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CHILDREN'S LAW REPORT

Legal Staff Hired

The Children's Law Project is pleased to announce the hiring of Pamela Mohr as Project Director. Ms. Mohr will be responsible for the overall implementation of the project and will develop and teach an interdisciplinary clinical course in child welfare law and practice. Ms. Mohr is an honor graduate of the UCLA School of Law. She founded and directed the Alliance for Children's Rights in Los Angeles, a public interest law office devoted solely to children. She comes to South Carolina from the American Bar Association, Center on Children and the Law, where she directed a program providing technical assistance to state court systems concerning the manner in which they deal with child abuse and neglect cases. Ms. Mohr is the recipient of numerous awards, including the 1990 Outstanding Child Advocacy Award of the American Bar Association, Young Lawyers Division.

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* The Children's Law Report is published monthly by the Children's Law Project. The Children's Law Project is a strategy of SC Families for Kids and also supported through the Children's Justice Act Task Force. It is administered by the USC School of Law in partnership with the Institute for Families in Society.

Mary Williams has been hired as Senior Resource Attorney for the Project. Ms. Williams is a graduate of the USC School of Law. Her previous positions include Co-Director of South Carolina Legal Services and Staff Attorney with the South Carolina Department of Social Services. She has extensive experience in child abuse and neglect cases, as well as other areas of law relating to children. At the Children's Law Project Ms. Williams will conduct training, provide technical assistance, and develop legal resource materials.

Heidi Holland has been hired as Resource Attorney. She was previously an Assistant Solicitor in the Second Judicial Circuit, where she specialized in the prosecution of child abuse. Ms. Holland graduated from the University of South Carolina School of Law and has participated in advanced training with the National Center on Prosecution of Child Abuse.

Services Expanded

The hiring of a permanent project director and resource attorneys has made it possible for the Children's Law Project to expand services. Technical assistance is now available to attorneys and guardians ad litem who represent children in family court abuse and neglect actions, and to attorneys who prosecute child abuse in criminal court. Technical assistance will include telephone or in-person consultation concerning the law and legal strategy. Case law research and access to professionals for expert testimony will be provided as resources allow. Assistance in preparation of appellate briefs and amicus curiae briefs will be offered in appropriate cases.

Technical assistance is available only to the child's attorney or guardian ad litem in family court abuse proceedings and the prosecuting attorney in criminal child abuse proceedings. Volunteer guardians ad litem should

ask their coordinator or attorney to contact the Children's Law Project. Other services of the Project, including training and provision of resource materials, are available to all professional participants in the child protection system.

Guardian ad Litem Appointment Order Adopted

A model order for the appointment of guardians ad litem and their attorneys in child abuse and neglect proceedings has been endorsed by the Board of Governors of the South Carolina Bar . The order will be distributed as an optional form by Court Administration.

The model was developed by a subcommittee of the Bar's Children's Committee in an effort to standardize appointment orders across the state. Authority and duties of the guardian ad litem are delineated in the order, thus clarifying the guardian ad litem's role and responsibilities. For a sample copy, call (803) 777-1646.

"My Court Notebook"

The Governor's Office, Division of Victim Assistance, is preparing to reprint copies of *My Court Notebook*, which was last revised in 1991. This booklet describes the court process and is intended for use by professionals assisting child victims or witnesses who will appear in court. Versions are available for family court and for criminal court. Both are specific to South Carolina. Definitions, parts of a proceeding, behavior in court, and possible outcomes are covered. The booklets include statements to be completed by the child, helping to identify his or her feelings and concerns about the court experience. A User's Guide contains suggestions for the professional working with the child.

If you have utilized these booklets in the past, please send your comments or suggestions to Linda Steadman, Division of Victim Assistance, 1205 Pendleton Street, Room 401, Columbia, SC 29201. Comments may also be sent by fax to (803) 734-1708. Single copies, which you may duplicate, can be obtained by calling Janet Whipple at (803) 734-1900. Multiple copies will be available at no charge in early 1997.

