

## **Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System**

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Fetal Alcohol Spectrum Disorder (FASD) is a clinically recognized disability. Persons with FASD are at a profound disadvantage within the criminal justice system. This article describes the range of deficits that characterize FASD and suggests that understanding FASD has important legal implications for the criminal justice system. Consideration is given to issues of suggestibility, witness reliability, false confessions and sentencing.

### Fetal Alcohol Spectrum Disorder (FASD) and Related Cognitive Deficits

Fetal Alcohol Syndrome (FAS) is considered the single most common nonhereditary cause of mental retardation, with prevalence estimates of from .5 to 3 per 1000 live births in the general population<sup>1</sup>. The diagnosis of FAS has typically been based on documented prenatal alcohol exposure in conjunction with a triad of characteristics including growth retardation, central nervous system (CNS) dysfunction and craniofacial anomalies (i.e., small eye slits, flat midface, thin upper lip). However, cognitive deficits can occur independently of morphological anomalies. In these cases, the diagnosis is Alcohol Related Neurodevelopmental Disorder (ARND) or Fetal Alcohol Effects (FAE). Recently the term Fetal Alcohol Spectrum Disorder (FASD) has been adopted as an umbrella term that refers to the full range of prenatal alcohol-induced impairments. FASD thus subsumes previous diagnostic categories (i.e., FAS, ARND, FAE). FASD is a lifelong disability; one does not “outgrow” it. Indeed, some FASD-related impairments may intensify over time.

Research employing magnetic resonance brain imaging techniques has revealed that FASD-related neurological deficits are uncorrelated with facial abnormalities<sup>2</sup>. Consequently, a child without distinctive morphological features may be as severely impaired in functional skills as someone displaying the full range of traditional diagnostic criteria. This means that that critical aspects of FASD – organic brain damage and the

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<sup>1</sup> K. Stratton, C. Howe & F. Battaglia (eds.), *Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention and Treatment* (Washington, DC: National Academy Press, 1996).

<sup>2</sup> See F. L. Bookstein, P. D. Sampson, P. D. Connor & A. P. Streissguth, “Midline Corpus Callosum is a Neuroanatomical Focus of Fetal Alcohol Damage”, *The Anatomical Record*, 269 (2002), 162-174; F. L. Bookstein, A. P. Streissguth, P. D. Sampson, P. D. Connor & H. M. Barr, “Corpus Collosum Shape and Neuropsychological Deficits in Adult Males with Heavy Fetal Alcohol Exposure”, *NeuroImage* 15 (2002), 233-251.

concomitant cognitive shortfalls -- are invisible to the naïve observer, thus allowing the police, counsel and the courts to “miss” the underlying pathology.

The CNS dysfunctions associated with FASD manifest in various cognitive deficits including problems with memory, language and social skills. Differences between children who have and have not been exposed to alcohol prenatally have been found for verbal memory<sup>3</sup>, nonverbal memory<sup>4</sup> and specific types of verbal or nonverbal memory, such as spatial memory<sup>5</sup>, auditory memory, and declarative memory<sup>6</sup>. Deficits in verbal memory continue through childhood to adolescence<sup>7</sup>. Similarly, social-behavioural problems are conspicuous and remain consistent throughout preschool, school age, and adolescence<sup>8 9</sup>. In addition, FASD children have inferior expressive and receptive language skills<sup>10</sup>. They are rated by teachers as having poor grammar, reading skills, written expression, and spelling ability<sup>11</sup>. These language impairments interfere with academic progress because FASD children have difficulty understanding their teachers and other adults. They learn to exploit nonverbal cues to maintain conversational flow, but their degree of comprehension may be much lower than it appears. They develop a glibness that belies their actual competence. Subtleties of language use are beyond them. Idioms or sarcasm are likely to cause confusion.<sup>12</sup>

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<sup>3</sup> S. N. Mattson, E. P. Riley, L. Gramling, D. C. Delis & K. Lyons-Jones, “Neuropsychological Comparison of Alcohol-Exposed Children with or without Physical Features of Fetal Alcohol Syndrome”, *Neuropsychology* 12(1) (1998), 146-153.

