PART 3

Legal Review of
Child Abuse and Neglect Issues

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LEGAL SUMMARY OF THE CHILD MALTREATMENT PROCESS

Overview: The Arkansas Child Maltreatment Act located at Ark. Code Ann. §12-12-500 et seq. sets out the procedures for initiation and completion of a child maltreatment investigation. This act also includes information concerning the Central Registry, release of information and findings concerning child maltreatment investigations, as well as the appeals process following a finding of child maltreatment. The act concludes with a section that segues into the court related procedures set out in the Juvenile Code *(Child Maltreatment Act – Exhibit 8).*

Child Abuse Hotline: The first step in the child maltreatment process involves a call to the child abuse hotline that is operated and housed at the Arkansas State Police headquarters in Little Rock. When a call comes in, information is taken from the reporter in order to determine if the report contains the requisite elements of child maltreatment (Ark. Code Ann. § 12-12-503). Reports to the hotline can be made by any person with reasonable cause to suspect child maltreatment, but certain reporters are considered mandatory reporters as set out in Ark. Code Ann. § 12-12-507(b). This reporting section also includes the procedures to follow if the child or the offender is not from Arkansas. Once the hotline determines the report is valid, it is referred for investigation.

Child Maltreatment Investigation: Reports of child maltreatment are divided in an agency protocol into two priorities. Priority I reports are those most often referred to as severe maltreatment; Priority II reports while still child maltreatment are those that are of a less severe nature. Priority I reports are assigned to the Crimes Against Children Division (CACD)of the Arkansas State Police (ASP). The investigation of allegation of severe maltreatment is required to be initiated within 24 hours of the report. Priority II reports most often investigated by the Division of Children and Family Services (DCFS) of the Arkansas Department of Health and Human Services (DHHS) are to start within 72 hours of the hotline report. These procedures are outlined in a cooperative agreement between the DHHS and the ASP (Ark. Code Ann. §12-12-502) *(Interagency Agreement – Exhibit 4).*

A child maltreatment investigation begins with interviews with the child, the parents, witnesses, other relevant parties and the alleged offender. Interviews with the child will be done separate and apart from the alleged offender or any representative or attorney of the alleged offender. A physical examination of the child is also allowed (Ark. Code Ann. §12-12-509). Child maltreatment investigators are allowed access to the child victim and have the right to enter into the child's home, school or any other place they can get access to the child. If this access is denied, an order of investigation can be sought in the juvenile division of circuit court (Ark. Code Ann. §12-12-510(b)). Personnel Records of employees and volunteers and information concerning witnesses or alleged offenders in any place where child maltreatment allegations are being investigated shall be open to the investigator (Ark. Code Ann. §12-12510(g)). The investigator has the discretion to determine who will be present during the interview with the child victim (Ark. Code Ann. §12-12-510(f)).

When CACD is investigating a report of severe maltreatment, they notify DCFS immediately if there are concerns about the health and safety of the children that are the subjects of the investigation. DHHS is a mandated to do a health and safety assessment to determine if the child can safely remain in the home. If the child is determined to be at risk of severe maltreatment, the agency shall take a 72 hour hold on the child as a prerequisite to the filing of a petition in juvenile court pursuant to Ark. Code Ann. § 12-12-516. This protective custody can also be taken by law enforcement, a juvenile division of circuit court judge in a juvenile proceeding, a hospital administrator or treating physician but if this protective custody is initiated, DHHS shall be notified immediately so that the proper procedure for attaining emergency custody can be initiated timely (Ark. Code Ann. §12-12-516(c)).

If during a Priority II investigation DCFS determines that the child cannot safely remain in the home, the 72 hour procedure is also followed. If the child can remain in the home, DCFS will offer services relevant to the needs of the child and the family. (Ark Code Ann. §12-12-519(d) (1)). Child Maltreatment investigations shall be completed and a finding entered within 30 days of the initiation of the investigation unless the alleged offender lives outside the victim's home and then an additional 30 days are allowed to gather further evidence if the allegations are going to be determined to be true (Ark. Code Ann. §12-12-509(d) (1) and (d) (3)).