Recent South Carolina Decisions

Abandoning Father's Right to Share in Son's Death Benefit

Adkins v. Comcar Industries, Inc., No. 24488 (Filed Sept. 3, 1996)

In an appeal from the Court of Appeals, the Supreme Court upheld a Circuit Court's finding that a father was entitled to share in the death benefits for his son under the Workers' Compensation Act, in spite of the father's abandonment of his son in childhood. The Supreme Court held that, in the absence of an order terminating the father's parental rights, the father maintained his right to share equally in the benefits. The mother of the deceased had contested the father's entitlement arguing that many years prior to the son's death, the father had intentionally and wilfully abandoned his son by failure to provide support. The Workers' Compensation Commission had agreed with the mother and denied the father benefits, but the father won a reversal in the Circuit Court.

The statute at issue in this case, S.C. Code Ann. § 42-9-140(B), was amended in 1996. The amended statute now permits the commission to deny or limit a parent's entitlement when a parent has failed to reasonably provide for the decedent.

Guardian ad Litem Service as Conflict of Interest

Townsend v. Townsend, No. 24484 (Filed Aug. 19, 1996)

The South Carolina Supreme Court upheld the removal of a father's attorney in a child support reduction matter where the attorney had previously served as guardian ad litem for the child.

The father brought an action against the mother for a reduction in child support, and the mother counterclaimed for college support. During the final hearing, the judge, upon learning that the attorney had served as the daughter's guardian ad litem several years earlier, removed the lawyer as father's counsel and stopped the hearing.

On a motion for reconsideration, the lawyer argued that the Rules of Professional Conduct governing conflict of interest [Rule 1.9(a) of the Rules of Professional Conduct, Rule 407, SCACR] did not apply because an attorney-client relationship does not exist between a child and guardian ad litem. While finding it technically correct that an attorney-client relationship does not exist between

child and guardian ad litem, the court found that Rule 1.7 applies because as guardian the attorney is charged with representing the child's best interest and has a confidential relationship with the child. See also In re Steveon R.A., 537 N.W. 2d 142 (Wis. Ct. App.1995).

The court also held that the lawyer had no standing to independently challenge his dismissal, stating that the lawyer's pecuniary interest did not constitute a real interest in the subject matter of the action.

Start at the Beginning: Preventing Violence by Protecting Children from Violent Homes

Part 1 of a 2-Part Series

Arlene Bowers Andrews, PhD, LISW

Consider this obscure fact:

*- Domestic violence is the **single major** precursor to fatal child abuse and neglect in the United States.*[1]

And these more commonly known facts:

- Each year, at least 3.3 million children are exposed to violence by family members against their mothers or female caretakers.[2]

- A child's development is harmed in multiple ways -- cognitively, psychologically, socially -- merely by observing or hearing the brutal domestic terrorism against a parent in the home.[3]

- Most domestic violence cases in households with children involve child abuse, too.[4]

- Children with a history of family disruption and violence are at an elevated risk of becoming victims or perpetrators of violence toward others. . . [5] *Studies of youth aggression indicate that family functioning is a substantial predictor of violent behavior.. .* [6] *Often, youth from violent homes begin to demonstrate violence in their own dating relationships. . . .*[7]

And the cycle continues.

The consequences of childhood exposure to violence can be as devastating as abuse of the child him/herself. Short-term effects often include internalizing symptoms such as depression, anxiety, impaired sense of self, suicidal ideation, and posttraumatic stress. Externalizing symptoms may include aggressiveness, impulsivity, delinquency, and substance abuse. Long term effects may include depression, anxiety, self-destructive behavior, isolation, poor self-esteem, trust issues, revictimization, sexual maladjustment, and the intergenerational transmission of violence.[8] Violent families create an atmosphere of tension, fear, intimidation, and tremendous confusion about intimate relationships.[9] Boys who witness the abuse of mothers by men are more likely to become men who batter than boys whose homes are violence-free. Women who were abused or witnessed the abuse of their mothers are more likely to be battered or raped.

