator to discover all facts relevant to the case
- advocate to ensure that all relevant facts are brought before the court
- counsel to ensure that the court is aware of all dispositional options
- guardian to ensure that the child's interests are fully protected in court proceedings.

The guardian *ad litem* should also serve as the child's spokesperson by allowing the child to express his or her own wishes and by presenting them to the court.

Some states specifically provide that the child has a right to be represented by counsel in dependency or neglect proceedings. Other jurisdictions provide that, in dependency or neglect proceedings, the parent is entitled to counsel, including appointed counsel if the parent is indigent.

In short, no consensus has been reached about either the parent's or the child's right to counsel in dependency or neglect hearings, although the trend is to guarantee it. Support for the right of parents to counsel comes from the U.S. Supreme Court cases which held that parental rights are fundamental and essential, and that due process requires a right to counsel when fundamental rights may be violated.

Parents may retain counsel on their own to represent them. However, if parents do not retain their own counsel, the court is not required to appoint or provide counsel for them from court funds unless this is mandated by state statute. Parents may always retain counsel for the child, but the court is required to appoint counsel only in those cases listed in the state codes.

Right to a Jury Trial

A jury trial is not constitutionally required in juvenile court. However states, by law, may provide jury trials in juvenile hearings. A number of states do require them, either by statute or by

judicial decision, usually upon request of one of the involved parties.

Right of Confrontation and Cross-Examination

In determining whether or not a party is entitled to the right of confrontation and cross-examination, the courts look at the potential seriousness of the impact of the hearing upon the individual, either parent or child. Given the gravity of a determination of abuse or neglect, and the repercussions such a finding may have upon parent or child, it would appear that all parties should be accorded this right. Of course, the effectiveness of this right depends upon representation by counsel.

To date, the U.S. Supreme Court has not held that a juvenile who is the subject of child abuse and/or neglect hearings has a right under the Sixth Amendment to confront and cross-examine witnesses. The states, by statute or by court decision, may grant this right in such hearings. Generally it appears that when counsel is provided for the child, counsel is also allowed to examine the witnesses. In addition, the right of parents to confront and cross-examine witnesses in child abuse and neglect hearings is based on the Sixth Amendment.

Right to Family Integrity

Authority exists in some jurisdictions to the effect that before a natural family relationship is terminated, attempts must be made to rehabilitate the family. Statutes in some states express a preference for care, guidance and control within the child's natural home. The court can put conditions on the child's remaining at home, such as cooperation with CPS agency personnel, mandated counseling, or correctional therapy for the parents or family unit.

III

OVERVIEW OF THE JUVENILE COURT PROCESS

A hearing in any court is characterized as "adversarial." It is a "contest" in which the various persons affected by the action attempt to bring out all the best facts to sustain their side (their own case) and to discredit the opposition. Each of the parties to the action may use to its own benefit all the legal limitations imposed as well as all the rights guaranteed by the law. The purpose of the hearing is to enable the court, and in some cases a jury, to hear the facts and determine the truth regarding the issue between the opposing parties in the action.

The degree to which the hearing process is adversarial varies somewhat according to the judge, attorneys, and parents; minimizing the adversarial nature of the hearing process may be helpful to all parties in cases of child maltreatment.

In a child abuse and/or neglect action, the two basic parties are the initiator of the action (the petitioner) and the parents; however, the child has a vital interest and should have affirmative representation to actively participate and protect that interest. The primary issue is: Is the child in need of protection within the boundaries of the state's definition of child abuse and neglect?

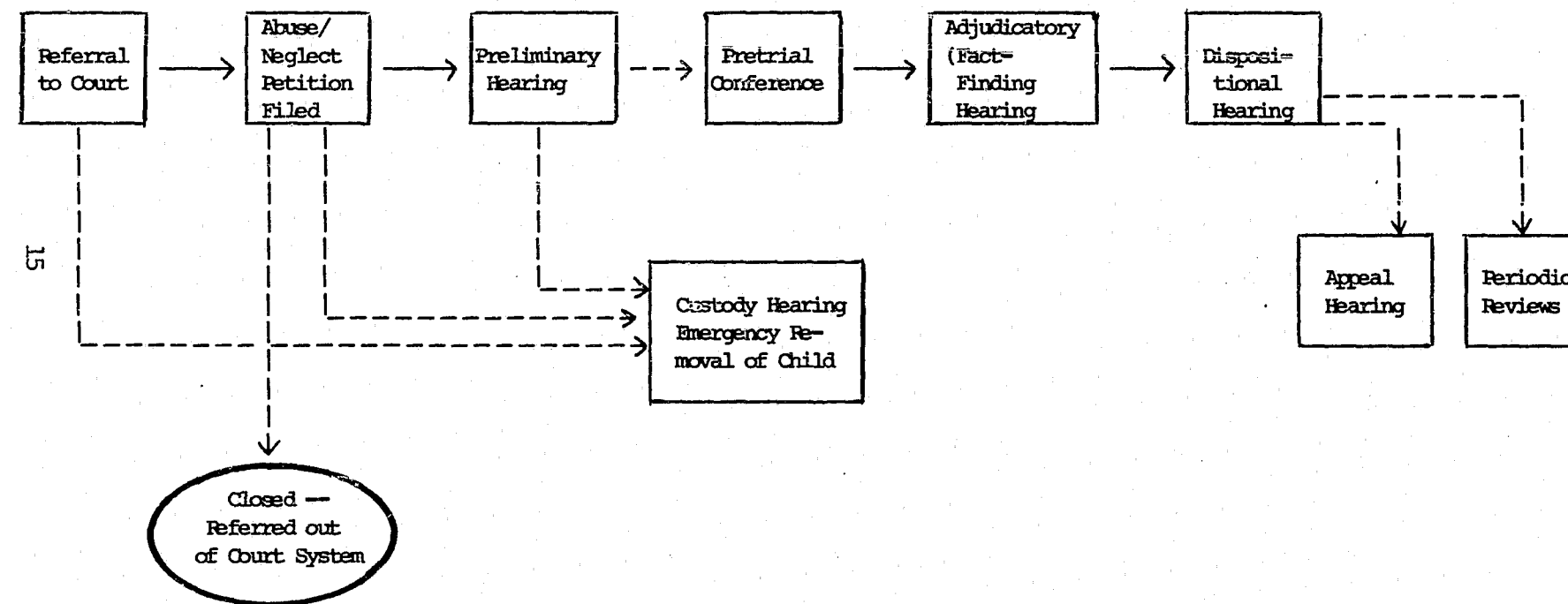
Sometimes in a child abuse or neglect situation, some action must be taken immediately, before a court hearing, to protect the child who is in imminent danger. In such a situation, the child may be taken into protective custody. When this occurs, the steps taken by the court will change somewhat.

The exhibit on the following page presents a flow chart which outlines juvenile court processes. Since the juvenile court process and procedures vary from state to state, it is crucial to refer to state statutes to determine how to proceed in a particular jurisdiction.

THE PETITION

Juvenile court intervention is initiated by filing a written complaint or petition. The complaint alleges or charges in specific detail the time, date, place and specific events or facts which,

EXHIBIT I
JUVENILE COURT PROCESS



as defined by state law, would bring the child(ren) before the court as allegedly having been abused or neglected. The complaint serves as the proper or formal notice to the parents that an action has been initiated, and specifies the conditions justifying intervention to protect the child. The petition will sometimes advise the parents of their right to counsel, if stipulated in state statutes.

The initiator of an action in juvenile court is usually called the *petitioner*. The CPS worker generally has the responsibility for filing a petition or complaint; however, state variations exist which permit other persons, such as law enforcement officers, physicians or juvenile probation officers, to bring a case before the court. In a few states, *anyone* can file a petition alleging that a child is abused or neglected.

Juvenile Court Intake

In many jurisdictions, the petition is filed with the juvenile court intake division. In areas where intake services are not available, petitions may be filed with the probation division of the juvenile court, or the offices of either the judge or county or state attorney. The intake division performs a screening function; that is, in some jurisdictions intake workers are empowered to determine whether there is sufficient information to file a petition. The intake worker may request an additional assessment of the child's situation or refuse to file the petition. In cases where the petition has been denied, the petitioner may appeal the decision to the judge. Juvenile court intake also has a referral function; that is, when a private citizen alleges abuse or neglect of a child, the intake worker *must* refer the case to the local child protective services agency.

PRELIMINARY OR PRETRIAL HEARING

A preliminary or pretrial hearing is sometimes held subsequent to the filing of the abuse/neglect petition. In cases where preliminary hearings are held, the general purpose is to issue temporary orders. In order to substantiate the need for temporary orders, it may be necessary to present evidence. At this hearing, all parties to the action are present and may or may not be represented by counsel.

Although the preliminary hearing is less formal than the adjudicatory (fact-finding) hearing, there are a number of issues that may be addressed.

- An attorney for the parents/child may be appointed. For the child, the right to counsel should be unwaivable.
- Continuances may be granted if one of the parties needs more time to prepare a case.
- Admission or stipulation to the petition may be addressed, whereby the parents admit and stipulate to all or parts of the petition and submit to the full jurisdiction of the court. The court is then empowered to proceed and make a finding of fact, as though a full hearing has been held.
- The jurisdiction of the court may be contested on the grounds that the case has been brought to an improper court or the case has been brought to court under the wrong statute.
- Temporary orders may be issued pending the adjudicatory hearing.
 - The court may order emergency medical care.
 - The court may order the parents and/or children to submit to medical examinations and/or psychiatric or psychological evaluations.
 - The court may issue orders of protection (for example, restraining orders).
 - The court may issue orders for supportive services, such as homemaker services.
 - The court may order the temporary removal of the child.

If settlement cannot be reached at the preliminary hearing, the case will proceed to the adjudicatory hearing.

Emergency Removal or Custody Hearing

There are situations which may require emergency action to protect a child from imminent risk to life or health. This may require taking a child into protective custody prior to filing a petition.

States vary as to: who may exercise emergency protective authority (for example, law enforcement, child protective services, or physicians), the criteria of "imminent risk," and whether court approval is required prior to exercising protective custody.

Whenever a child is placed in protective custody and has not been returned to the parents, a petition must be filed in the juvenile court, usually within 24 to 48 hours. The petition should allege or identify as much as is known of the issues of the child abuse and/or neglect problems, as well as the specific conditions which precipitated removal of the child.

When filing an emergency removal petition or affidavit, the petitioners will sometimes be involved in an *ex parte* hearing in which they provide the judge with evidence supporting the petition. Whether this court procedure exists in a particular jurisdiction is dependent on state law. This is an informal hearing at which only the petitioner is present. In most cases, the parents will not have been informed of the action being recommended. During this informal hearing, the judge may issue orders in response to recommendations in the petition. In cases where no *ex parte* hearing takes place, the judge may simply issue an order based on an affidavit filed by the petitioner.

A custody or removal hearing will be held soon after the petition has been filed, usually within 48 to 72 hours. The removal hearing may be the only preliminary hearing held. Alternatively, the removal hearing may be held in addition to, but independent of, the preliminary hearing previously described. This hearing will not be a full hearing of all the facts; the sole question before the court is whether the child should be returned to the home prior to the full (adjudicatory) hearing. The removal hearing procedure is less formal than the fact-finding hearing; however, the person who removed the child must be available to testify to the circumstances which prompted the removal action.