The child maltreatment investigative report shall be completed within the thirty-day time period and shall include among other things the investigative determination of true or unsubstantiated, the nature and extent of the child maltreatment, including any evidence of previous injuries or child maltreatment to the child or his siblings, and the services offered and accepted. This report is filed with the Central Registry which is located at DHHS and maintains all reports of true child maltreatment investigations (Ark. Code Ann. §12-12-505 and §12-12-514). Appeals of true child maltreatment determinations are made by requesting an administrative hearing within thirty (30) days of the receipt of written notification of the determination (Ark. Code Ann. §12-12-512 (C) et seq.) If the alleged offender does not prevail at the administrative hearing, he or she can petition the circuit court for judicial review under the Administrative Procedures Act, (Ark Code Ann. §25-15-210 et seq.) If the alleged perpetrator prevails at either the administrative or circuit court level, the name will be removed from the central registry.

The final section of the Child Maltreatment Act sets out the procedure for taking custody of children as well as for the delivery of services to families when the child is allowed to remain in the home during the course of a child maltreatment case. If a case is found true, protective services cases are allowed as an option to removal of custody when it would be in the child's best interest to remain in the home. When the child's best interest requires removal from the home, the department takes emergency custody and follows the procedures set out in the Juvenile Code. If the child maltreatment report is unsubstantiated, DHHS can offer supportive services. Supportive services can also be delivered to a family upon request for the purpose of preventing child maltreatment (Ark. Code Ann. §12-12-519).

Dependency-Neglect Proceedings Overview

In 2005, 3,261 new dependency-neglect cases were filed in the Circuit Courts, Juvenile Division. This is a 24% growth in the number of cases filed since 2001. The process concerning these important cases and the various hearings required for these cases are governed by federal and state law. The process for handling these cases and the various hearings requried are scattered throughout the Arkansas Juvenile Code of 1989, Ark. Code Ann. §9-27-301 et seq.

Approximately 98% of all court cases begin because a child is in immediate danger and must be removed from his or her home to protect his/her health and safety. If DCFS continues to hold the child for more than 72 hours, DCFS must seek a court order, known as an ex parte emergency order (Ark. Code Ann. §9-27-314). An attorney ad litem shall be appointed when the petition or emergency ex parte order is filed to represent the child's best interest.

Parent counsel may also be appointed and indigency determined at the probable cause hearing. Within five business days the court must conduct a probable cause hearing (Ark. Code Ann. § 9-27-315) to determine if probable cause existed to protect the juvenile when DCFS removed the child; if it continues to exist; and if removal from the home is in the child's best interest and is necessary to protect the child.

If probable cause is found, the court will schedule a trial, known as the adjudication, to determine if the child is abused, neglected, or dependent (Ark. Code Ann. §9-27-303). Caseworkers should develop a case plan to address the child's needs and remedy the situation that caused the removal (Ark. Code Ann. §9-27-402). The case plan is the roadmap to ensure the best interest, safety, and permanency of the child. It should be developed with the family; child, if age appropriate; Court Appointed Special Advocate (CASA) volunteer; attorneys; and other relevant stakeholders. The case plan identify strengths, and areas needed for improvement. The case plan should have a clear description of all parties' roles and responsibilities with timelines for accomplishment and services to be provided to the child and family that address the reason the child came to the agency and court's attention. The case plan is to be submitted to the court at the adjudication.

If the court finds at the adjudication (Ark. Code Ann. § 9-27-327) that the parents committed the alleged offense, the court should review the case plan goal and determine if the goal and services are appropriate and are in the child's best interest. Then the court will issue orders with regard to the child and family, known as the disposition. (Ark. Code Ann. §9-27-330; §9-27-334; §9-27-335). The court also issues orders for services to meet the child's best interest. The court determines where the child will live and what visitation the parents will have if the child does not return home. If children are separated from siblings in a placement, the court has to ensure that they will have visitation with each other.