<sup>4</sup> K. L. Kaemingk, S. Mulvaney & P. Tanner-Halverson, “Learning Following Prenatal Alcohol Exposure: Performance on Verbal and Visual Multitrial Tasks”, *Archives of Clinical Neuropsychology* 18 (2003), 33-47.

<sup>5</sup> A. Uecker & L. Nadel, “Spatial Locations Gone Awry: Object and Spatial Memory Deficits in Children with Fetal Alcohol Syndrome”, *Neuropsychologia* 34(3) (1996), 209-223.

<sup>6</sup> H. Carmichael-Olson, J. J. Feldman, A. P. Streissguth, P. D. Sampson & F. L. Bookstein, “Neuropsychological Deficits in Adolescents with Fetal Alcohol Syndrome: Clinical Findings”, *Alcoholism: Clinical & Experimental Research* 22(9) (1998), 1998-2012.

<sup>7</sup> A. P. Streissguth, H. M. Barr, F. L. Bookstein, P. D. Sampson & H. Carmichael-Olson, “The Long-Term Neurocognitive Consequences of Prenatal Alcohol Exposure: A 14-year Study”, *Psychological Science* 10(3) (1999), 186-190.

<sup>8</sup> H. C. Steinhausen, & H. L. Spohr, “Long-Term Outcome of Children with Fetal Alcohol Syndrome: Psychopathology, Behavior, and Intelligence”, *Alcoholism: Clinical & Experimental Research* 22(2) (1998), 334-338.

<sup>9</sup> S. J. Kelly, N. Day & A. P. Streissguth, “Effects of Prenatal Alcohol Exposure on Social Behavior in Humans and Other Species”, *Neurotoxicology & Teratology* 22 (2000), 143-149.

<sup>10</sup> L. A. Janzen, J. L. Nanson & G. W. Block, “Neuropsychological Evaluation of Preschoolers with Fetal Alcohol Syndrome”, *Neurotoxicology & Teratology* 17(3) (1995), 273-279.

<sup>11</sup> *Supra* note 7.

<sup>12</sup> J. Conry, “Effects of Parental Substance Abuse on Children’s Development”, in S. Harrison & V. Carver (eds.), *Alcohol and Drug Problems: A Practical Guide for Counsellors (2<sup>nd</sup> edition)* (Toronto: Addiction Research Foundation, 1997).

‘Executive control’ is yet another domain of functioning that is compromised in FASD children. Planning, organizing and learning from past mistakes are not in their repertoire. They are egocentric, impulsive and very concrete in their thinking. Typically they do not make connections between cause and effect, anticipate consequences or take the perspective of another person.

In *R. v. J. (T.)*<sup>13</sup> the Yukon Territorial Court set out in vivid detail some of the forensically significant attributes of FASD:

... The cognitive processes that most people use to regulate their conduct and to adapt to their social environment are located primarily in the anterior frontal lobe of the brain. The effect of alcohol on the fetal brain is such that this region does not develop sufficiently to allow the FAS individual to appropriately control his or her actions. As such, FAS patients tend to be impulsive, uninhibited, and fearless. They often display poor judgment and are easily distracted. Difficulties in perceiving social cues and a lack of sensitivity often cause interpersonal problems.

FAS patients have difficulties linking events with their resulting consequences. These consequences include both the physical, e.g. getting burned by a hot stove, and the punitive, e.g. being sent to jail for committing a crime. Because of this, it is difficult for these individuals to learn from their mistakes. Lacking sufficient cognizance of the threat or fear of consequences, the FAS patient is less likely to control his or her impulsive behaviour. Similarly, FAS individuals have trouble comprehending that their behaviour can affect others. As such, they are unlikely to show true remorse or to take responsibility for their actions.