At this hearing the parents must be present and all parties should be represented by counsel. In addition to deciding whether or not to continue the placement, the court may issue other temporary orders, examples of which were discussed in the previous section.

PRETRIAL CONFERENCE

Pretrial conferences may occur in combination with any of the preliminary hearings previously described. Alternatively, they

may occur alone or not at all. Prior to the adjudicatory hearing, the parties may attempt to resolve the issue at hand without having a full fact-finding hearing. Through "admission," "stipulation," or "settlement," the child can be protected and services can be arranged under court jurisdiction without a hearing.

Even in situations where settlement was unsuccessful at the preliminary hearing, the parties may again attempt to resolve the case without a hearing. However, if no settlement can be reached, the case will proceed to the adjudicatory stage.

ADJUDICATORY HEARING

In the adjudicatory hearing, the petitioner must prove the charges alleged in the petition. All parties--the petitioner, the parents and the child--are present with their respective counsel to determine: *Did the facts occur as alleged in the petition?*

The adjudicatory hearing involves the testimony of witnesses and the production of documentary and written records. This will be discussed in detail in subsequent chapters. A judge will generally hear the case; however, some state laws provide for a jury trial.

The petitioner will present evidence first and has the burden of proof; that is, it is the petitioner's responsibility to convince the court of the truth of the allegations. The parents must refute or rebut the charges by their own testimony, testimony of other witnesses, and presentation of other evidence. In addition the child's attorney may support the petitioner or the respondent and thus assist in either proving or refuting the charges.

Rendering a Decision

After all the evidence has been presented and it has been demonstrated that the incidents in the petition did occur, the court is required to make a decision as to whether or not the maltreatment of the child falls within the state's statutory definition of child abuse and neglect.

If the court determines that, based on the facts presented, no abuse or neglect has occurred, the case will be dismissed.

If there is a finding of abuse/neglect, the court assumes jurisdiction over the child. The court at this point has a number of options.

- The court may order temporary or permanent removal of the child. The child may be placed in the custody of the Department of Social Services, or may be placed with a relative or friend of the family. If the child is already in temporary custody, such custody may be continued or become permanent, or the child may be returned to the natural parents or placed with another family.
- The court may order medical, psychiatric, and/or psychological examinations of the parent(s) and/or child(ren).
- The court may order a predispositional investigation or social study that may be conducted by the court probation department or CPS.

All the orders at this stage are designed to assist the court in the planning part of the case which usually occurs in a separate hearing called the *dispositional hearing*.

DISPOSITIONAL HEARING

In addition to the adjudicatory (fact-finding) hearing, most states require a separate dispositional hearing to determine further action in cases of child abuse or neglect. In some states dispositions are made at the time of adjudication; the majority of jurisdictions, however, operate on a bifurcated system which requires separate proceedings. The dispositional hearing usually involves presentation of the results of a predispositional investigation and social study, which the court will take into consideration along with the findings from the adjudicatory hearing. Following testimony, the judge will make one of the following dispositions: dismissal, adjournment, suspended judgment, probation, order of protection, placement, or termination of parental rights.

Predispositional Investigation and Social Study*

The predispositional investigation and social study are intended to provide the court with information which will enable it to place the findings of the adjudicatory hearing in perspective and

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

make the best determination for the child. Although the investigations are not mandated by statute, most jurisdictions order them; frequently they are prepared independently by the probation department. The predispositional report includes: extensive background information about the child and family, mental health evaluations if conducted, recommendations as to the disposition of the case, and a specific plan for working with the child and family.

Background Information

Investigation into the family's background includes interviews with people who have been involved with the case or who have special knowledge of the family. For example, relatives, friends, neighbors, clergy and professionals within the community who are familiar with the family (such as teachers, doctors, and therapists) may be interviewed.

The background investigation will also include home visits in which the family's home environment and interaction patterns are assessed. In addition, this investigation will include a study of school, court and medical records, psychiatric reports, and employment records. It should also include an evaluation of the family's concern for the child(ren) and of its capabilities in child rearing.

Mental Health Evaluation

In some cases a mental health evaluation may be conducted. This evaluation may include interviews with a psychiatrist and/or social worker, psychological testing, diagnosis, prognosis and recommendations. If possible, the family should be evaluated by a court psychologist or a court mental health team. For more details on the mental health evaluation, the reader should refer to another manual in this series, *The Role of the Mental Health Professional in the Prevention and Treatment of Child Abuse and Neglect*.

Recommendations

The report will also contain an assessment of the family's situation and specific recommendations regarding the child's safety and well-being. This section will include:

- a description of the harm or injury which the child has sustained

- recommendations for treatment and/or placements which will be necessary in order to prevent further harm, and why these will be helpful
- specific services which will be provided to the family
- criteria (for example, specific changes in parental behavior) which will be used to determine when a family no longer needs supervision, or when a child no longer needs placement
- a schedule for the achievement of these goals.

In addition, in any case where removal from parental custody is recommended, the report should contain a full explanation of why the child cannot be adequately protected in the home; this should include a description of previous efforts to work with the parents with the child in the home, the "in-home treatment programs" which have been considered and rejected, and the parents' attitude toward placement of the child. The probable psychological damage resulting from parental separation should also be assessed, and steps to minimize the damage to both child and family should be outlined.

Copies of the report are provided to the court and to all parties involved in the proceedings. Ideally, the predispositional investigation and social study should be the judge's most valuable guide in making the proper disposition of the case; by providing an objective overview and synthesis of information, the report will enable the judge to assess the family's ability to respond to services and achieve an acceptable level of child care.

Types of Dispositions*

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

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

Dismissal

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

Adjournment in Contemplation of Dismissal*

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

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

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

Suspended Judgment

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

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

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

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

Order of Protection

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

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

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

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

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

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

Placement

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

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

Termination of Parental Rights

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

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

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

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

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

RIGHT TO APPEAL*

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

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

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

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

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

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

PERIODIC REVIEWS

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

IV

CASE PREPARATION

In order to initiate court intervention in cases of child abuse and neglect, opinions and judgments must be supported by facts. Professionals, especially CPS workers, may be called as witnesses at any point in the juvenile court process. However, because the emphasis at the adjudicatory hearing is on concrete factual evidence and procedural requirements, this hearing necessitates detailed preparation. At an adjudicatory hearing, the court decides a case based on the evidence presented, so that the sufficiency of admissible evidence of child maltreatment will determine the judge's decision.

Thus, the petitioner (usually CPS) must keep accurate case records and collaborate with the attorney representing the agency in order to prepare a case effectively. Since other professionals often have a part in the hearing process, it is important that they also keep accurate case records and have an opportunity to meet with the attorney prior to testifying.

In addition, whenever court action is undertaken, the professional-client relationship must be taken into account. CPS workers and other professionals must prepare their clients for court intervention if an effective working relationship is to be maintained.

RECORDKEEPING

Documentation of the activity relevant to a child abuse and neglect case is one of the most important tasks for which a CPS worker (or other professional) is responsible. It is imperative to maintain proper records in every case. The written case record is the basic tool required for the preparation of a case if and when juvenile court intervention is necessary. If a record has been admitted as evidence, documented observations (for example, of the parent child interaction) may substitute for "expert" testimony.

The competently prepared case record contains all activity regarding the case (clearly and promptly recorded) from the first telephone call to the current date. In order to ensure adequate recordkeeping, factual observations and professional opinions or evaluations are clearly labeled as facts or opinions in the records. Also, conclusions are supported by specific observations.

A checklist of the kinds of detailed information which are particularly relevant to court intervention and which should be part of the case record includes:

- The child's age, sex, developmental status and special characteristics
- The actual harm to the child, that is, physical and behavioral indicators, the severity of the harm incurred, and the present suffering and future dysfunction
- The act or omission, that is, the type of abuse or neglect and the chronicity and multiplicity
- Person(s) responsible for the acts or omissions, his or her relationship to the child, explanation of the injuries or neglect situation, relevant past behaviors and surrounding circumstances.
- Likelihood of future harm.

Other information relevant to court intervention includes: the parents' response to being confronted with the report; the parents' acceptance or lack of acceptance of services; the parents' and CPS worker's records regarding appointments kept, not kept or cancelled; the worker's explanation to the parents of the obligation and rights regarding CPS involvement with the family; the people present at each interview; interviews with the child; interviews with witnesses and witnesses' addresses and telephone numbers.

Because the case record itself is so vital, it is crucial that the CPS worker (or other responsible professional) know how to keep such records accurately and completely. There are some general guidelines to follow with regard to recordkeeping.

- Records should be up to date at all times. Each entry should be dictated or written as near to the recorded event as possible for two reasons: since accuracy is so important, this assures that the events, conversations and other details being recorded are fresh in the worker's mind; in order to qualify as evidence in most courts, the record must be a "record kept in the course of business," which means all entries must be made as the events occur.

- The case record should contain answers to who, what when, where, why and how. The record should contain specific information on dates, times of day, persons interviewed (including relationship or professional status), locations, what was said, detailed observations with careful descriptions of conditions and diagnoses. For conversations, the record should include time, place and person(s) present.
- The factual information should be recorded and observations and judgments should be noted as such.
- Names, addresses, and telephone numbers of all potential witnesses should be included. Information concerning witnesses' availability and willingness to appear in court should also be included.
- The record should also include copies of any and all releases signed by the parents for confidential information and copies of records from medical and social work sources. For releases signed by the parents, the record should include the date of the release, a copy of the communication which was sent with the release requesting the information, the date of this request for information, and the date of receipt of the desired information. Records received from outside sources should have the date of receipt stamped on them and an entry should be made in the case record noting their receipt.

WORKING WITH AN ATTORNEY

CPS has an important role in working with the state's attorney to support the allegations in an abuse and neglect petition. It is preferable for the CPS worker to meet with the attorney prior to filing the petition, and again before the adjudicatory hearing. In order to prepare for filing a petition, CPS workers should discuss with an attorney which sections of the neglect or abuse statutes have been allegedly breached; who will provide the initial evidence; the status and location of the child; a brief summary of the efforts which have been made to work with the family; and the reason for court action at this time. The case need not be proved at this point in the court process; however, there must be sufficient evidence to show that a full adjudicatory hearing is necessary.

The conference with the state's attorney prior to the adjudicatory hearing should be much more detailed. The CPS worker should be prepared to advise the attorney regarding who can provide important testimony, what each will say, and how credible they will be. Possible flaws and biases should be pointed out. The CPS worker and the attorney should also review all potentially useful documents or other exhibits to determine which are necessary and to avoid admissibility problems at the trial.

Since CPS workers are usually called as witnesses, it is necessary that they prepare carefully for both direct and cross-examination. A list of direct examination questions and responses should be developed and analyzed. The state's attorney should evaluate professional testimony for possible flaws and inconsistencies in order to help prepare for cross-examination. Answers to likely questions should be prepared in advance; it is helpful to role play for both direct and cross-examination.

CPS workers often confer with the guardian *ad litem* and the parents' attorney. This is especially true during pretrial conferences, when all parties are attempting to work toward resolution without having a full fact-finding hearing. In these situations, workers should rely on the expertise of the state's attorney.