Injuries to women and children are far more frequent during or after separation as the batterer attempts to force reconciliation. About 75% of emergency room visits and calls to law enforcement for domestic

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[1]McClain, P., Sacks, J. & Frohlke, R. (1993). Estimate of fatal child abuse and neglect, United States, 1979 to 1988. Pediatrics, 91, 338-343.

[2]American Psychological Association. (1996). Report of the APA Presidential Task Force on Violence and the Family. Washington, DC: APA.

[3]Pagelow, M. D. (1990). Effects of domestic violence on children and their consequences for custody and visitation agreements. Mediation Quarterly, 4:7, 347-363.

[4]American Bar Association. (1994). The impact of domestic violence on children. Washington, DC: ABA.

[5]Wolfe, D.A., Wekerle, C., Reitzel, D. & Gough, R. (1995). Strategies to address violence in the lives of high-risk youth. In Peled, E., Jaffe, P.G., & Edleson, J.L. (Eds.) Ending the cycle of violence, Thousand Oaks: Sage, 255-274.

[6] Loeber, R. & Stouthamer-Loeber, M. (1986). Family factors as correlates and predictors of juvenile conduct problems and delinquency. In M. Tonry & N. Morris (Eds.), Crime and justice: An annual review of research, 29-150. Chicago: Univ. of Chicago.

[7]Girshick, L.B. (1993). Teen dating violence. Violence Update. Thousand Oaks, Calif: Sage.

[8] Worchester, N. (1993). A more hidden crime: Adolescent battered women. The Network News. Washington, DC: National Women's Health Network.

[9] Allan, B. (1991). Wife abuse--The impact on children. Ontario, Canada: National Clearinghouse on Family Violence.

intervention occur after separation.[10] Moreover, batterers frequently choose the visitation arena as a common place in which to attempt coerced reconciliation or to penalize the woman for refusal to reconcile. As a result, children may be harmed or abducted. Visitation needs to be a protected event for both the children and the battered woman.

Women accounted for 56% of all violent crime victims in SC in 1993 (female victimization rate: 248 per 10,000 population).[11] The vast majority of victims and perpetrators were ages 18-35, the years when they are likely to have dependent children. Overall, the victimization rate for nonwhite women is 172% higher than the victimization rate for white women.

South Carolina maintains statistics about violence among persons known to one another in two categories: "domestic assaults" include aggression among people related to one another; "violence among intimates" includes aggression among intimate people, including those who are not related (thus spousal assault is included in both counts). For example, in 1994, there were 29,597 domestic assaults in SC. Of these, 49.9% were committed by a spouse, 9.4% were committed by a common-law spouse, 9.7% were committed by a parent or stepparent, 8.7% were committed by a child or stepchild, 10.4% were committed by a sibling, and 11.9% were committed by another family member. Also in 1994, there were 32,089 incidents of violence between intimates reported to law enforcement in SC. Of those, 46.1% were committed by a spouse, 8.7% were committed by a common-law spouse, 3.5% were committed by an ex-spouse, and 41.8% were committed between boyfriend and girlfriend. Of particular interest here is the large number of incidents occurring between boyfriend and girlfriend.

Most children exposed to family violence are not identified by helping professionals in childhood. Those that are identified rarely receive the help they need.

A 1994 American Bar Association report on the impact of domestic violence on children includes several recommendations about what the legal community can do to protect children in violent homes. Briefly, their recommendations include:

1. **Reform domestic violence laws to require police and courts to adequately protect children.** Law enforcement officers should be trained to protect the parental victim's children as well as the victim; victims should be able to seek protection orders for themselves and their children; every party to a domestic violence judicial proceeding should be required to inform the court of all other past and present judicial proceedings pertaining to their children (e.g. child protection, criminal action, custody, child support, etc.).

2. **Enhance legal representation for victims of domestic violence and their children**. Attorneys and the organized bar should do more to make assistance of legal counsel available and affordable to victims of domestic violence and their children. Measures should include training lawyers, enhancing *pro bono* and law school clinic programs, and supporting expanded legal services programs.

3. **Prohibit firearms purchase and possession for all perpetrators of domestic violence and child abuse**. Legislation should provide that criminal convictions of either domestic violence or child abuse should result in relinquishment of any firearms the convicted person possesses and prohibition of any future acquisitions.