### Some Forensic Implications

This constellation of deficits poses significant obstacles to the fair treatment of FASD persons in the criminal justice system. Persons with FASD, as a group, challenge the underlying premise that defendants understand the relationship between actions, outcomes, intentions, and punishment. The treatment of FASD defendants raises fundamental questions about how we assess individual responsibility, both at the guilt-determining and sentencing stages of the adjudicative process. It raises questions, as

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<sup>13</sup> (1999) Y. J. No. 57

well, about the appropriateness of law enforcement and, more generally, the criminal law, as social control models for the management of FASD-related deviance.

The ability of FASD adolescents to comprehend the consequences of their actions is severely compromised. One recent study<sup>14</sup> found that over 23% of youth remanded for psychiatric inpatient assessment in British Columbia suffered from FASD. For many, the risk of conflict with the law is even greater in adulthood when the structure and supervision provided by parents or schools no longer obtain. For most FASD defendants, the response of the criminal justice system only exacerbates their difficulties. As Conry and Fast<sup>15</sup> note, during legal proceedings

an accused person with [FASD] may give a false confession or a false statement and, in court, may appear confused or give contradictory explanations. A witness .. may interpret questions too literally or deny something that seems obviously true. The victim with [FASD] may not clearly remember details of time, place, and sequence, and may be easily influenced by leading questions.

Witnesses and complainants who suffer from FASD are equally vulnerable<sup>16</sup>.

The participation rates of FASD persons in criminal proceedings, raise a wide array of concerns, including but not limited to issues related to investigative procedures, witness advocacy, fitness to stand trial, diminished responsibility, pre-trial diversion, effective representation, the role of expert evidence, persistent recidivism, special supervision needs during probation and parole, testimonial capacity and reliability, false confessions and sentencing. This paper provides an introduction to these last three issues, with particular emphases on the plight of young persons – both defendants and complainants -- who suffer from the disorder.

(a) *Suggestibility/FASD Witnesses: Confusing Fact with Fiction*

There is no shortage of evidence that people without any apparent impairments are susceptible to suggestion and diverse social pressures. During the Martensville, Saskatchewan sexual abuse scandal, many family members and several police officers were charged with engaging in various acts of child abuse, including oral and anal sex, locking a naked child in a cage, and anal penetration with an axe handle. One child testified to seeing a boy's nipple cut off and eaten. All but one of over a hundred charges

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<sup>14</sup> D. K. Fast, J. L. Conry & C. A. Loock, "Identifying Fetal Alcohol Syndrome (FAS) Among Youth in the Criminal Justice System", *Journal of Developmental and Behavioral Pediatrics* 20 (1999), 370-372.

<sup>15</sup> J. Conry & D. K. Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* (Vancouver: The Law Foundation of British Columbia, 2000) at 3.

<sup>16</sup> R. LaDue & T. Dunne, "Legal Issues and FAS", in A. Streissguth & J. Kanter (eds.) *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (Seattle: University of Washington Press, 1997); C. Barnett, "A Judicial Perspective on FAS: Memories of the Making of Nanook of the North", in A. Streissguth & J. Kanter (eds.) *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (Seattle: University of Washington Press, 1997).

were eventually dismissed. The Saskatchewan Court of Appeal in *R. v. Sterling*<sup>17</sup> observed that:

...the use of coercive or highly suggestive interrogation techniques can create a serious and significant risk that the interrogation will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.

The case law<sup>18</sup> and scientific literature offer many examples of both children and adults having been induced to describe non-experienced events<sup>19</sup>. Controlled laboratory studies have confirmed the ease with which leading and suggestive questions can provoke entirely false accounts, including reports of genital touching<sup>20</sup>.

*R. v. R. (A)*<sup>21</sup> is a telling and recent Canadian illustration of the problem. The accused was charged with 4 counts of sexual misconduct involving his adopted daughter who was 11 when the assaults were alleged to have occurred and 14 at the time of trial. The daughter was first diagnosed with FAS when she was 7. Two independent psychological assessments, conducted at ages 11 and 13, referred to pronounced deficits in her expressive and receptive language abilities:

It is necessary to be very concrete and to keep the questions very, very short as the more words there are in the question, the more confused C can become.

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<sup>17</sup> (1995) S. J. No. 612 (C.A.)