RELATIONSHIP WITH CLIENTS

Court intervention may have an effect on the professional-client relationship, especially when a professional is called as a witness against the parents. This is particularly evident in situations in which CPS workers initiate court action concerning families with whom they have been working.

CPS Worker

CPS workers have a special responsibility to assure protection of the child while maintaining, to the extent possible, a supportive relationship with an abusive or neglectful family. Since court action is often initiated after other methods of intervention have failed, the CPS worker normally has been in contact with the family prior to the filing of the petition. The CPS worker may have already established a relationship with the parents, which may include more or less extensive efforts to help the parents modify their relationship with their children in order to meet minimum standards of child care.

It is, therefore, extremely important that when a petition of neglect or abuse is filed the CPS worker maintain open communication with the parents; workers should assure parents of their continued support in efforts to keep the family together or to restore the child if placement is being recommended. This is, of course, difficult when the CPS worker has been the one to initiate the petition (as is often the case). In such cases the worker should explain the purpose of the court action and talk with the parents about evidence which will be presented and recommendations made.

To the extent possible, court action and recommendations should be presented to parents as providing alternatives to their present lifestyle and opportunities to make positive changes. The CPS worker should encourage both parents and children (in separate interviews) to express their feelings about the upcoming proceedings. Finally, the CPS worker should continue to offer assurances that, regardless of the outcome of the case, the family will receive continued help and support.

Other Professionals

Other professionals who have worked with a particular family experience similar conflicts surrounding the issues of confidentiality and trust. Medical personnel, mental health professionals and school personnel may testify in child abuse and neglect hearings. These professionals may have been involved with the family in a care-giving capacity over a period of time, and the necessity for presenting evidence in court may impair their relationship with the family. The CPS worker can mitigate such situations to some extent by taking the responsibility for explaining the need for testimony to the family. Both the CPS worker and the professionals who have been involved with the family should place their testimony in perspective for the parents, with the emphasis on the child's best interests and the professionals' continued support in helping the family to make changes.

V

PROVING CHILD MALTREATMENT

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

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

STANDARD OF PROOF*

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

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

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

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

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

EXHIBIT II

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

*Applies in only one state

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

RULES OF EVIDENCE

Proof is not evidence; proof is the result of evidence. Evidence is the means by which an allegation which comes before the court is proved or disproved. The means used to prove or disprove the allegation are controlled by certain rules called "the rules of evidence." The rules of evidence are basic to any court hearing whether it is juvenile, criminal, or civil.

In many states, evidence at the fact-finding hearing must be:

- **Competent:** It conforms to the legal rules of evidence.
- **Material:** The facts prove the issue before the court, they have a direct bearing on the issue (whether the child is abused and/or neglected), or they have an effective influence or bearing on the issue.
- **Relevant:** The facts are not remote from the issue, and they tend to establish a belief as to the existence of the alleged facts at issue.

There are four kinds of evidence that qualify as competent or conform to the rules of evidence:

- **Direct evidence:** factual information without requiring the proof of any other facts, such as the witness's own conversations with the parent and/or child, or the witness's own observations.
- **Real or demonstrative evidence:** concrete evidence, such as a child in court with injuries, the instrument that caused the injuries, x-rays or photographs of the injuries.
- **Circumstantial evidence:** direct observations that will permit the court to reach a specific conclusion. For example, if the parent had glazed eyes and slurred

speech, was unable to stand or walk, and smelled of alcohol, the conclusion could be reached that the parent was intoxicated. However, the witness may not testify that the parent was drunk, as this is a conclusion. Only direct observations may be presented.

- *Expert or opinion evidence:* evidence provided by a witness who has special expertise, skill or knowledge which is beyond that of the average person. Opinions may be offered on the matter at issue, for example by the pediatrician who diagnosed the child's injuries. For detailed information on expert testimony, refer to Chapter VI.

No consistent rules are followed by all states for admissibility of evidence in juvenile court proceedings. In some jurisdictions, a case may be proven by any combination of these types of evidence, and in other jurisdictions by one type exclusively if there is a sufficient accumulation of it. This means that, in some states, circumstantial evidence may be sufficient for a court to take jurisdiction. Rules vary from state to state but are consistent within a particular state.

The rules of evidence clearly exclude any evidence which is "hearsay," that is, oral or written evidence which is not based on the witness's own personal knowledge or observation but on something said or written by someone other than the parties before the court. An exception to this basic rule is records kept in the course of business. The objection to hearsay evidence is that it is not subject to cross-examination.

Usually, certain conversations (such as those between doctor and patient, clergy and penitent, husband and wife, attorney and client) are recognized as "privileged" and absolutely confidential, and therefore excluded from testimony. However, in most states, direct statutory language, designed to protect children subject to child abuse and/or neglect, abrogates certain rights of privileged conversation, such as that between doctor and patient or husband and wife. The privileged communications between patient and doctor have to be given careful consideration if the patient is the child. To ascertain which privileges can and which cannot be claimed, it is essential to refer to the state's statutory exceptions and case law.

It is important to remember that a preliminary or pretrial hearing is usually not bound by the legal rules of evidence; hearsay is

often admissible. In addition, at the dispositional hearing information may be considered that could not be admitted at the adjudicatory hearing. The most important information of this type is the predispositional investigation and social study; these reports usually do contain hearsay. However, if the report is to be used by the court, it must be accurate and complete; otherwise any disposition based on it will be open to legal challenge.

USE OF RECORDS

As stated previously, records kept in the course of business are an exception to the hearsay rule and thus may be admitted as evidence. For a record to qualify as evidence, it must meet certain criteria.

- Entries were made in the regular course of business, and it is the practice to make and keep such records. For example a hospital and a CPS agency usually qualify as businesses. Thus the transcribed notes of a CPS worker qualify.
- Entries were made at, or reasonably close to, the time the event occurred. For example, if a CPS worker makes an entry into the case record, describing from memory an event that occurred six months earlier, the record does not qualify. The judge determines whether or not there was too long a delay before entry into the record; this determination is based on whether the information is reliable, considering the delay before entry.
- Entries were made by someone who has personal knowledge of the facts, or entries came from someone who had the knowledge and communicated that knowledge to someone responsible for making entries. This may be subject to state variation, particularly if a state has adopted the Federal Rules of Evidence and Procedure which are more liberal and do not require the testimony of a witness to authenticate the writing.

After a record is qualified, it becomes primary and independent evidence. Thus, conclusions such as "the house was filthy" are not sufficient to stand alone. The record must describe the conditions in detail.

Procedure for Admittance of a Record

In order to admit a record as evidence, a witness who is familiar with the procedure for creating the record is called. In his or her testimony, the witness must:

- identify the record
- describe the method of preparing the record
- state the time of preparation of the record
- testify that recordkeeping is a part of the business of the office.

USE OF ADMISSIONS*

Admissions can be offered as evidence in a criminal case against the defendant except when illegally obtained. An admission is not necessarily a confession. However, a guilty plea to a criminal charge can be used against that person in a later court action involving the same situation. For example, although it is considered hearsay in later court action, a guilty plea to criminal child abuse may be offered as evidence in a subsequent juvenile court hearing to determine jurisdiction over a child or in a hearing on termination of parental rights. The plea, however, would not be sufficient grounds to make a finding of abuse/neglect.

In addition, admissions can be used as evidence in a juvenile court hearing, for example when a parent acknowledges to the CPS worker or other responsible professional that he or she abused the child. The parent's admission is allowed as evidence to prove the act and can be used in any subsequent hearing. This reemphasizes the importance of keeping accurate and timely records of all conversations relevant to the case.

HOW TO PROVE CHILD MALTREATMENT**

When attempting to prove a civil court case of child abuse and neglect, the need to protect the child against the actions or failures to act on the part of his or her parents or caretakers must be shown. The need for protection, although not observable,

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

**Based on material developed by Douglas J. Besharov.

may be inferred from present circumstances which are observable. A showing that harm is likely to occur to the child indicates to the court the child's need for protection; court action is justified by the need to provide protection for the child. For example, harm may be proven in a case where a three-month-old child was admitted to the hospital with a spiral fracture and several other fractures in different stages of healing. The parents' explanation of the current fracture did not correspond with the actual injury incurred. In addition, it was determined during the investigation that the parents had been married for only one year and had recently moved into the city and that there had been a prior substantiated report of abuse in another city.

There are three possible options for proving the child's need for court-ordered protection based on the elements of proof in a particular case. The options and the elements of proof necessary in each, which are outlined in the exhibit following this page, may be used as a framework for the gathering of evidence during preparation of a case and for the presentation of a case in court. The elements of proof include:

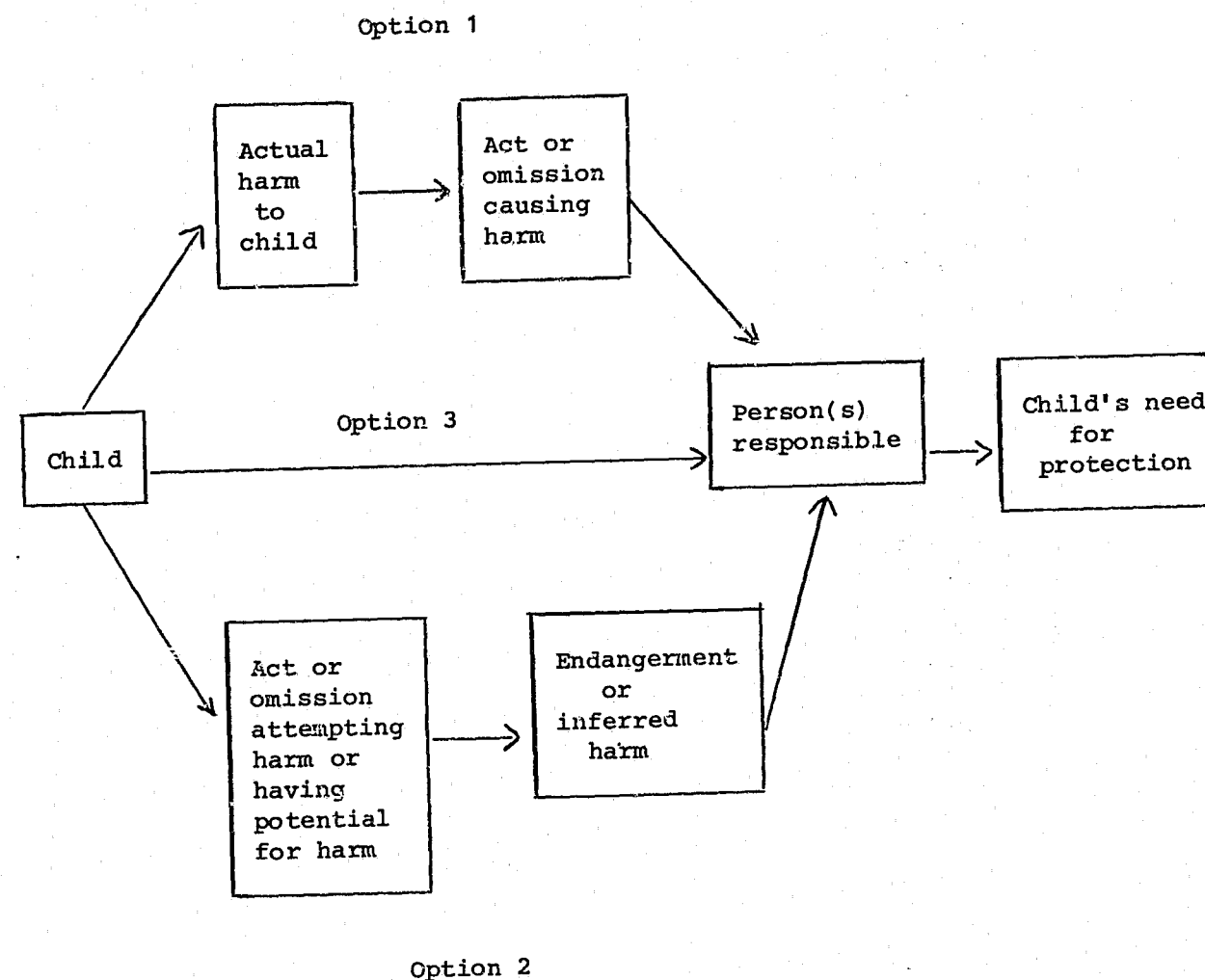
- The child
- The actual harm to the child
- The act or omission causing harm
- The act or omission attempting harm or having potential for harm
- Endangerment or inferred harm
- The person(s) responsible.