Each case goal should be analyzed individually to meet the best interest of each individual child. While most cases start with the goal of providing services to correct the conditions that caused removal and to reunify the family, DCFS, the Attorney Ad Litem (AAL), or the court may file a motion for a no-reunification hearing (Ark. Code Ann. § 9-27-327; §329; §303). If the court after a hearing grants the motion, it relieves DCFS from providing reunification services. The

court may determine there is a more appropriate permanent plan, such as termination of parental rights so that the child can be adopted by another family or the court may order guardianship or custody with a relative.

When a child remains out of his or her home, review hearings (Ark. Code Ann. §9-27-337) must be conducted at least every six months from the date the juvenile was removed from his or her home. At this time the court reviews the case to ensure that the child's best interest and needs are being met; that the parents and DCFS are in compliance with the case plan and court orders; and that the parties are working towards an appropriate permanency plan for the child.

If a child remains out of his/her home for one year, a permanency planning hearing (Ark. Code Ann. §9-27-337) is required to determine a permanent plan for the child. At that time, or before, a decision should be made based on the child's best interest to finalize a safe and permanent placement for that child. Federal law prioritizes these permanent placements. If it is in the child's best interest, and a child can return to his or her home with his or her health and safety protected, that is the preferred outcome and is required by law. If a child cannot be returned to his or her home within one year, the next goal is termination of parental rights (Ark. Code Ann. § 9-27-341) so that the state may seek an adoptive home for the child. However, nothing prevents the state or the AAL from filing a petition to terminate parental rights at any stage in the case if they have grounds. Other possible permanent plans in order of preference are guardianship, custody, and another permanent planned living arrangement.

Courts are required to have reviews and permanency planning hearings until the child is in a safe and permanent placement. It is traumatic for a child to be abused or neglected and to be removed from his/her home. Therefore, courts must ensure that when the state intervenes, that the child's best interest is first and foremost. Courts are the gatekeeper to ensure that children are protected, remain in stable placements, receive the services that the court has ordered, and are placed in safe and permanent homes as soon as possible.

Hon. Bill Frenzel, Chair of the Pew Commission on Foster Care, stated that "No child leaves the foster care without a judge's decision. Every significant decision in the child's life from entry into until exit from foster case is in the hands of the court." All children deserve safe, permanent families that love, nurture, protect, guide, and help them reach their full potential. *(Dependency-Neglect Hearing Flow Chart and Dependency- Neglect Statutory Summary – Exhibits 39,38).*

Dependency-Neglect Representation and Advocacy

History: In 1995, the Arkansas Supreme Court conducted an assessment by contracting with Arkansas Advocates for Children and Families to determine how our courts could improve handling child abuse and neglect cases. The Supreme Court issued a report in 1997 and found "that children were not adequately represented in dependency-neglect cases and, even when they were represented, the quality of representation was minimal or poor." Arkansas law at that time required the appointment of a guardian ad litem to represent the best interest of a child and to advocate for the child's articulated wishes. Across the state there were very few court appointed

guardians ad litem. In most areas public defenders filled this role or the judge appointed an attorney who was present in the court that day.

The assessment also found that parents were not always represented by counsel and if they were, it was often not until their parental rights were being terminated, despite federal and state law requiring such representation for indigent parents. When represented, attorneys were not consistently prepared. Indigent parents were typically appointed public defenders or legal services attorneys. There were no standards or requirements for training in order to be appointed as an attorney for a child or parent in these important cases.

The Supreme Court Committee on Foster Care and Adoption: Court Improvement Assessment Report issued in 1997 called for statewide AAL and CASA programs to represent the best interest of children. It also recommended that an attorney represent indigent parents and guardians at all stages of dependency-neglect proceedings. Most importantly, it called for all attorneys in these cases to meet qualification standards and have ongoing training.