4. **Ensure that domestic violence is properly considered in all domestic relations actions involving custody and visitation**. The Bar Committee found: "It is always appropriate, indeed vital, for judges and other judicial hearing officers to consider *any history of abuse toward an adult* in the home of one seeking custody, guardianship, reunification, or visitation rights over a child as a primary factor in the 'best interests of the child" (p.13). Where there is proof of severe or repetitive abuse to an intimate partner, batterers should be presumed by law to be unfit custodians of their children. Further, state law should provide that visitation be awarded to such a parent only if the safety and well-being of the abused parent and children can be protected. State laws should

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[10] Stark, E. & Flitcraft, A. (1988). Violence among intimates: An epidemiological review. In Van Hasselt, V.B., Mirrison, R.L., Belleck, A.S., & Hersen, M. (Eds.), Handbook of family violence., 293-317. NY: Plenum.

[11] Crime data, unless otherwise noted, is from the SC Law Enforcement Division (SLED), 1994. Their definitions include:
Domestic aggravated assault is an unlawful attack by one family member upon another with the intent of inflicting serious bodily injury through the use or threatened use of dangerous weapons. Assaults with hands and feet are counted if the assaults result in serious injury. Attempts to assault are also counted.
Domestic simple assault is an unlawful attack by one family member upon another, not involving the use of a dangerous weapon, and not resulting in any serious or aggravated injury.
Domestic intimidation is defined as one family member unlawfully placing another family member in reasonable fear of bodily harm through the use of threatening words or other conduct, but without displaying a weapon or subjecting the family member to actual physical attack. Stalking can be intimidation if the victim feels a threat of bodily harm. Such threats can be made in person, by telephone, or in writing (SLED, 1994).

direct the establishment of supervised visitation programs. Criminal custodial interference statutes should be amended to include flight from domestic violence as an affirmative defense.

5. **Responsibly address the connections between domestic violence and child abuse/neglect.** The battered *victim* is often punished by losing custody of children through child protective services actions based on failure to protect the children from the batterer. Battered victims often make tough choices: they stay in dangerous situations for fear that if they flee, they will lose their children to CPS or face custody battles that lead to more intense violence against themselves or their children. The child welfare system should be prepared to aid the victim in protecting her or his children. CPS investigations and reunification plans should intensively explore the role of the father or other males in the family.

6. **Address the special needs of immigrant women and their children and other special populations (spouses of military personnel, persons with disabilities, parents with mental health problems, substance abusers).** Often persons in special circumstances are subject to coercive measures by their batterers, such as immigrants who are threatened with deportation and separation from their children if they seek protective action. Their legal status may be affiliated with their partner's so that their perceived options for escape or protection are limited. Attorneys should be prepared to assist victims in special circumstances so that they can protect themselves and their children.

Of course, perpetrators and victims of domestic violence should be referred for counseling and advised to obtain help for their children. The maxim is, "**SAFETY AND SURVIVAL FIRST.**" The victim and the children need protection, then they can begin to recover from the harm and, hopefully, overcome the effects that can lead to harm in the next generation.

[A follow-up article will address the practitioner's actions in cases which involve spouse abuse combined with child abuse.]

Training Schedule

January 8
Introduction To The Child Protection Reform Act
Greenwood

January 14
Introduction To The Child Protection Reform Act
North Charleston

February 7
Workshop on Sexual Abuse for Guardians ad Litem
Florence

April 18
Workshop on Sexual Abuse for Guardians ad Litem
Charleston

June 6
Workshop on Sexual Abuse for Guardians ad Litem
Greenville

Upcoming Topics:
Roundtable: Court Practices for Children
Roundtable: Connection of Spouse Abuse and Child Maltreatment
Investigation of Physical and Sexual Child Abuse

Recent Child Welfare Cases from Around the Country

Child's Opinion in Termination of Parental Rights Decisions

In re A.R., 679 A.2d 470 (D.C. Ct. App. 1996)