Although all elements will not be applicable in each case, there are two essential elements which must be shown in any child abuse and neglect hearing: the vulnerability of the child; the person responsible. These elements are common to all three possible options for proving a case of child abuse and neglect.

The Child

A determination of the vulnerability of the child should include a review of such factors as the child's age, sex, developmental status and special characteristics. For example, an infant, a physically handicapped child, or a mentally retarded child is less able to defend himself or herself from abuse than a seventeen-year-old "normal" child.

EXHIBIT III
ELEMENTS OF PROOF IN CASES OF CHILD MALTREATMENT*



*Developed by James A. Harrell

Person(s) Responsible

The assessment of the person responsible for the act(s) or omission(s) causing harm or attempting or having the potential for harm must include consideration of a number of factors.

- The relationship to the child: Whether the perpetrator is in the home infrequently or is the primary caretaker has a direct bearing on the child's need for the court's protection.

For example, abuse of the child is more likely to recur in a situation where the person responsible is the primary caretaker of the child by virtue of the fact that the person is with the child consistently and there is thus more time for the abuse to occur.

- Relevant past behaviors: It is important to consider relevant past behaviors of the caretaker which are related to the child's need for protection; for example, the parent has previously abused another child; the parent has had frequent hospitalizations for severe psychiatric problems; the parent has been hospitalized for alcohol or drug related problems.

- Internal and external conditions: The external and internal factors affecting the caretaker's behavior should be considered when attempting to determine predictable future harm to the child. These include:

- the occurrence, duration, and kind of stress
- the availability of external supports
- the strengths and problems of the caretaker

- Predictable future behavior: It is important to demonstrate the likelihood that parents will behave in a harmful or potentially harmful manner in the future. Such a demonstration depends on the assessment of the relationship of the person responsible to the child, the relevant past behaviors, and/or the internal and external conditions.

It is important to remember that, when using any one of the following options, the elements of proof in each are interrelated, and

that proving the child's need for the court's protection is based on the presence of all appropriate elements of proof. Since each of the elements of proof within a particular option builds on the preceding element, it is important to present the evidence regarding each element in the sequence depicted in Exhibit III.

Option 1

Option 1 provides the strongest case in court because it is based on actual harm to the child. To use option 1, the following elements must be present:

- The child (as previously discussed)
- Actual harm to the child
- Act(s) or omission(s) causing the harm
- Person(s) responsible (as previously discussed).

Cases in which there is actual harm to the child and an act or omission causing the harm are most appropriately proven through use of this option.

Actual Harm to the Child

Actual harm is a harm that is present now; it may be known through observation of physical or behavioral indicators in the child. Harm in the form of a physical injury, such as lateral bruises on the buttocks or multiple fractures in a child under two years of age, can be observed by a CPS worker or other professional. An emotional harm may be exhibited through the unusual or maladaptive behaviors of the child; for example a child may engage in self-destructive behavior such as biting himself and head-banging, or may appear extremely withdrawn or aggressive.

There are three essential factors in proving actual harm to the child which must be presented in a child abuse and neglect hearing in order to show that the child is in need of protection (that is, prediction of future harm).

Indicators of Abuse/Neglect: The physical and/or behavioral indicators in an abused/neglected child must be assessed and presented as evidence during a court hearing. Physical indicators may include: large areas of bruises on the child's torso, back, or thighs; unexplained spiral fractures; abnormal hemoglobin count;

abnormally low weight. Behavioral indicators may include: obsessive or compulsive behavior in a child; developmental delays; fear of physical contact with parents or other adults; constant fatigue, listlessness or hunger.

In cases where there are physical indicators of abuse/neglect in the child, it is preferable to present photographs or x-rays (if appropriate) of the child's injuries. In addition, expert medical testimony is often necessary to prove actual physical harm to the child. In situations where there are behavioral indicators of abuse/neglect in the child, it is not only important that CPS workers present their observations, but also that their testimony be supported by that of expert witnesses. This is essential in cases where the child is exhibiting psychological problems and developmental delays. Expert witnesses may also present evidence based on psychological or developmental evaluations or testing.

Severity: In addition to the physical and behavioral indicators in the child, the severity of the harm to the child must be assessed and presented in a child abuse and neglect court hearing. The degree of injury to the child is the measurement used in assessing the severity of the actual harm. For example, any fracture, lacerations which require extensive sutures, or second and/or third degree burns on the child's body would be considered serious injuries. A fractured skull is more serious in nature than a black eye and would tend to prove the severity of the harm to the child. In addition, a mild depression in an emotional abuse case is less serious than a psychosis.

Present Suffering and Future Dysfunction: The third interrelated factor to be assessed when attempting to show actual harm to the child is the nature of the child's present suffering and/or future dysfunction. The questions to be asked are: "How is the harm to the child affecting his or her present functioning?" and "What is the probability and extent of future dysfunction?"

Act or Omission Causing Harm

A showing of actual harm to the child is insufficient to prove a case of child maltreatment; it is also necessary to show an act or omission by the child's caretaker (person responsible), causing the harm. For example, it must be shown that the child's delays in development were caused by severe and continuous lack of emotional and physical stimulation.

Type of Act or Omission (Abuse/Neglect): The type of abuse/neglect must also be presented as evidence when attempting to prove that an

act or omission resulted in harm to the child. The following is a partial categorization of the types of acts or omissions:

- sexual abuse
- physical abuse
- emotional abuse
- failure to meet the child's nutritional needs
- failure to provide for physical shelter from the elements
- failure to protect a child from dangers in the environment, if protection is within the parent's control
- failure to meet the child's health needs, including specific medical care
- failure to meet the child's emotional needs
- failure to meet the child's intellectual needs
- failure to provide the child with moral guidance and supervision.

In addition, some acts or omissions are by their nature more serious because of their greater potential for harm. For example, the use of a knife resulting in an injury to the child would be more serious than the use of a hand resulting in a bruise. The nature of acts or omissions, while varying considerably, is important when presenting evidence, in order to prove that the child is in need of protection.

Chronicity: The chronicity, that is the number and duration of the acts or omissions causing harm in the identified child and other children in the same care, must be assessed. This is particularly important in emotional abuse cases. For example, one instance of a parent verbally degrading and humiliating a child would not substantiate a case, but the establishment of a pattern of similar instances would, and thus would reinforce the need for court action to protect the child.

Multiplicity: If there are a variety of types of acts or omissions resulting in harm to the identified child or other children

under the same care, the need for court-ordered protection of the child will be strengthened--for example, a case where a six-year-old child is expected to care for her eight-month-old sister for extended periods of time, is not allowed outside to play with friends, and is disciplined by being made to stand in the corner for two hours at a time.

Reasons for the act(s) or omission(s): The level of responsibility of the perpetrator is an essential element in proving to the court that the child is in need of protection. There are three levels of responsibility.

- *Willful:* those situations where the harm is consciously intended
- *Reckless:* those situations where the harm is the result of a disregard of a known risk or danger of harm
- *Negligent:* those situations where harm is the result of a disregard of risk or danger that would have been deemed hazardous by most "reasonable" persons, although it is not recognized as hazardous by the perpetrator.

Mitigating or excusing conditions: Mitigating or excusing conditions, which may affect the court's decision about a caretaker's behavior regardless of the level of responsibility, must be considered when preparing and presenting a child abuse and neglect case in court. Although the following mitigating conditions may be thought to justify the caretaker's behavior, the presence of any of these conditions does not necessarily eliminate the need for court action. Because the attorney representing the caretaker may use the excusing conditions as a rationale for the caretaker's behavior, CPS workers may be particularly vulnerable to cross-examination on these points and should plan their testimony carefully.

- *Parental privileges:* to discipline a child, either physically or by withholding privileges
- *Choice of evils:* to choose the lesser of two evils; for example a seven-year-old child is engaging in self-destructive behavior and the only way his parents can prevent him from harming himself is to physically restrain him
- *Protection of personal property:* may be an issue in cases of adolescent abuse

- *Provocation and self defense:* usually only an issue in adolescent abuse cases
- *Mistake:* in law or in fact.

When using option 1 to prove the child's need for protection, CPS workers must build their case around all of the elements of proof--the child, the actual harm to the child, the act or omission causing the harm, and the person(s) responsible. In addition, the factors relevant to each element of proof such as chronicity and multiplicity related to the act or omission, must be considered. This is crucial because the elements of proof and their related factors are interdependent.

Option 2

The primary difference between option 1 and option 2 is the absence of actual harm to the child. Although, when using option 2, there has been no actual harm to the child, there has been an act(s) or omission(s) having the *potential* for harm from which endangerment to the child can be inferred. In option 2, there are no physical or behavioral indicators of abuse/neglect *evident* in the child, thus making it more difficult than with opinion 1 to prove that the child is in need of court-ordered protection. To use option 2, the following elements must be present:

- The child (as previously discussed)
- Act(s) or omission(s) attempting harm or having the potential for harm
- Endangerment or inferred harm
- Person(s) responsible (as previously discussed).

The Act(s) or Omission(s) Attempting Harm or Having the Potential for Harm

Act(s) or omission(s) having the potential for harm to the child can *possibly* fall within any of the types listed in Option 1, such as emotional abuse, physical abuse, failure to meet the child's emotional needs, or failure to meet the child's intellectual needs. Acts or omissions having the potential for harm to the child but where there is not yet any actual harm to the child evident (that is, the child is exhibiting no physical or behavior

indicators) are least likely to occur in situations of physical abuse of the child and most likely to occur in situations of emotional abuse of the child.

Some examples of kinds of act(s) or omission(s) by category include:

- *Physical abuse:* For example, some situations which would be considered extreme or bizarre discipline such as tying the child to a bed, or situations where a parent throws an object (such as an ashtray) at a child but misses.
- *Sexual abuse:* For example, some situations where the caretaker fondles the child or forces the child to sexually stimulate him or her.
- *Emotional abuse:* For example, in situations where the caretaker constantly berates the child, rejects the child, or makes a scapegoat of the child.
- *Neglect:* For example, in situations where there is consistent failure to provide for a child's emotional, intellectual, or nutritional needs.