Act 708 of 1999 Ark. Code. Ann. §9-27-401 established a state-wide system of employment or contracts for AALs to represent the best interest of children. It developed a state CASA program to provide grants to local programs to recruit and train CASA volunteers to advocate for the best interest of a child. A mechanism for the state to reimburse attorneys who were qualified and specifically trained to represent indigent parents was also established. The Act created the Division of Dependency-Neglect Representation ("Dependency-Neglect Division") within the Administrative Office of the Courts (AOC) to oversee and implement the program. The Act further requested the Arkansas Supreme Court to adopt standards of practice and qualifications for attorneys receiving contracts, or being employed, to represent children and parents. The AOC began to develop the infrastructure and work with the Supreme Court to develop standards *(Supreme Court Administrative Order No. 15 – Exhibit 13).* However, no state funding was provided to provide attorneys for children, grants to local CASA programs, or reimbursement for parent counsel in dependency-neglect cases during the 1997 General Assembly.

Act 1438 of 1999 provided some initial funding for AALs to represent the best interest of children in dependency-neglect cases and provided funds for grants to local CASA programs. By January 2000, the AOC Dependency-Neglect Division had entered into contracts with attorneys who met training and clinical requirements established by Administrative Order No. 15 to represent the best interest of every child in the state in a dependency-neglect proceeding. Funding was also appropriated to develop and expand local CASA programs to recruit trained volunteers to advocate for the best interest of the child. It was envisioned that the AAL and CASA volunteer work as a team to represent the best interest of the child; however, the CASA volunteer would serve independently and make his or her own recommendations to the court so that the court received the most information about a child that was possible in these important cases.

Act 1267 of 2001 provided funding for reimbursement of fees and expenses for qualified attorneys who met the requirements of Administrative Order No. 15 to represent indigent parents in dependency-neglect cases. It also provided increased funding to the AALs to hire qualified attorneys as state employees and continue contracts where it met the best interest of the child.

AAL Program: The AOC AAL Coordinator employs or contracts with every AAL to ensure that every attorney is qualified and that statewide coverage is available. The judge and attorneys in the district are consulted as part of the application process and the judge is informed of the AALs that are selected for his/her district.

Currently, the AOC Dependency-Neglect Division has 23 full-time attorneys and 67 part-time contractors to represent the best interest of every child who has a dependency-neglect case. AALs presently represent the best interest of over 5,438 abused and neglected children in over 3,261 cases. Every child who has a dependency-neglect case is appointed an attorney who meets the qualification standards in Administrative Order No. 15 immediately when the case begins. Presently, 39% of the AALs in dependency-neglect cases have more than 11 years experience in child abuse and neglect representation; 31% have over 8 years experience, and 30% have 4-6 years experience.

Teri Hays, AOC AAL Coordinator, rigorously screens and selects all AALs who provide representation to children in these cases *(AAL Application and Qualification - Exhibit 17)*. Hays developed an AAL Program and Policy Manual and worked with AALs to update the AAL Research Manual *(AAL Policy Manual and AAL Research Manual Table of Contents – Exhibits 14 and 16).* Hays has also developed a nationally recognized monitoring system, including peer review, to ensure that the AALs comply with Administrative Order No. 15 standards and represent the best interest of every child *(AAL Program Monitoring and AAL Complaint Procedure – Exhibit 28)*. Hays coordinates specialized AAL training and provides technical assistance to the AALs. An AAL Advisory Board has also been formed to make recommendations on how to enhance representation and advocacy of abused and neglected children and to make recommendations to improve the child welfare and court system *(AAL Advisory Committee – Exhibit 71)*. An AAL Research Specialist has been hired to provide legal research assistance to AALs, assist AALs with appeals, assist with peer reviews, and cover conflict cases so that all children receive representation at all times. For more information on the D-N AAL Program contact Teri.Hays@arkansas.gov.