A father who had been incarcerated and unavailable to the child for much of the child's life appealed the termination of his parental rights to the child. The child was placed in foster care for almost four years. The physical neglect was the basis for the removal of the child. The mother was mentally ill and unable to provide adequate care for the child. The father appealed this case on the basis of the court's refusal to interview the child in camera in order to consider the child's opinion. The District of Columbia's TPR statute provides that the courts consider the child's opinion "to the extent feasible." The appeals court held that the trial court's consideration of the child's need for integration into a stable home; the physical, mental, and emotional health of all the individuals involved; and the interaction and interrelationship of the child with the involved adults was sufficient to determine best interests. The Court of Appeals also said that it was within the trial judge's discretion whether or not to interview the child as to his opinion. Therefore, there was no violation of statute when the judge declined to do so or to otherwise try to expand evidence by determining his

opinion.

Expert Testimony and Child Sexual Abuse

Commonwealth v. Federico, 666 N.E.2d 1017 (Mass. App. Ct. 1996)

Massachusetts Appeals Court reversed the conviction of step father for rape and indecent assault and battery of a child in a case involving two sisters because of an error in admitting expert testimony, which the defendant had appealed, claiming that the admission of expert testimony which bolstered the victims' testimony was error. The court found that there was harmful error in admission of certain testimony by a pediatrician and a psychiatrist which was "tantamount to an endorsement" of the child witnesses' credibility.

The objectionable testimony involved presentation of a hypothetical which mirrored the victims' complaints of six years of sexual abuse and the behavior of the victims. The pediatrician had testified that the hypothetical complaints were not inconsistent with physical exams that revealed no genital trauma. In response to a hypothetical that presented the same underlying facts of the case, the psychiatrist had offered her opinion that the hypothetical behavior was consistent with sexually abused children. The prosecutor had presented one hypothetical containing victims of the same age, living in a household composed of the same members, sexual interactions between the step father and the girls occurring over the same length of time, and disclosures made under the same circumstances as those involved in the case. He concluded by asking the psychiatrist what her opinion was regarding whether such "assumed facts" seem consistent with sexual abuse of a child who had been abused since the age of nine, the same age as the youngest girl when the alleged abuse had begun. The psychiatrist answered by stating that it was her opinion that the facts were "clinically consistent" with such abuse and explained the basis of her opinion.

Guardian ad Litem Presence in Custody Hearing

Miller v. Miller, 644 N.Y.S.2d 579 (A.D.3 Dept. 1996)

The New York Supreme Court, Appellate Division reversed family court's dismissal of a mother's petition for custody and grant of custody to the father in a hearing that commenced without the presence of the court appointed guardian for the children. The appeals court held that it was error to commence and proceed with a custody hearing when the law guardian (guardian *ad litem*), who had been appointed to protect the interests of the children involved, was absent due to a short-term illness. Despite the fact that neither party had objected to going ahead without the guardian and the trial court's offer to allow the guardian to recall witnesses who had testified in her absence, the appeals court held that commencing the hearing in her absence combined with an absence of explicit factual findings required by New York Code required that the case be remanded for a new hearing.

Evidence Of Prior Abuse In Child Abuse And Child Fatality Cases

Evidence of prior abuse of a child is frequently considered important whether or not the child in the current proceeding was the subject of the earlier abuse. The use of prior abuse as evidence in civil cases of child abuse or termination of parental rights cases is generally accepted as relevant and probative. Questions regarding the admissibility of such evidence in criminal trials are not always easily answered. This article attempts to clarify the conditions under which prior abuse evidence can be admitted based on a review of case law from around the country.

In civil proceedings on child abuse, courts have usually held that allowing evidence of a prior abuse to be admitted is important to carry out the intent of child protection laws, including the prevention of abuse or neglect. The future abuse that is possibly prevented by admission of evidence of prior abuse is generally referred to as "prospective abuse" or "derivative abuse or neglect." The dissent in Smith v. Dept. Of Health and Rehabilitative Services, 665 So.2d 1153 (Fla. Dist. Ct. App. 1996) discusses the elements required for the proof of prospective abuse. There are two elements of such abuse or neglect: (1) abuse or neglect of another child that has been clearly established and (2) a determination that the prognosis for the parent's improvement or rehabilitation poses a high likelihood that his or her condition will result in abuse or neglect of other children.