Chronicity and Multiplicity: Attempting to prove the child's need for protection in situations where there have been act(s) or omission(s) but no actual harm to the child always raises the issue of chronicity. It is very difficult to prove that the child is in need of protection when there has been only one act or omission and no resulting harm evident; however, the greater the number, duration and variation in types of acts or omissions, the more likely the child's need for court-ordered protection will be proven.

Endangerment or Inferred Harm

Since there is not yet any observable harm to the child, it is the task of the CPS worker to prove that the child has in fact suffered harm as the inevitable result of the act(s) or omission(s) of the person(s) responsible. It is almost always necessary to have expert witnesses provide testimony to support this conclusion. For example, a CPS worker may safely assume that an infant who has consistently received little if any physical and emotional stimulation has suffered harm that may result in serious developmental delays; or a four-year-old child who is continuously belittled by his parents and who, unlike his siblings, is the recipient of excessive discipline has suffered harm which will be manifested

through psychological difficulties. In both of these cases it is essential to provide expert testimony by professionals such as a pediatrician or child psychiatrist, which will prove inferred harm to the child.

Option 3

Option 3 is only used in cases where the elements of proof present are the child and the person(s) responsible; there is no actual or inferred harm to the child and there has been no act or omission causing harm or having the potential for harm. Thus, this is the weakest and most difficult case in which to prove that the child is in need of protection.

Since this option is based only on the vulnerability of the child and the characteristics and circumstances in which the person(s) responsible finds himself or herself, most experienced CPS workers know that this option should be used only in extreme cases. For example, this option may be effectively used in a child abuse and neglect hearing in a case where a parent has a history of multiple psychiatric hospitalizations and has delusions in which he or she envisions killing the child, but where there has not yet been any actual harm to the child.

SUMMARY

When CPS workers determine that it is necessary to take a case to court in order to ensure a child's safety, they must prove to the court that the child is likely to suffer physical or emotional harm in the future unless the court intervenes on the child's behalf. To do so, CPS workers must be aware of and use the elements of proof described in this chapter. The CPS worker must determine which elements of proof are present in the particular case and then use the option which includes those elements of proof. This will allow the CPS worker to make the strongest possible case regarding the child's need for protection.

VI

THE USE OF WITNESSES

A court hearing will involve the testimony of witnesses and the production of documentary and written case records. Witnesses can be used at any point in the hearing process.

QUESTIONING OF WITNESSES

In a hearing, the state (petitioner) calls its witnesses and offers its evidence first. After the state has called its witnesses, the other parties in the case are given the opportunity to call witnesses on their behalf. After a party has called all of its witnesses, the party then rests its case. Once the parties have rested, they will not ordinarily be permitted to call any other witnesses.

The questioning of each witness occurs in the following order:

- Direct examination (by attorney calling the witness to testify)
- Cross-examination (by opposing attorney)
- Rebuttal or redirect examination (a second direct examination by attorney calling the witness on the issues raised during the cross-examination)
- Recross-examination (a second cross-examination by opposing attorney on issues raised in redirect examination)

Direct Examination

Initial testimony is elicited by counsel's direct examination of the witness. At this stage the witness will be expected to respond to questions based on his or her knowledge of the case.

The state will usually call the CPS worker as its first witness. The questioning will focus on the areas referred to in the petition and will generally include the worker's conversations with family members and his or her observations of individual family members, family interactions, and the home environment. Other individuals who have had contact with the family, such as school

personnel, doctors, social workers, neighbors and relatives, may be called as witnesses by the petitioner.

Leading questions are those which imply a response and require only a yes or no answer; they are not usually allowed during direct examination. However, leading questions are permitted in situations where the witness is a child who requires assistance in formulating a useful response.

Cross-Examination

At the conclusion of the direct examination of the witness the attorneys for the other parties may cross-examine the witness. Cross-examination is designed to discover any untruths or weaknesses in the witness's testimony. Most states require that questions during cross-examination cover only those subjects brought out in the direct examination. Opposing attorneys who wish to elicit testimony on new subject areas must call the witness during presentation of their side of the case. In addition, leading questions are permitted during cross-examination.

At the completion of the cross-examination, the child's attorney or the guardian *ad litem* has the right to question the witness.

Rebuttal or Redirect Examination

Upon conclusion of all cross-examination, the attorney who called the witness may ask rebuttal or redirect questions. These questions are designed to show that the apparent untruths and weaknesses discovered on cross-examination are not damaging to the party's case. The scope of the rebuttal is limited to the subjects dealt with on cross-examination.

Recross-Examination

After rebuttal or redirect examination is completed, the opposing counsel may conduct a cross-examination, asking leading questions on subjects covered during the redirect or rebuttal examination. The questioning of the witness is then complete. The judge may question the witness at any time, interrupting the questions of the attorneys.

"Voir Dire" Examination

Each witness may be subject to a "voir dire" examination, which involves questioning to determine the qualifications and

credibility of the witness. This examination will generally occur prior to any testimony by the witness.

OBJECTIONS

If a party believes that any question or tactic by the examining attorney is improper, that party may object. When an objection is made, the judge may rule immediately by sustaining or overruling the objection, or the judge may ask the examiner why the objection should be overruled. If the judge disagrees with the objecting attorney or with the reason for the objection, the judge will overrule the objection and the witness may answer the question. If the judge agrees with the objecting party that the question is improper under law, then the judge will sustain the objection and the witness may not answer the question.

TYPES OF WITNESSES*

In general, witnesses are divided into two major classes: lay witnesses and expert witnesses.

Lay Witnesses

Witnesses must have first hand knowledge of the facts about which they are testifying. Their testimony must be based on knowledge drawn from direct sensory perceptions, for example, what the witness actually saw or heard.

Lay witnesses may not testify about inferences or conclusions they have drawn from the facts observed, no matter how obvious the conclusions may seem to be. If the conclusion is truly an inescapable one, the judge or jury will reach it.

The difference between observed facts and inferences from observations may be slight. It could be argued that many of the statements admitted are, in fact, opinions. Testimony such as, "the parent was uncooperative" would be subject to objection in many courts. However, testimony describing the parent's uncooperative behavior can lead to as strong a conclusion.

Some courts permit lay witnesses to testify to a conclusion such as "uncooperativeness" after they have provided the factual basis for the conclusion. However, it is safest to describe the facts in detail.

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

Character Witnesses

Generally, the character and reputation of the respondent in a civil hearing are considered irrelevant and are therefore usually not admissible. However, where the character of a person is an issue in the case, such evidence is admissible. For example, in a dependency hearing if the fitness of a child's home is directly related to the character of the parents, evidence to show character, good or bad, is relevant and admissible. The usual method of showing good or bad character in either a civil or a criminal hearing is to provide testimony about the person's reputation. Reputation is the generally accepted view of a person in his or her own community. Rumors are not admissible testimony; nor is the witness's personal opinion about a party. Evidence of specific acts of a person is generally not admissible to show character, because an examination of specific acts may be unfair or may tend to raise irrelevant issues. The trend, however, is to allow evidence of specific acts to prove character when it is an essential element of a claim, charge, or defense.

A witness who is called for the purpose of giving character testimony will generally be asked to testify about the following:

- character witness's own qualifications
- association with the party
- knowledge of the party's reputation.

Expert Witnesses

Ordinarily a witness is prohibited from testifying about anything other than personal observations. However, because of expert witnesses' specialized knowledge or experience, this does not apply. Expert witnesses are called precisely because, in their particular areas of expertise, they can reach conclusions beyond the skill of the judge or jury. Therefore, expert witnesses are permitted to state opinions and make inferences in their areas of expertise while lay witnesses are not.

As with other evidence, the judge weighs the expert's testimony and may disregard it, except where statutes require its use.

Who Can Act As An Expert Witness?

An expert witness is any person who, in the judge's opinion, possesses sufficient knowledge to aid the court in making a valid

determination. An expert witness need not be world-renowned and need not have published articles or books. The witness may have gained superior knowledge from practical experience, formal education, or a combination of the two.

The expert need not be the "best" expert on the subject; nor is it required that the expert's views reflect only those that are accepted in the field. If the witness belongs to a controversial school of professional thought, she or he may still qualify to express expert opinions. The judge will determine to what extent those opinions are to be relied upon in reaching a decision.

In addition to experts called by the parties in a case, the court itself may appoint an expert witness. Even though courts' experts are not associated with either side in litigations, they must be qualified and may be cross-examined by both parties.

Subject Matter For Expert Testimony

Experts may offer opinions in the area of their expertise only. For example, a radiologist may express opinions regarding the child's x-rays and the possible cause of injuries. A psychiatrist may discuss professional opinions regarding the prognosis for the parents' mental condition. Outside their specialties, expert witnesses are on the same footing as lay witnesses.

Subject matter so intimately bound up in a science, profession, business, or occupation that it is beyond the knowledge of the average lay person is the province of the expert witness. If the subject is such that an expert is needed to investigate facts but where an ordinary person can reach an independent conclusion once the facts are known, the expert will not be allowed to draw inferences.

Expert testimony is most commonly used when the evaluation and understanding of facts depend on specialized training. Here the expert's opinion is required, since an ordinary person cannot draw accurate inferences. Social sciences, as well as natural and physical sciences, frequently require expert testimony.

A few courts will admit expert testimony on those subjects which ordinary persons understand. The standard for admission in these rare cases depends on how useful the expert's opinion will be in clarifying the judge's basic understanding.

A witness may not give opinion evidence as an expert if the judge believes that the state of the art in the field does not permit a reasonable opinion to be asserted even by an expert.

Procedure in Qualifying as an Expert Witness

A proper foundation must be presented before an expert can give an opinion. The party offering the expert's testimony must prove to the satisfaction of the court that:

- The subject matter is an area where the judge or jury will require expert assistance.
- This particular person is sufficiently qualified to provide assistance.

In order to prove the expert's qualifications, the proponent will ask questions to elicit credentials. Credentials may include experience, areas of specialty, relationship of the expert's specialty to the subject matter, degrees earned, professional publications, and membership in professional societies.

The opposing attorney then has the right to question the expert on his or her qualifications. A well-recognized figure may not be challenged. However, experts who are not as well known should anticipate challenges to their credentials and should be prepared to overcome doubts raised by the opposing side.

Eliciting Expert Testimony

After the judge determines that the expert's opinions are admissible, the attorney offering the testimony questions the expert. First, it must be shown that the expert is familiar with the facts, either by having been present in the courtroom when evidence was presented, by firsthand knowledge, or by reading pertinent records and files. In situations where the expert has no firsthand knowledge of the case and has made no independent investigation, questioning is in the form of hypothetical questions. In a hypothetical question, the attorney asks the expert witness to assume that certain evidence is true as presented and then to draw a conclusion based on these assumptions.

It is the opponent's responsibility to cross-examine the expert about premises and facts relied upon and to bring out any inconsistencies, unorthodox theories, or incomplete considerations.

The opponent may ask the expert for an opinion based upon the opponent's version of the facts in the case, and may or may not use hypothetical questions.