CASA: The AOC Arkansas State CASA program provides grants, technical assistance, and consultation to local CASA programs, in order to ensure that they comply with national and state standards, but more importantly, to ensure that local CASA programs are empowered to provide quality volunteer advocacy to represent the best interest of abused and neglected children. In order to receive state grants *(CASA Funding Formula – Exhibit 67)*, local CASA programs must be in compliance with CASA state and national standards. These standards may be found at http://www.arkansascasas.org. For example, CASA volunteers must complete a rigorous screening process and background check, and undergo a minimum of 30 hours of classroom training, observe dependency-neglect proceedings, and complete at least 12 hours of continuing education each year.

CASA volunteers may not be assigned to more than two cases at a time so that he/she may proactively concentrate on the best interest and specific needs of each child. The number of CASA programs in Arkansas has increased from seven in 1998 to 22 in 2006. These programs are currently serving 26 of Arkansas's 28 judicial districts, and 56 of Arkansas's 75 counties.

The State CASA is conducting needs assessments and identifying resources for development of new CASA programs in Conway, Crittenden and Phillips Counties, and for expansion of programs in underserved counties. During FY 2006, 696 CASA volunteers advocated for the best interest of 2,661 dependent-neglected children *(CASA Map – Exhibit 69)*.

Julian Holloway, State CASA Director, and the assistant director conduct biannual quality assurance visits with each local program to review operating procedures, volunteer training and supervision, satisfaction and retention methods, financial controls, board development, public awareness campaigns and case files. A quality assurance (QA) instrument allows the collection of certain data that assists in evaluation and improvement of the local program's advocacy efforts *(CASA QA - 65)*. In addition, Holloway administers local program grants, provides training and technical assistance to local programs, assists with local program start-up, and staffs the CASA Advisory Committee that reviews and makes recommendations on all local grants *(CASA Advisory Committee – Exhibit 68).* For more information on CASA contact CASA@arkansas.gov.

Parent Counsel: Within the AOC Division of Dependency Representation, the AOC only administers the reimbursement of fees and expenses for attorneys who meet the standards and qualifications pursuant to Administrative Order No. 15. State funding is divided among the judicial districts based on dependency-neglect caseloads. This is not a program like the AAL or CASA program and does not have the staff support to provide quality assurance and support to parent counsel. The AOC Dependency-Neglect Division has developed reimbursement guidelines, indigency forms, billing cover sheets, and sample orders for judges *(Parent Counsel Forms – Exhibits 29–37).*

Currently, over 250 attorneys are qualified for appointment in accordance with Administrative Order No. 15. During FY 2006, 119 attorneys actively billed and there were 3,631 attorney appointments for indigent parents.

Gabrielle Russ, AOC Dependency-Neglect Division Administrative Assistant, processes the reimbursements for the attorneys, ensures that they are qualified pursuant to Supreme Court Administrative Order No. 15 and meet the reimbursement guidelines. Russ enters all attorney fees and reimbursements into a data base and produces monthly reports that detail what an attorney has been paid on an individual case and the total amount spent in each district. The AOC Dependency-Neglect Division has also allocated grant funds to engage the assistance of experienced parent counsel to conduct peer reviews in selected judicial district to determine compliance with Administrative Order No. 15. This attorney also provides research and technical assistance to parent counsel. For more information about indigent parent counsel reimbursement contact Gabrielle.Russ@arkansas.gov

Office of Chief Counsel (OCC): The Division of Children & Family Services' is represented by attorneys in the Department of Health and Human Services' Office of Chief Counsel (OCC), County Legal Operations Unit.