In many states the initial finding of abuse or neglect takes place in an administrative hearing and the evidentiary standard is lower than that required for a judicial hearing and much lower than what is required in a criminal proceeding. In Virginia, where the initial determination of abuse or neglect is by the DSS commissioner, the permissive rules on evidence were indicated in comment by the appeals court that "the rules of evidence are considerably relaxed in administrative proceedings, ...and the findings ...will not be reversed solely because evidence which was received would have been inadmissible in

court." Turner v. Jackson, 417 S.E.2d 881, 886 (Va. Ct. App. 1992). Though the standard is higher in judicial proceedings, the extent to which admissibility of prior abuse is allowed is indicated in an opinion by the Minnesota Court of Appeals. In a child abuse case the trial court admitted evidence of allegations of abuse in another state, Wisconsin. In re Matter of Welfare of D.M.D., 438 N.W.2d 713 (Minn. Ct. App. 1989). The trial court noted that evidence in Minnesota was "insufficient by itself for a dependency and neglect finding" and that the evidence from Wisconsin of prior abuse was "admitted and considered due to its similarity and relevancy to the conduct which occurred in Minnesota." Id., at 715. The Court of Appeals found no error in the admission of the prior abuse evidence from Wisconsin.

Illinois has a statute that allows proof of abuse or neglect of one child to be admissible evidence on the issue of abuse, neglect or dependency of any other child who the subject parent was responsible for. "The juvenile court should not be forced to refrain from taking action until each particular child suffers an injury." In re Interest of Joseph B., 612 N.E.2d 39, 40 (Ill. App. Ct. 1993) (citing In re Brooks, 379 N.E.2d 872 (1978)). However the court in Joseph B., held that the statute was limited to children who were actually neglected and did not extend to those who were subject to neglect in the future.

A Missouri appellant court explained the reason for the inclination toward admission of such evidence. See In the Interest of D.D.H., 875 S.W.2d 184 (Mo. Ct. App. 1994). The court there cited numerous state cases supporting removal of a sibling of a child who had been previously abused and said cases involving "maltreatment of a prior child present[s] one of the few situations in which a juvenile court, and social agencies at its instance, can be alerted to take before-the-fact protective measures." Id., at 188. Prior abuse of another child is prima facie evidence of imminent danger to a sibling in a similar circumstance in order to justify the child's removal.

The level of leniency in admission of prior abuse evidence is expanding. As indicated in a Pennsylvania decision, even when the previous abuse is not a recent occurrence, some courts will allow admission of the evidence of the abuse. In a protection petition against a father who allegedly left bruises on his seven year old son, the trial court admitted evidence that he had apparently been neglectful six years earlier in allowing his toddler to pour bleach on his infant child, causing burns. The appeals court held that it was not an abuse of the trial court's discretion to admit testimony regarding the six-year-old incident. Miller v. Walker, 665 A.2d 1252 (Pa. Super. Court 1995). The court stated "Past abusive conduct on the appellant's part was a crucial inquiry necessary for entry of a proper order." Referring to the state statute on protection, the court noted that the purpose of the act was to prevent harm.

In termination of parental rights cases courts regularly admit evidence of prior abuse of the subject child or other children. Many courts agree with the holding of a West Virginia appeals court that "prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding." In re Interest of Carlita B., 185 W.Va 613, 408 S.E. 2d 365, 382. In a South Carolina TPR case, the Court of Appeals affirmed the termination of a father's rights to the subject child based on a finding that the child's sibling had been abused. SCDSS v. Brown, 454 S.E.2d 335 (S.C.Ct. App. 1995). Despite the fact that no testimony had been presented suggesting that this particular child had been abused or neglected, she had been taken into protective custody after her infant sister died after apparently being battered by the father who was criminally charged, along with the mother, in the child's death. The court stated that it was in the child's best interest to terminate the father's rights even without adjudication of his guilt in the death of the other child.