An expert's testimony can be contradicted by other experts who arrive at different conclusions. The judge or jury must then decide which expert is more credible.

The Child as a Witness

The child who is the subject of the court action may be called as a witness by any party. The child's capacity or competence to testify rests completely within the discretion of the court. The court may independently question the child to make this determination. If a child is called as a witness, the court determines whether the child's testimony is admissible based on competency criteria which include the age, maturity and understanding of the child as revealed on questioning by the court. Some states, in their juvenile court acts, establish a minimum age below which a child may not be called as a witness.

Whether the child's testimony will occur in open court, in the presence of the parents, or "in camera" (that is, privately in the judge's chambers with only the attorneys for all sides present), will depend on state law, the allegations in the petition, or the judge's discretion. If the testimony is in chambers, the judge, on returning to the bench, will offer a succinct resume for the parents and the record.

To whatever extent possible, the child witness must be protected from trauma resulting from testifying. Thus, children should be told what is going to happen when they testify and their feelings and fears about testifying should be discussed. It is also important to avoid repeated or lengthy interrogations.

SEQUESTRATION OF WITNESSES

Generally, a witness may be present throughout a trial; however, the judge may order witnesses to leave the courtroom while the trial is in progress. This is called an order of sequestration of witnesses.

Sequestration serves to ensure that a witness's testimony will truthfully reflect the person's personal observations and that the witness will not be influenced by the testimony of other

witnesses. This principle applies to both civil and criminal trials.

The motion for and order of sequester must be made at the appropriate time--usually either at the very beginning of the trial or before the attorneys begin their opening statements. The sequestration order applies to all persons who are going to be called to testify during the trial. Sequestration does not apply to spectators.

The order to sequester does not apply to the defendant in a criminal case or to a party in a civil one (for example, the parents or the CPS worker). The order also does not apply to the lawyer for any party in either a criminal or civil trial.

Witnesses subject to a sequestration order must leave the courtroom and must stay out until called to testify. When their testimony is complete, they should not remain in the courtroom even if they have been excused from testifying further because it is possible that they may be called again.

A witness who has violated the sequestration order may not be allowed to testify, or the testimony of the witness may be removed from the record. This may be done by the trial judge if the prejudice to the opposing party is significant and if it results from the breach of the order to sequester witnesses.

Each party in the case is responsible for assuring compliance with the sequestration order. If a witness deliberately disobeys the order, she or he can be found in contempt of court. This sanction also applies to any lawyer or party who aided or abetted the violation.

The witness often will be permitted to testify if the violation was inadvertent, or if neither the party nor his or her lawyer knew about or consented to the violation. The trial judge will consider the likelihood that the witness actually heard testimony or was influenced by what was said.

GUIDELINES FOR TESTIFYING IN COURT

People in various professions, such as child protective services, law enforcement, education, mental health and medicine, may be called upon at some point to testify in a child abuse and/or neglect hearing. CPS workers are the most likely to have to testify

frequently. It is important for professionals who may have to testify to understand what will be expected of them in court.

CPS workers and other professionals have the right to request a prehearing conference with the attorney who represents the petitioner. This provides the CPS worker with the chance to review the case and find out what will be asked and what documents may be needed at the hearing. In addition, a prehearing conference can familiarize other professionals with the circumstances of the case, courtroom procedures, and questions they may be asked.

The following are guidelines for effective testimony:

- A witness should present a professional appearance and attitude in court. A witness's manner of dress, tone of voice, and facial expression all contribute to the judge's perception of the testimony. A worker who antagonizes the judge or any of the attorneys may prejudice the case and could be held in contempt of court. It is very important, therefore, to avoid being argumentative.
- CPS workers and other professionals who are testifying are permitted to bring notes to which they can refer during the hearing; notes are sometimes helpful in remembering specific dates and times. These notes, however, may be admitted as evidence.
- It is necessary to be as thoroughly prepared and as objective as possible regarding the case. Testimony should be limited to the facts, unless the witness is specifically asked for a professional opinion. For example, a CPS worker should testify: "I visited the family on Tuesday and Thursday of last week," rather than "a couple of days last week;" "I arrived at 12:30 p.m.," rather than "around noon;" and "food and dishes were scattered all over the kitchen," rather than "the house was a mess."
- The witness should be aware of the general rules of evidence before testifying, although these do change slightly depending on the type of hearing.
- The witness should answer only the question asked and should not volunteer additional information. It is important for the witness to understand the question asked and not to guess at an answer. All statements

must be as accurate as possible. The witness should take time to think through both the question and the answer thoroughly before responding. If a yes or no answer is requested, but cannot be accurately given, the witness should explain that this would be a misleading response and that the question cannot be answered in this way. Usually the witness will be given an opportunity to explain the response more completely.

Remember that witnesses have rights, too. Help can be sought in the form of a question to the judge if the witness feels the answer being sought would be misleading or untrue.

- During cross-examination, an attorney may try to confuse the witness in order to make the testimony appear inaccurate or biased. The witness should never respond to this angrily or in haste, but should remain calm and answer the question as clearly and accurately as possible. If a witness becomes flustered, it is possible that inaccurate or misleading information may be given, and the best interests of the child may not be served. The worker may ask the judge for help if the questions or manner of an attorney are confusing.

The exhibit following this page lists some helpful hints to remember when testifying.

EXHIBIT IV HINTS FOR TESTIFYING

- Dress appropriately.
- Prepare ahead of time.
- Don't memorize your testimony.
- Expect to feel anxious.
- Speak a little louder and slower than you feel is necessary.
- Be sincere and dignified.
- Speak clearly and distinctly.
- Use appropriate language.
- Answer the question that was asked.
- Let the attorney develop your testimony.
- If you don't know the answer to a question, say so. Don't guess.
- Don't make your testimony conform to other testimony you may have heard.
- When answering questions, look at the person asking the questions or at the judge or jury.
- Tell the truth.

How to survive cross-examination:

- Be careful about what you say and how you say it.
- Listen carefully to the question; don't answer it unless you understand it.
- If a question has two parts requiring different answers, answer it in two parts.
- Keep calm.
- Answer positively rather than doubtfully.
- If you are testifying as an expert, be prepared to reconcile or distinguish your opinion from opposing schools of thought.
- Don't close yourself off from supplying additional details.
- Don't allow yourself to be rushed.
- Don't get caught by a trick question.

VII COURT-ORDERED TREATMENT

Once the court has made a finding of abuse/neglect, the judge has a wide variety of dispositional alternatives available; these range from dismissal of the case to termination of parental rights. Dispositional alternatives, however, generally fall within two basic categories: those where the child is placed under protective supervision (usually within the home) or the court orders services for the parents and/or child(ren); and those involving removal of the child from the home. The court's plan is meant to eliminate the danger to the child, counteract any harm the child has suffered, and help to rehabilitate the parents so that there will be no further harm to the child. It is important to remember that the intent of the court is to rehabilitate rather than to punish.

The disposition of the court is usually based upon the plan recommended by CPS or a probation department. The plan should be as specific as possible, and should elaborate the expectations for all parties involved in the case. In cases where it is recommended that the child remain with the natural parents, the plan should describe needed changes in parental behavior or in conditions of the home environment that will prevent any further maltreatment. The plan should also specify services that will be provided to the parents and/or child, and the measures that will be used to determine when supervision is no longer necessary. An example of a disposition of the court in this type of case may include:

- The parents must jointly attend weekly marital therapy sessions at the local community mental health center.
- The parents must attend a 10 week course on Parent Effectiveness Training.
- The mother will attend infant stimulation classes offered by the Public Health Department.
- The parents will accept weekly home visits by a CPS worker.

¹ Institute of Judicial Administration, American Bar Association. *Standards Relating to Abuse and Neglect*. Cambridge, Massachusetts: Ballinger Publishing Co., 1977, p. 129.

In situations where removal of the child is recommended, the focus of the plan is on the steps that will be taken to facilitate the return of the child and on the means that will be used to maintain parent-child contact.¹ Again the plan should specify what actions are necessary for the custody of the child to be returned to the parents and how it will be determined when the parents are "ready" to regain custody. An example of a court disposition in this case situation is:

- The parents must establish a suitable living arrangement for themselves and the child.
- The father must have secured employment for at least six months and be able to adequately support the child.
- The parent must have a diagnosis of being cured from overt psychosis.

If the parents fail to obey any part of the court order, the court has the power to hold them in contempt which could result in a fine or incarceration.

CONTROVERSY SURROUNDING COURT-ORDERED TREATMENT

There is a great deal of controversy regarding the effectiveness of court-ordered treatment; both opponents and advocates have substantive arguments supporting their positions.

The following are some of the arguments voiced by opponents of court-ordered treatment.

- Providing court-ordered treatment compounds the difficult task of establishing the necessary therapeutic relationship with the parents, and court-ordered treatment does not coincide with theoretical models of motivation.
- Court-ordered treatment is inconsistent with the accepted nonpunitive approach to treating abusive and neglectful parents.

¹ *Ibid.* p. 132.

- Court intervention in child maltreatment officially labels parents as "child abusers" who are "sentenced" to court-ordered treatment. This can have far-reaching effects on the parents in terms of their relationships with their children and other individuals in the community.

Thus, the opposition to court-ordered treatment reflects both a concern for the parent as an individual and an adherence to the informal conciliatory, supportive approach espoused by most experts.

On the other hand, those advocating court-ordered treatment base their position on the following:

- The law must be invoked to ensure that the rights of all individuals in abuse and neglect cases are protected.
- The firm mandate of the court can be an important therapeutic tool in getting a parent to recognize his or her problems and work toward their solutions.
- The court provides the universal common denominator for treatment-related decision making as well as the appropriate forum for pooling professional knowledge.

In addition, those advocating court-ordered treatment address the claims made by opponents. They state that:

- Court-ordered treatment is not an insurmountable obstacle to the establishment of a therapeutic alliance.
- Client participation in treatment planning can be employed as a motivating factor in cases involving mandated treatment.

Even though there is disagreement about the effectiveness of court-ordered treatment, it can be extremely helpful in protecting children and rehabilitating families. Realistically, court-ordered treatment increases protection for the child and ensures that resistant parents remain in treatment. Thus, it is not inconsistent with the goals of a non-punitive approach to abusive and neglectful families.

REVIEW HEARINGS

Most courts order reviews as part of child abuse and neglect cases; cases where supervision or removal of the child has been ordered should be reviewed at least every six months. In addition, any party to the case may request a hearing prior to the six-month review if there has been significant change in circumstances.

Periodic court reviews help to ensure that systematic planning is conducted in each case and that the goals of intervention are being achieved. Thus, the court evaluates both agency and parental performance.

Court review is especially important when the children have been removed from their homes. The hearings provide formal mechanisms for reviewing parental performance so that it can be determined whether they have been working towards the return of the child. In addition, reviews determine whether the agency has been providing needed services and allowing visitation.²

¹ *Ibid.* p. 136.

² *Ibid.* p. 137.

VIII

COURT PROCEEDINGS INVOLVING INDIAN CHILDREN

Most Indian tribes maintain and operate tribal governments, including a judicial system that has authority over matters arising on the Indian reservation. As of 1978, 127 tribes had tribal courts.