County Legal Operations (CLO) consists of 44 attorneys and 34 legal secretaries located in 18 offices across the state. *(CLO Organizational Chart – Exhibit 62).* Each CLO attorney has an

average caseload at any one time of approximately 99 cases. The recommended caseload for state agency attorneys in child welfare cases, according to the American Bar Association, is 40 to 60 cases per child welfare attorney. These attorneys are responsible for representing DCFS in all dependency-neglect petitions filed by DCFS and they bear the burden of proof at all hearings. In addition to handling child welfare cases, the CLO attorney also handles administrative hearings where an offender's name is put in the adult or child maltreatment registry and adult maltreatment custody cases. The caseload for the CLO unit has almost doubled in ten years *(CLO Ten Year Case Load – Exhibit 60 and CLO Total Caseload Exhibit 61).*

To ensure quality legal representation, CLO attorneys are evaluated at least annually with surveys from clients, judges and fellow attorneys. CLO attorneys are observed by supervisors or peers with feedback provided on courtroom performance.

Dependency Neglect Court Improvement Program (CIP) Assessment: In 2003, the Supreme Court Ad Hoc Committee on Foster Care and Adoption began its reassessment of how courts were handling dependency-neglect cases and to evaluate the progress toward the 1997 court recommendations. The Supreme Court Ad Hoc Committee issued a report in October 2005, *Arkansas Supreme Court Committee on Foster Care and Adoption; Court Improvement Program (CIP) Reasssessment.* On November 4, 2005, the Supreme Court held a press conference to release the *CIP Reassessment Report and CIP Executive Summary (CIP Reassessment Report – Representation – Exhibit 70 and 72).*

Best Practices: Best Practices standards have been developed for each type of hearing in a dependency-neglect proceeding. The standards were developed with judges, attorneys, casesworkers and CASA volunteers. They were also submitted to peers for review and comment. They have been used in training and are in the process of being laminated and provided to all judges, OCC attorneys, parent counsel, AAL, CASA volunteers, DCFS caseworkers, and foster *parents (AAL, Parent Counsel, OCC (Exhibits 47 – 59), and CASA Best Practice Hearing Cards – Exhibit 66).*

Prosecuting Child Abuse Cases

Overview: In Arkansas, the prosecuting attorney is responsible for deciding whether or not to charge a person with committing a crime. Ordinarily, when a prosecutor decides to pursue criminal charges against someone, he or she will file a document called an "information". In some cases, a prosecutor may decide to convene a grand jury to determine whether there is enough evidence to bring a person to trial. If the grand jury determines there is sufficient evidence, then an indictment formally charging the person with a crime is filed. Amendment 21, § 1 of the Arkansas Constitution gives prosecutors the authority to file criminal charges.

> "The framers of our constitution have charged an incumbent prosecutor with the grave responsibility of filing informations against those he deems guilty and refusing to file against those he believes to be innocent. He is also charged with the duty of acting as attorney for a grand jury who, like the prosecutor, should return an indictment against those it deems guilty and return a no true bill against

> those it deems innocent. The office of Prosecuting Attorney calls for sound judgment and a knowledge of the law in the exercise of discretion." *Venhaus v. Brown,* 286 Ark. 229, 232, 691 S.W.2d 141 (1985).

A criminal case is brought in the name of and by the State, not by the victim of the crime. The prosecuting attorney may bring charges against a defendant even if the victim does not want to pursue charges.

Under (Ark. Code Ann. § 16-21-103), each prosecuting attorney has the duty to "commence and prosecute all criminal actions in which the state or any county in his district may be concerned."

Prosecutors as Elected Constitutional Officers: Prosecuting Attorneys are elected officials from a judicial district who serve a term of four (4) years. Amendment 80, § 20 of the Arkansas Constitution. "Only the people in an election have the right to remove a prosecuting attorney from office due to objections to the use of discretion." *Venhaus v. Brown,* 286 Ark. 229, 233, 691 S.W.2d 141 (1985).

A circuit court has limited power to appoint a special prosecuting attorney in a matter. The reasons given in case law for allowing the appointment of a special prosecuting attorney are if the prosecutor is legally removed from office or is legally disqualified to act. *Venhaus v. Brown*, 286 Ark. 229, 232, 691 S.W.2d 141 (1985).