<sup>18</sup> The recent judgement in the case of Richard Klassen (see *Kvello v. Miazga*, 2003 SKQB 559) details equally heinous allegations which, despite the prosecutions that followed, had no basis in fact. For similar U. S. cases, see *State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (N.J., 1994) and *State v. Fijnje*, 11th Judicial Circuit Court, Dade County, Florida, #89-43952 (1991).

<sup>19</sup> W. Bernet, "Case Study: Allegations of Abuse Created in a Single Interview", *Journal of the American Academy of Child and Adolescent Psychiatry* 37(7) (1997), 966-970; M. Bruck, & S. Ceci, "Amicus Brief for the Case of *State of New Jersey v. Margaret Kelly Michaels* Presented by Committee of Concerned Social Scientists", *Psychology, Public Policy, & Law* 1(2) (1995), 272-322; M. Garry & D. L. Polaschek, "Imagination and Memory", *Current Directions in Psychological Science* 9 (2000), 6-10; E. F. Loftus, "Creating False Memories", *Scientific American* 277 (September, 1997), 70-75.

<sup>20</sup> S. Garven, J. Wood & R. Malpass, "Allegations of Wrongdoing: The Effects of Reinforcement on Children's Mundane and Fantastic Claims", *Journal of Applied Psychology* 85 (2000), 38-49; S. J. Lepore & B. SESCO, "Distorting Children's Reports and Interpretations of Events Through Suggestion", *Journal of Applied Psychology* 79 (1994), 108-120; D. A. Poole & D. S. Lindsay, "Interviewing Preschoolers: Effects of Nonsuggestive Techniques, Parental Coaching, and Leading Questions on Reports of Nonexperienced Events", *Journal of Experimental Child Psychology* 60 (2001), 129-154; D. A. Poole & D. S. Lindsay, "Children's Eyewitness Reports After Exposure to Misinformation from Parents", *Journal of Experimental Psychology: Applied* 7 (2001), 27-50.

<sup>21</sup> (2003) Carswell Ont 1401 (OSCJ). The case resulted in an acquittal. The senior author was retained as an expert witness by the defence.

A test measuring her memory for meaningful material was administered. [...] Even a simple sentence was difficult for her. At times she confabulated from a single word, almost making up a sentence with different ideas in it.

C is very vulnerable to suggestion and also is likely to become confused when questions are lengthy or involved. She will have considerable difficulty responding to questions requiring her to remember things that happened three years ago. [...] In a normal courtroom setting, C will not be able to maintain a consistent and believable story.

The evidence showed that the complainant had reported, at various times, that her father had had sex with her one time, four times, 10 times, 40 times, and, finally, every day during a 12-month period. During the preliminary inquiry she reported having had sex with her playmate's six year-old brother. In a police interview conducted two years later, she described sexual activities that she had never mentioned on any previous occasion. While investigative irregularities further jeopardized the reliability of the complainant's testimony, the elasticity of her accounts posed the largest challenge to the court's truth-seeking function. Most importantly, the dubious reliability of the complainant's statements was less a product of her own idiosyncrasies or any investigative overreach than it was a reflection of the frailties inherent in the testimony of any person with FAS.

The American case of *U. S. v. Butterfly*<sup>22</sup> offers a rare appellate pronouncement on the forensic impact of FAS. In *Butterfly*, the U. S. 9<sup>th</sup> Circuit Court of Appeal reversed convictions for the sexual assault of four boys, all of whom had been diagnosed with FAS. During a previous appeal, the defendants had not been permitted to submit evidence showing that FAS had compromised the reliability of the boys' testimony. All four "victims" subsequently recanted. Their initial accounts included testimony about several murders for which no evidence was ever unearthed. "[F]etal Alcohol Syndrome", said the court, "often makes it difficult for its victims to separate fact from fiction." One boy's therapist testified that the boy did not know whether his stories of abuse were true or false.

(b) *Suggestibility/FASD Suspects: The Spectre of False Confessions*

Juvenile "false confessions" have recently attracted considerable judicial scrutiny<sup>23</sup>. The convictions of five teenagers in the infamous 1989 "Central Park Jogger" rape case were vacated in December 2002. DNA evidence implicated a different culprit

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<sup>22</sup> (1999) WL 369954 (9th Cir.)