Not all tribes exercise jurisdiction over juvenile matters. A federal statute, *Public Law 83-280*, and its subsequent amendments gave six states (California, Nebraska, Minnesota, Oregon, Wisconsin and Alaska) civil and criminal jurisdiction over all matters arising on Indian reservations within their boundaries. The Act also gave the remaining states the option to assume jurisdiction over the reservations within their borders. Some states elected to assume partial territorial jurisdiction; others elected to assume partial subject matter jurisdiction. For example, the state of Montana assumed jurisdiction over only one of seven reservations in the state (partial territorial jurisdiction). In addition, Montana assumed jurisdiction only over selected civil issues (partial subject matter jurisdiction).

In situations where the state has jurisdiction by federal statute, the *Indian Child Welfare Act*, which was enacted in 1978, stipulates certain procedures to be followed in court proceedings involving Indian children. However, in areas where jurisdiction is not already established, the *Indian Child Welfare Act* reserves to Indian tribes exclusive jurisdiction over Indian children who reside or are domiciled on an Indian reservation or who are wards of the tribal court. State courts have original jurisdiction over all other Indian child custody proceedings. In addition, the *Indian Child Welfare Act* provides that tribes may reassume jurisdiction and stipulates procedures for doing so.

In areas where the tribe exercises juvenile jurisdiction and the child maltreatment occurred on the Indian reservation, the case would proceed in the appropriate tribal court.

Court proceedings involving Indian children under either state or tribal jurisdiction are described in this chapter.

STATE JURISDICTION

The *Indian Child Welfare Act*, which was mentioned previously, requires states to establish different procedures for child custody

proceedings that involve Indian children. Congress's power to require different standards for American Indians is well established and is based on legal principles, not racial considerations. The purpose of the Act is to restore to Indian tribes the power and authority to place Indian children and to prevent the unwarranted removal of Indian children from their Indian families and homes.

The Act applies to "child custody proceedings" which are defined as foster care placement, adoption, and termination of parental rights proceedings. Juvenile proceedings and divorce custody proceedings are expressly excluded from coverage by the Act. The Act must be read with care, however, because not every section of the Act applies to every type of proceeding.

The Act is expressly limited to cases involving an "Indian child," defined as any unmarried person under the age of eighteen who is either a member of a tribe or is eligible for membership and who is the biological child of a member of a tribe.

The following discussion provides an overview of the Act and its effect on state courts.*

Jurisdiction

As previously described, Indian tribes, according to this Act, maintain exclusive jurisdiction over Indian children who reside or are domiciled on an Indian reservation or who are wards of the tribal court, while state courts have original jurisdiction over all other Indian child custody proceedings. However, if a state court has original jurisdiction over a foster care or termination of parental rights proceeding that involves an Indian child, the state court is required to transfer the case to the court of the child's tribe upon the petition of either parent, the Indian custodian, or the child's tribe. Such transfers are prohibited if either parent objects, the tribal court declines, or if there is "good cause" not to transfer.

In voluntary foster care placement or termination of parental rights proceedings, the person seeking to make the placement or termination is required to give notice of the proceeding to the parent, the Indian custodian, and the Indian child's tribe. If the identity of the parent, the Indian custodian or the tribe cannot be determined, notice must be given to the Secretary of the Interior, who has fifteen days to notify the parent and custodian. The

* Based on P.L. 95-608, 92 Stat. 3069 (1978), Section 4.

proceedings cannot be held until ten days after one of the above receives notice.

In any foster care or termination of parental rights proceeding in a state court involving an Indian child, the Indian child's Indian custodian and tribe have the right to intervene.

Right to Counsel

The Act guarantees that any indigent parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement or termination proceeding. The court may also appoint counsel for the Indian child if such an appointment would be in the best interests of the child. The Secretary of the Interior is authorized to pay all reasonable costs and expenses of appointed counsel.

Standards of Proof

A foster care placement must be supported by clear and convincing evidence that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Termination of parental rights must be supported by evidence which proves beyond a reasonable doubt that continued custody by either the parent or Indian custodian will result in serious emotional or physical damage.

Rehabilitative Efforts

The Act requires that the party seeking to place an Indian child in a foster home or who is seeking termination of parental rights show that remedial efforts to prevent the breakup of the family were made and that such attempts were unsuccessful.

Voluntary Termination

If the Indian parent voluntarily consents to foster care placement or to termination of parental rights, the consent must be executed in writing and recorded before a presiding judge. The judge is required to certify that the terms and consequences of the consent were fully explained in English, or interpreted if necessary, and fully understood.

Any consent given either before or within ten days after birth is invalid. The parent or Indian custodian may withdraw consent to foster care placement at any time. Consent to termination can be

withdrawn at any time prior to entry of the final decree. However, consent may be withdrawn after entry of the final decree on grounds that the consent was obtained through fraud or duress.

Emergency Removal

The Act expressly authorizes the emergency removal from the parent or Indian custodian, or the emergency placement of an Indian child who resides or is domiciled on an Indian reservation but who is temporarily off the reservation. Such emergency removal or placement is permitted if it is necessary to prevent imminent physical damage or harm to the child; it must be discontinued when no longer necessary.

Preference

In any state court adoption proceeding involving an Indian child, preference must be given to placement with 1) a member of the child's extended family, 2) other members of the child's tribe, and 3) other Indian families.

Foster care placement of an Indian child must be in the "least restrictive setting which most approximates a family and (in) which his (or her) special needs, if any, are met." Children must also be placed near their homes, taking into account any special needs they may have. The preference list for Indian child foster care placement is as follows:

- A member of the child's extended family
- A foster home licensed, approved, or specified by the child's tribe
- An Indian foster home licensed or approved by an authorized non-Indian licensed authority
- An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

The above preference requirements prevail unless the child's tribe establishes a different order of preferences.

The state is required to maintain records of each placement and to make them available upon request to the Secretary of the Interior and to the Indian child's tribe.

Full Faith and Credit

The Act requires the federal government, its territories and possessions, the states, and all other Indian tribes to give full faith and credit to the public acts, records and judicial proceedings involving Indian child custody proceedings.

State and Tribal Agreements

The Act authorizes state and tribal agreements regarding jurisdiction over Indian child custody proceedings and the care and custody of Indian children. The agreements can be revoked upon 180 days notice by either party.

Records

Any state court entering a final order of adoption of an Indian child must provide a copy of the order to the Secretary of the Interior together with information to indicate the name and tribal affiliation of the child, the names and addresses of the biological parents, the names and addresses of the adoptive parents, and the identity of any agency having files or information relating to the placement. Any affidavit regarding the confidentiality of the information must be included.

The Act contains three access-to-records sections. Section 107 gives Indian adoptees who have reached the age of 18 the right to apply to the court for information necessary to protect any rights they may have flowing from their tribal relationship, including the tribal affiliation of the biological parents, if any. Section 301(b) states that the Indian adoptee over the age of 18, the adoptive or foster parents of an Indian child, or an Indian tribe can request information from the Secretary of the Interior as may be necessary for enrollment of the adoptee in an Indian tribe. Section 102(c) gives each party to a foster care placement or termination of parental rights proceeding in state court the right to examine all reports and other documents filed with the court "upon which any decision with respect to such action may be based."

TRIBAL COURT JURISDICTION

Indian Civil Rights Act

Tribal governments that do exercise jurisdiction are not governed by the U.S. Constitution; the 1968 Indian Civil Rights Act provides many of the same constitutional protections for individuals in

tribal courts. Because the U.S. Constitution does not apply to tribal courts, case law that has developed as a result of interpreting constitutional protections, such as the rules on hearsay evidence discussed previously, are not applicable in tribal courts.

The Indian Civil Rights Act was based on the Bill of Rights of the U.S. Constitution and contains most of the same provisions. However, because the Act has only been in existence since 1968, tribal courts have not had the time to develop the large body of law interpreting the Act that federal and state courts have to interpret the Constitution. For this reason, elaborate evidentiary rules are not in effect in tribal courts.

Tribal Law

Almost all of the tribes exercising jurisdiction over juvenile matters have a written juvenile code; the contents of the code vary from tribe to tribe. Many of the codes incorporate tribal custom, such as providing for notice to family members beyond the immediate family. Since a few tribes do not have written codes, a local attorney or tribal judicial personnel should be able to provide advice regarding the proper juvenile procedure.

Most tribal judges are not attorneys. However, they do have access to intensified training sponsored by the National American Indian Court Judges Association (NAICJA). As a result, tribal judges are usually well versed in law relevant to juvenile cases.

Proceedings of the Tribal Court

Tribal courts are very similar to state and county courts, except that a tribal court's jurisdiction is created by tribal and federal law, not by state law. As in the state court structure, the name of the tribal court exercising jurisdiction over juvenile matters and the age of majority (between 16 and 21 years) will vary from tribe to tribe. A tribal juvenile court has civil jurisdiction. The statutory law of each tribe will describe the purpose, jurisdiction, procedures, rights of parties, and powers of the court.

There are also variations with regard to how the tribes characterize the actual proceedings, such as: child protection, dependency, child abuse and neglect, or minor in need of care. Regardless of these variations, the procedural steps and processes are basically the same. Tribal court proceedings are very similar to judicial proceedings in rural communities; resources and personnel may be limited and proceedings may be less formal than those in the state courts.

Child Abuse and Neglect Definitions

Reference must be made to tribal law for definitions of child abuse and neglect. Tribal law will also determine who can be held responsible for child abuse and neglect.

Notice to Parties

In state courts, the U.S. Constitution's due process clause guarantees notice to all of the parties whose rights may be affected by a judicial proceeding. The Indian Civil Rights Act also has a due process clause, and as a result tribal courts must give the same notice as state courts. In some tribes a copy of the formal complaint (petition) will not be delivered to the parents, but the parents will be notified of the hearing and the reasons for it.

As stated previously, because extended families are an important element of Indian culture, notice in tribal court proceedings may be required for other family members such as aunts, uncles or grandparents.

The person(s) responsible for filing the complaint (petition) varies from tribe to tribe, but is usually from one of the same groups as those already enumerated in this manual.

Hearing Process

All tribal members have the right to be represented by counsel; however, the Indian Civil Rights Act does not guarantee indigents the right to free counsel as the U.S. Constitution does. Those individuals in tribal court who cannot afford an attorney can be represented by a lay advocate or can represent themselves. Because children are unable to pay for counsel themselves, tribes will sometimes have a juvenile court worker whose sole duty is to protect the interests of children and appear in court on children's behalf. Those tribes that do not provide these services delegate the responsibility for protecting children's rights to the judge.

In cases requiring emergency custody, a hearing will normally be held on the next scheduled juvenile court date. As in state courts, the issue at this hearing is whether the child's life and/or health will be in imminent danger if the child is returned home. If it is determined that the child will be in danger, the court will continue the child's placement outside of the home. If not, the child will be returned home until a full fact-finding hearing is held.

Prior to the tribal court's fact-finding hearing, the parents can admit or stipulate to all or parts of the petition, just as they can in state courts. If they admit or stipulate, the tribal court can proceed to the dispositional stage without a hearing.