The Arkansas Constitution, Article 19, § 8 gives the General Assembly specific authority to address issues of a public officer's neglect of duty in his or her official capacity:

> "It shall be the duty of the General Assembly to regulate, by law in what cases, and what, deductions from the salaries of public officers shall be made for neglect of duty in their official capacity."

The General Assembly has clarified when it is appropriate for a court to appoint a prosecuting attorney pro tempore. Ark. Code Ann. § 16-21-112(a) states:

> "If any prosecuting attorney neglects, or fails from sickness or any other cause, to attend any of the courts of the district for which he was elected and to prosecute as required by law, it shall be the duty of the court to appoint some proper person, being an attorney at law, to prosecute for the state during the term. That person shall, on taking the oath of office, perform all the duties of the regular prosecuting attorney for the term."

A prosecuting attorney may be indicted for any misdemeanor in office or neglect of duty (Ark. Code Ann. § 16-21-116(a)). Arkansas law does not contemplate or allow for disqualification of a prosecuting attorney based upon the exercise of his or her discretion.

Social Services System Contrasted with the Criminal Justice System: There are two (2) systems of determining child abuse and neglect and each culminates in different results. The first is the **social services system** administered by the DCFS, DHHS and discussed at length

under other topics in this report. The "best interest of the child" is the focus of this system, and even though hearings related to cases arising under this system may come before a judge, the decisions do not result in the incarceration of individuals.[i] These proceedings may, however, result in a range of results from services to the child or the family, to removal of the child from the home, or to termination of parental rights. For additional information, see Exhibit 63, "Crime Victim's Guide".

The second is the **criminal justice system** in which law enforcement, prosecutors, and the courts play the primary role. Although the two (2) systems may be operating in tandem, may operate consecutively, or may not both operate in a given case, the distinction between the criminal justice system and the social services system is more than just the result that each is seeking. Another significant difference is the rules under which each operates. The rules for the criminal justice system include provisions of the United States and Arkansas Constitutions; case law interpreting those provisions; state and federal law regarding child abuse and neglect; state and federal rules and regulations regarding child abuse and neglect; the policies and practices of local law enforcement agencies regarding child abuse investigations; and the policies and practices of prosecuting attorneys' offices regarding the prosecution of child abuse cases.

By contrast, the focus of the social services system is assisting the child and acting in the best interest of the child, and the person who has offended against the child is not the focus. Consequently, there is a lesser standard for proving child abuse or neglect in the social services system. Additionally, there are some acts that are considered abuse and neglect for purposes of the social services system, but are not defined as crimes under the criminal code, and therefore cannot be prosecuted. Since incarceration is not the point and will not result from court proceedings in the social services system, constitutional concerns under Amendment 6 of the United States Constitution, as well as other constitutional issues are more of the exception rather than the rule.

Evidentiary Issues in Child Abuse Cases: In stark contrast, Amendment 6 applies to **every** criminal prosecution. Amendment 6 states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment 6 covers a substantial number of rights afforded to criminal defendants under the United States Constitution, the most relevant of which to the prosecution of child abuse cases is the "Confrontation Clause". The obvious issue that a prosecutor must consider is whether the child can sustain questioning on the stand by the offender's attorney.

Children as witnesses in child abuse cases pose special challenges for prosecutors and the courts. One such challenge is that a child must be competent to testify in court. The decision as to

whether a child is competent to testify lies within the sound discretion of the trial court. *Modlin v. State,* 353 Ark. 391 (1989). Even if a court does or would find the child competent to testify, a prosecutor may be reluctant to call the child victim as a witness and subject the child to cross-examination by a defense attorney who is experienced in questioning and turning words around on a witness. This is especially a concern in cases where the child is very young or where the experience of testifying could be very traumatic.