<sup>23</sup> See M. B. Johnson "Juvenile *Miranda* Case Law in New Jersey, from *Carlo*, 1966, to *JDH* 2001: The Relevance of Recording All Custodial Questioning", *Journal of Psychiatry and Law* 30 (2002, Spring), 3-57. More generally, the Supreme Court of Canada acknowledged the very real risk of false confessions in *R. v. Oickle* [2000] 2 S.C.R. 3. See also W. S. White "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions", *Harvard Civil Rights & Civil Liberties Law Review* 32 (1997), 105-156.

who had acted alone. The original convictions rested on their videotaped confessions<sup>24</sup>. In 1998, two young boys (aged 7 and 8) in Chicago confessed to the murder and sexual assault of an 11 year-old. The boys had been interviewed individually without a parent or lawyer present. The charges were later dropped when DNA evidence linked the assault to an adult with a record of sexual offences<sup>25</sup>. That same year, a 14 year-old in San Diego confessed to the murder of his sister after 11 hours of questioning. The confession was later ruled inadmissible and another man was indicted through the use of DNA evidence<sup>26</sup>. While the age of the initial suspects in each of these cases undoubtedly rendered them especially vulnerable, their “confessions” are largely attributable to the potency of police interrogation methods<sup>27</sup>. The vulnerability of suspects with FASD – and thus the risk of false confessions – is greater still. As Professor Yarmey<sup>28</sup> of the University of Guelph cautions: “What is the worth of a confession given by someone who is intellectually handicapped, and/or extremely frightened, anxious, hyper-suggestible and overly compliant? Probably very little.”

Whatever its worth as accurate reportage, the inculpatory value of a confession cannot be overestimated. Police and prosecutors have little incentive to look beyond the face validity of an admission of guilt, particularly when it conforms to the police theory of the case. The American case of *State v. Christoph*<sup>29</sup> provides an extreme version of such single-mindedness. The defendant, who had been diagnosed with FAS, told a staff member at a psychiatric facility that she had abused her younger sister. The police promptly charged her with first-degree rape. The alleged victim was never interviewed. The appellate court affirmed the finding of a lower court of appeal that there was no evidence a crime had been committed: “. . . a minimally adequate investigation could have discovered [the defendant’s] documented long-term mental and emotional difficulties and sufficient exculpatory evidence to warrant dismissal of the information. . .”

In most cases, the underlying problem is widespread ignorance of (or, at best, insensitivity to) the cognitive impacts of FASD. Defence counsel are likely no better informed than police and prosecutors. While not specific to confessions, the U. S. case of

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<sup>24</sup> *New York v. Wise et al.*, Affirmation in Response to Motion to Vacate Judgment of Conviction, Indictment No. 4762/89 (December 5, 2002).

<sup>25</sup> A. Kotlowitz, “The Unprotected”, *The New Yorker*, 2/8/99, 42-53.

<sup>26</sup> S. A. Drizin & B. A. Colgan, “Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From Juvenile Suspects”, in G. Daniel Lassiter (ed.), *Interrogations, confessions, and entrapment*, (New York: Plenum, 2004).

<sup>27</sup> See S. Kassin, “The psychology of confession evidence”, *American Psychologist* 51 (1997), 221-233; S. Kassin & K. L. Kiechel, “The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation”, *Psychological Science* 7 (1996), 125-128; G. Daniel Lassiter (2004) *supra* note 26.

<sup>28</sup> D. Yarmey, “Police Investigations”, in R. Schuller & J. Ogoloff (eds.), *Introduction to Psychology and Law: Canadian Perspectives*, (Toronto: University of Toronto Press, 2000) at 81.

<sup>29</sup> (2000) WL 1854134 (Wash. App. Div. 3)

*State v. Brett*<sup>30</sup> highlights the problem. There, the Washington Supreme Court, in vacating a death sentence, held, that the appellant (who suffered from FAS) had been denied the effective assistance of counsel during the penalty phase of his prosecution for murder:

When defense counsel knows . . . of mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into the defendant's medical and mental health, have such problems fully assessed and, if necessary, retain qualified experts to testify accordingly.