If the parents do not stipulate, an adjudicatory or fact-finding hearing will be held, as provided by tribal law. The title of this hearing will vary from tribe to tribe. The purpose of the full fact-finding hearing is the same as in state courts; that is, to determine whether or not the alleged incidents occurred. If the petition is supported, it must be determined whether the court has jurisdiction based on the statutory definition of child abuse and/or neglect.

The hearing is conducted according to procedures developed by tribal practice and laws, and may vary from tribe to tribe. Usually, the petitioner has the burden of proof and the parents, as the defendants, can challenge or rebut the allegations. Witnesses can be called and cross-examined, and evidence can be admitted. Tribal law dictates what standard of proof is required for a determination of child abuse and/or neglect. Since tribal courts have not yet developed elaborate evidentiary rules, an attorney may not be able to make the same objections in tribal courts as in state courts.

Most tribal courts allow motions to dismiss the case at the conclusion of the petitioner's presentation of witnesses and evidence. If no motion is made or if the motion is denied, the parents then present their witnesses and evidence. The judge can question witnesses during any stage of the proceedings.

Some tribal courts allow a motion to dismiss after all testimony has been given. If the motion is denied, the court makes a finding. If the petition alleging abuse and/or neglect is sustained, tribal courts usually proceed immediately to the dispositional phase of the proceedings. If the court postpones the dispositional hearing, it will place the child in an appropriate facility or allow the child to remain at home until the dispositional hearing is held.

The court may also issue other orders after it makes its decision, including protective orders which direct a course of behavior for the parents or restrict some aspects of the parents' behavior.

At the dispositional hearing, the tribal court, like a state court, is free to issue a variety of orders. The major problem is that most reservations, like most small towns, do not have many

dispositional alternatives available. Fortunately, the extended family provides flexibility and dispositional alternatives not generally available in non-Indian societies. For example, it is common practice among Indian traditionalists for an aunt, uncle or grandparent to assume responsibility (temporarily or permanently) for the care of a child.

When researching dispositional alternatives for Indian children, non-Indians should bear in mind that there are important cultural differences which should not necessarily be seen as cultural deprivations. For example, a Navajo family may choose to live in a hogan, a traditional dwelling with small windows. In such a case, this family should not be disqualified as a foster or adoptive family due to limited space or lack of windows.

Also, Indian people do not typically aspire to material wealth. They often give away money or possessions to those less fortunate than they. Therefore, it is a mistake to assume that a family is financially unable to care for a child simply because it appears to be lacking in material goods and possessions.

Appeals

Tribal court decisions may be appealed to the appropriate body as determined by tribal law; it is usually a three-member appellate court. Some tribes provide for appeals to the tribal council.

In addition to an appeal to the tribal appellate system, the Indian Civil Rights Act provides another remedy, a petition for a *writ of habeas corpus*, which asks for release from unjustified custody. The U.S. Supreme Court has stated that in a criminal proceeding, the petition for a *writ of habeas corpus* is the only remedy available to appeal a case to federal court. However, since the law is less clear in civil cases, it is necessary to consult an attorney prior to taking any action in a civil case such as a juvenile proceeding.

IX

SUMMARY

While the court system is very complex, it is sometimes necessary for the courts to become involved in cases of child abuse and neglect. It is crucial that CPS workers and other professionals who work with families experiencing abuse and neglect problems have a basic understanding of the processes and procedures of the court system.

An understanding of the courts in general and of the juvenile court in particular should enable CPS workers to better navigate their way through the system. CPS workers and other professionals also require guidance regarding their responsibilities in using the court system. This includes information on how to prepare a child maltreatment case for court; how to work with clients, attorneys, and other professionals; how to prove child maltreatment; and how to properly use records and witnesses. Access to this type of information should facilitate professionals' use of the court system.

It is hoped that, as CPS workers and other professionals become more familiar with and skilled in using the court system, they will be able to provide more effective services for maltreated children and their families.

APPENDIX
STANDARDS APPLICABLE TO ROLE OF THE COURTS

STANDARDS APPLICABLE TO ROLE OF THE
COURTS

STANDARD A-3

THE STATE LAW SHOULD PROVIDE FOR THE RECOGNITION OF CHILD PROTECTIVE ORDERS ISSUED BY INDIAN TRIBAL COURTS

STANDARD A-6

THE STATE LAW SHOULD DESIGNATE THE PERSONS WHO HAVE THE POWER TO EXERCISE PROTECTIVE CUSTODY, AND DEFINE THE CONDITIONS THAT MUST EXIST AND THE PROCEDURES THAT MUST BE FOLLOWED IN EXERCISING PROTECTIVE CUSTODY AUTHORITY

STANDARD B-1

ANY PERSON ALLEGED OR FOUND TO HAVE ABUSED OR NEGLECTED A CHILD SHOULD BE INFORMED OF HIS LEGAL RIGHTS BY THE INTERVENING AUTHORITY

STANDARD B-2

ANY SUBJECT OF A CHILD ABUSE OR NEGLECT REPORT SHOULD BE INFORMED OF HIS RIGHTS PERTAINING TO INFORMATION IN THE REPORT OR IN RECORDS GENERATED FROM THE REPORT

STANDARD B-3

ANY SUBJECT OF A CHILD ABUSE OR NEGLECT REPORT SHOULD BE PROTECTED FROM UNAUTHORIZED DISCLOSURE OF IDENTIFYING INFORMATION

STANDARD B-4

THE PARENT(S) OR OTHER PERSON RESPONSIBLE FOR THE CHILD'S WELFARE SHOULD RECEIVE WRITTEN NOTICE AND SHOULD BE ADVISED OF HIS LEGAL RIGHTS WHEN PROTECTIVE CUSTODY AUTHORITY IS EXERCISED

STANDARD B-5

A CHILD WHO IS ALLEGED TO BE ABUSED OR NEGLECTED SHOULD HAVE INDEPENDENT LEGAL REPRESENTATION IN A CHILD PROTECTION PROCEEDING

STANDARD B-6

THE PARENT(S) OR OTHER PERSON RESPONSIBLE FOR A CHILD'S WELFARE WHO IS ALLEGED TO HAVE ABUSED OR NEGLECTED A CHILD SHOULD BE ENTITLED TO LEGAL REPRESENTATION IN BOTH CIVIL AND CRIMINAL PROCEEDINGS

STANDARD B-7

THE LOCAL CHILD PROTECTIVE SERVICES UNIT SHOULD HAVE THE ASSISTANCE OF LEGAL COUNSEL IN THE CHILD PROTECTIVE PROCEEDING

STANDARD B-8

EACH PARTY SHOULD HAVE THE RIGHT TO APPEAL CHILD PROTECTIVE CASE DETERMINATIONS

STANDARD E-8

THE LOCAL UNIT AND THE COMMUNITY COUNCIL SHOULD ESTABLISH A MULTI-DISCIPLINARY CHILD ABUSE AND NEGLECT CASE CONSULTATION TEAM(S)

STANDARD F-3

HEALTH CARE PROFESSIONALS SHOULD FULFILL THEIR ETHICAL RESPONSIBILITY TO THOSE THEY SERVE BY ENSURING THAT RIGHTS ARE PROTECTED

STANDARD G-5

ALL ASPECTS OF THE MENTAL HEALTH SYSTEM SHOULD FULFILL THEIR ETHICAL RESPONSIBILITY TO THOSE THEY SERVE BY ENSURING THAT RIGHTS ARE PROTECTED

STANDARD H-2

THE STATE DEPARTMENT OF EDUCATION AND THE LOCAL EDUCATION AGENCY SHOULD ENSURE THAT THE RIGHTS OF ALL SCHOOL PERSONNEL, STUDENTS, AND FAMILIES ARE RESPECTED AND PROTECTED

STANDARD I-1

TO DIVERT THE NEED FOR COURT ACTION, THE JUDICIAL SYSTEM SHOULD REFER REPORTS OF CHILD ABUSE AND NEGLECT TO THE LOCAL CHILD PROTECTIVE SERVICES UNIT FOR ASSESSMENT AND POSSIBLE NON-COURT HANDLING

STANDARD I-2

THE JUDICIAL SYSTEM SHOULD ENSURE THAT CHILD PROTECTIVE COURT PROCEEDINGS ARE INITIATED ONLY WHEN NECESSARY TO PROTECT THE CHILD'S HEALTH OR SAFETY

STANDARD I-3

A JUDGE SHOULD ORDER THAT A CHILD BE PLACED IN TEMPORARY PROTECTIVE CUSTODY IF THERE IS REASON TO BELIEVE THAT IMMINENT DANGER TO THE CHILD'S HEALTH OR SAFETY EXISTS AND THERE ARE NO OTHER LESS DRASTIC MEANS TO PROTECT THE CHILD

STANDARD I-5

JUDGES, ATTORNEYS AND THE COURTS SHOULD ENSURE THAT FAIR EVIDENTIARY STANDARDS ARE APPLIED TO PRELIMINARY AND ADJUDICATORY CHILD PROTECTIVE HEARINGS, AND THAT ADJUDICATORY HEARINGS ARE COMPLETED WITHIN 60 DAYS

STANDARD I-6

JUDGES, ATTORNEYS AND THE COURTS SHOULD ENSURE THAT THE CHILD PROTECTIVE DISPOSITIONAL HEARING IS COMPLETED WITHIN 60 DAYS

STANDARD I-7

JUDGES, ATTORNEYS, GUARDIANS AD LITEM, AND THE COURTS SHOULD ENSURE THAT THE DISPOSITIONAL ORDER CONTAINS THE LEAST RESTRICTIVE PROVISIONS CONSISTENT WITH THE BEST INTERESTS OF THE CHILD, AND THAT THE ORDER IS REVIEWED AUTOMATICALLY FOR MODIFICATION OR ENFORCEMENT

STANDARD I-8

JUDICIAL SYSTEM PERSONNEL SHOULD PARTICIPATE ON THE STATE CHILD PROTECTION COORDINATING COMMITTEE AND ON THE COMMUNITY CHILD PROTECTION COORDINATING COUNCIL

STANDARD I-9

JUDICIAL SYSTEM PERSONNEL SHOULD ESTABLISH PROCEDURES TO IDENTIFY "HIGH RISK" CHILDREN AND FAMILIES WHO COME TO THEIR ATTENTION AND REFER THEM TO THE LOCAL CHILD PROTECTIVE SERVICES UNIT OR TO OTHER APPROPRIATE SERVICE PROVIDERS

STANDARD I-10

JUDICIAL SYSTEM PERSONNEL SHOULD RECEIVE TRAINING TO INCREASE THEIR UNDERSTANDING AND KNOWLEDGE OF JUDICIAL RESPONSES TO CHILD ABUSE AND NEGLECT

STANDARD I-11

JUDICIAL SYSTEM PERSONNEL SHOULD CONDUCT AN ANNUAL EVALUTION OF THEIR CHILD ABUSE AND NEGLECT PREVENTION AND TREATMENT EFFORTS

STANDARD J-8

THE LAW ENFORCEMENT AGENCY SHOULD EDUCATE ITS PERSONNEL IN THE LEGAL ASPECTS OF CHILD ABUSE AND NEGLECT

STANDARD K-II-6

EACH INSTITUTION SHOULD INFORM EVERY ENTERING CHILD AND HIS FAMILY OF THEIR RIGHTS AND THE RIGHTS OF THE INSTITUTION

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