Criminal Cases

Constitutional rights of defendants and rules of evidence require a higher level of scrutiny before evidence of prior abuse can be admitted in criminal trials. Because of the rule which does not allow evidence of prior bad acts, determining whether to admit evidence of prior abuse in criminal trials usually requires showing that the evidence should be admitted for a purpose indicated in the list of exceptions: intent, motive, identity, common scheme or plan, the absence of mistake or accident. Courts in many jurisdictions have held that evidence that a defendant has perpetrated abuse against a child is admissible for specific purposes that are narrower than those recognized in civil proceedings. The United States Supreme Court allowed the evidence of prior child abuse to be admitted in criminal cases under the appropriate circumstances. In Estelle v.McGuire, 502 U.S. 62 (1991) Chief Justice Rehnquist voiced the majority opinion that admission of evidence on battered child syndrome did not violate the defendant's constitutional rights and stated that:

When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted

those injuries. Id., at 68. He concluded that whether or not the evidence was directly linked to the defendant, it was "probative on the question of the intent with which the person who caused the injuries acted." Id., at 69. Proof of the child's battered child status demonstrated that the child's death was the result of an intended act by *someone* and not an accident.

Many states have admitted prior abuse evidence to prove the intent with which fatal injuries to a child occurred. See, People v. Evers, 12 Cal Rptr. 2d 637 (Cal. Ct. App. 1993) (admitting prior abuse of decedent child and another child to show defendant's knowledge that serious injury or death could result from physical abuse and that fatal injury was not accidental.); Canaday v. State, 853 S.W.2d 810 (Tex. Ct. App. 1993) (upholding admission of prior abuse and evidence of failure to seek medical attention for child as sufficient to show defendant's intentional infliction of fatal injuries); and Worden v. State, 603 So. 2d 581(Fla. Ct. App. 1992) (where defendant argued fatal injury was accidental and injury was different type than prior injury, prior abuse admitted to prove criminal intent and absence of mistake by the defendant). State courts have allowed prior abuse evidence to establish a specific pattern of behavior toward the victim. State v.Tanner, 675 P.2d 539 (Utah 1983). Similar to civil cases, prior abuse of a child other than the child who is the victim of the criminal action is sometimes admitted as probative. In considering a defendant's appeal of conviction for felony child abuse and voluntary manslaughter, the Supreme Court of Wyoming held that prior abuse evidence was properly admitted to prove general intent in that the prohibited conduct was undertaken voluntarily. Longfellow v. State, 803 P.2d 848 (Wyoming 1990).

There are decisions which indicate that the issues of proof of elements, unfair prejudice to the defendant and proximity of the prior abuse to the charged incident put some limitations on the admission of such evidence. In remanding a second-degree murder case, the Louisiana Supreme Court said the evidence was not admissible to show intent when specific intent was not an element of the crime and it was not offered to rebut a defense such as accident, but it was admissible to show similarity if there was sufficient time proximity. State v. Humphrey, 381 So. 2d 813 (La. 1980). The Louisiana court then ruled that beatings that occurred ten months to the fatal beatings of two children were too remote to meet the requirement, but that beatings which occurred three days prior to the deaths were admissible to prove similarity. The issue of unfair prejudice to the defendant is illustrated by the reversal of convictions for felony child abuse and murder by a mother in Arizona. State v. Fernane, 914 P.2d 1314 (Az. Ct. App. 1995). In the Arizona case, the trial court had admitted testimony on the autopsy of another of the Defendant's children who had been killed by the child's father subsequent to beatings from the Defendant. The appeals court held that the evidence was inflammatory and that the prejudicial effect of the testimony outweighed its probative value. Id.

The benefit of admitting evidence of prior abuse is obvious and particularly important in cases of child protection and termination of parental rights when the child's care and future interests are at stake. Admission of such evidence in criminal trials has to meet a higher evidentiary standard. Yet, its value to justice and protection of other children who may subsequently come within the care and control of a person who is inclined toward abusive behavior requires that the courts consider admission of the evidence and allow it where appropriate.

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