(c) *Sentencing*

Convicted FASD persons are, by definition, special need defendants. The special programs and services essential to meeting these needs are woefully lacking. Too frequently, sentencing courts are simply unaware of the disability. Even when aware of the complexity of problems associated with FASD persons<sup>31</sup>, sentencing courts are too often powerless to craft an appropriate disposition or are frustrated in their efforts to do so. The necessary programs are simply unavailable. Even courts that are mindful of the problem are frustrated in their efforts to fashion responsive dispositions. For example, in *R. v. K. (L. E.)*<sup>32</sup>, as part of a probation order a youth court judge directed that a youth court worker with specialized training in organic brain impairment be assigned to the FASD defendant's file and, further, that a detailed service plan for the accused be provided to the judge on the day of the youth's release. The Saskatchewan Court of Appeal set aside these portions of the probation order because they exceeded the court's jurisdiction. The court, however, was not unaware of the dilemma posed by FASD defendants:

Having said all that, it must be recognized that the youth court judge in this case was attempting to act in the best interests of the young offender and to obtain for him the best treatment possible. She was attempting to ensure that the young offender who suffers from fetal alcohol syndrome (FAS) would receive the kind and type of treatment and post-disposition care most appropriate to permit him to function in society. Her motivation and that of her colleagues in similar cases is to try to break the cycle of criminal behaviour. When one reads her reasons and those rendered by youth court judges in other cases dealing with FAS (see for example, *R. v. L. (M.)* (2000), 187 Sask.

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<sup>30</sup> (2001) 16 P. 2d 601

<sup>31</sup> Some Canadian cases bearing on FASD-related issues can be found in Conry and Fast's groundbreaking monograph: *supra*, note 15.

<sup>32</sup> (2001) SKCA 48

R. 195, 45 W. C. B. (2d) 86 and *R. v. D. (W.)* (2001), 49 W. C. B. (2d) 25.) one discerns a clear cry for assistance and help. There is a strong request for help from the provincial authorities to assist youth court judges with appropriate programs so they can impose dispositions that will assist in breaking the insidious cycle of in/out as exemplified by this young offender who, at 16 years of age, has a string of at least 45 convictions. As Judge Stuart pointed out in *R. v. Sam* [1993] Y. J. No. 112 (QL) this is not a complex legal case as much as a complex medical case and the goal should be one of attempting to ensure that the young offender receives appropriate treatment, a goal which requires an aggressive comprehensive intervention and preventative treatment program. The difficulty is that at the moment no such program exists.

*R. v. Gray*<sup>33</sup> paints a similarly disheartening picture of the prospects for FASD persons caught in the revolving door of criminal justice in British Columbia.

#### Conclusion

Reported decisions of judicial efforts to grapple with the challenges posed by FASD are exceptional. More typically, police, prosecutors, defence counsel, judges and the general public are profoundly uninformed about the disorder. Training and education are crucial. Front-line judges need legislative and appellate sanction to fashion FASD-sensitive dispositions.<sup>34</sup> Absent special programs and support services, FASD offenders have a reduced probability of parole because they are unlikely to demonstrate “progress” or rehabilitation. In any event, sending FASD persons to jail to “learn a lesson” is futile because of their impaired appreciation of cause and effect. Indeed, almost any sentence founded on specific or general deterrence is meaningless.

There are no simple answers to the challenges presented by FASD, but recognition of the problem is a *sine qua non* of its solution. A modest first step involves the cataloguing and analysis of recurring FASD-related legal issues, and the identification of the best practices and strategies for dealing with each of them.

#### Notes

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<sup>33</sup> (2002) BCSC 1192

<sup>34</sup> K. A. Kelly “The Victimization of Individuals with Fetal Alcohol Syndrome/Fetal Alcohol Effects”, *TASH Connections*, (Aug./Sept., 2003), 29-30.