Before 2004, prosecutors were having considerable success prosecuting cases where a witness was unavailable to testify but had made prior out-of-court statements which were allowed to be used at trial under the reliability test for hearsay evidence established in *Ohio v. Roberts,* 448 U.S. 56 (1980). The rule under *Ohio v. Roberts,* 448 U.S. 56 (1980), was what has been called a "witness lite/hearsay heavy approach which appeared to result in a discernable increase in convictions."[ii]

What this meant for prosecutors of child abuse cases was that convictions could more easily be obtained without the child having to testify in court. The reason for this was that evidence necessary to secure a conviction under the criminal standard of beyond a reasonable doubt was easily within reach if an out-of-court statement of an absent witness was available and fit in a firmly rooted hearsay exception or demonstrated particularized guarantees of trustworthiness. Whether the defendant had an opportunity to cross-examine the witness was not relevant to the analysis under *Roberts*.

In 2004, the United States Supreme Court reexamined the issue of whether the admission into evidence of an out-of-court statement of a witness when the witness was absent from the trial violated the defendant's rights under the Confrontation Clause in *Crawford v. Washington,* 541 U.S. 36 (2004). *Crawford* has been called:

> "the judicial equivalent of a double whammy…. [because] it destroyed the existing *Roberts* framework for analyzing Confrontation Clause challenges and … failed to provide explicit instructions as to what to substitute in its place."[iii]

The distinctions between the social services system and the criminal justice system discussed above are relevant in determining whether *Crawford* applies. The good news for social service agencies that provide services to abused and neglected children, namely in Arkansas the Division of Child and Family Services of the Department of Health and Human Services, is that *Crawford* does not apply to civil child protection hearings related to the social service system. Also, *Crawford* does not apply to criminal proceedings in which the child will testify.[iv]

The bad news for prosecutors and law enforcement agencies is that the *Crawford* decision makes it more difficult to prosecute a child abuse case without the child's testimony. The framework for analysis under *Crawford* is vague and rather complicated. Whether *Crawford* applies to an out-of-court statement hinges on whether the statement is "testimonial". However, the *Crawford* Court did not provide a clear definition for "testimonial". A statement is likely to be "testimonial" if the statement was made to a governmental officer during intensive questioning that occurred as part of an investigation. A casual remark is not likely to be found to be "testimonial".[v]

The key to the *Crawford* analysis is the examination of the circumstances surrounding the statement. An out-of-court statement that is "initiated and freely given by the victim; [has] no indicia of police compulsion; and [is] not made in contemplation of future prosecution" would likely be admissible.[vi] An out-of-court statement made during a 9-1-1 call is non-testimonial and admissible. *Davis v. Washington,* 126 S.Ct. 2266 (2006).

Crawford also complicates the decision of a prosecutor to collaborate with social service caseworkers during the investigation. A statement made to a social services caseworker who works "at the behest of and in tandem with the State's attorney with the intent and purpose of assisting the prosecutorial effort…" has been held to be testimonial. *In re T.T., a Minor v. T.T.,* 351 Ill.App. 3d 976 (2004).

Prosecutorial Immunity: Under both state and federal law, a prosecuting attorney is absolutely immune from civil liability when acting within the scope of his or her official duties.

Endnotes

i If the offender is under the age of eighteen (18), then the proceeding could result in the commitment of the juvenile offender to the Division of Youth Services or a juvenile detention center.

ii "Domestic Violence, Child Abuse, and Trustworthiness Exceptions after Crawford", Myrna S. Raeder, Criminal Justice/American Bar Association Summer 2005, Vol. 20, No. 2 at page 24.

iii "Domestic Violence, Child Abuse, and Trustworthiness Exceptions after Crawford", Myrna S. Raeder, Criminal Justice/American Bar Association Summer 2005, Vol. 20, No. 2 at page 25.

iv Vieth, Victor. Keeping the Balance True: Admitting Child Hearsay in the Wake of Crawford v. Washington, NCPCA Update Newsletter, Vol. 16, No. 12, (2004)

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