Collateral Consequences for Delinquency Clients Who Want to Join the Military.
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Finding a way to partner with your soon-to-be ex to create that new post-divorce family is the biggest gift that you can give to your children.

Representing Child Abuse Victims - Forensic Interviewing Tips, Vol. 34, No.4.
By: Claire Chiamulera, Legal Editor, ABA Center on Children and the Law
Representing Child Abuse Victims: Criminal Court Strategies, Vol. 34, No.6.
By: Claire Chiamulera, Legal Editor, ABA Center on Children and the Law

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By: ABA Center on Children and the Law, ABA Child Custody and Adoption Pro Bono Project (2008)


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Collateral Consequences for Delinquency Clients Who Want to Join the Military.

By: Jared M. Trujillo, Esq.

Juvenile adjudications are usually considered civil matters rather than criminal. Almost every state allows ex-offenders to seal or expunge their records, and many states limit the disclosure of delinquency adjudications. However, for the purpose of joining the military, delinquent adjudications are considered criminal actions, similar to criminal convictions, and they must be disclosed before one can enlist. Further, pursuant to 10 U.S.C. § 504(a), any felony juvenile adjudication will permanently disqualify an offender from serving in the armed forces. While the statute gives the military discretion to make exception to this policy; currently the military can be selective because it does not need a lot of new recruits, and the military does not frequently grant these policy exceptions to recruits with delinquency adjudications. Moreover, when juvenile defense attorneys discuss plea agreements with their clients, they should note that all judicial intervention must be disclosed during recruitment. This could significantly impact a juvenile’s decision about whether to agree to a favorable plea or a pretrial diversionary program. Usually, successful completion of these programs avoids a finding of juvenile delinquency on the youth’s record. However, for the purpose of enlisting in the military, these infractions will be viewed as criminal actions.

Finally, juvenile defense attorneys should counsel their clients on the irrevocable nature of juvenile adjudications. Potential recruits must disclose past adjudications even if the records were sealed or expunged, and it will be considered a criminal action for the purpose of enlistment. Even if an attorney reopens the case in the future to change the original finding of delinquency to not guilty, or has the case dismissed, the military will still consider it a criminal action for the purpose of enlistment. Failure to disclose these adverse adjudications could be discovered during a background check, and the ex-offender could be charged with fraudulent enlistment under 10 U.S.C. § 883(1).

As juvenile offenses can have a long and harsh impact on youth who hope to join the armed forces, juvenile defense attorneys should carefully counsel their clients about the collateral consequences.¹

¹ Each branch of the military uses different criterion to determine whether potential recruits are eligible to serve. This article briefly details universal criteria that the branches use. Juvenile defense attorneys should consult military recruiters for the branch that their client is interested in when discussing the collateral consequences of delinquency adjudication with their client. See U.S. Gen. Accounting Office, Military Recruiting: New Initiatives Could Improve Criminal History Screening (1999) [hereinafter GAO Military Recruiting], available at http://www.gao.gov/archive/1999/ns99053.pdf.
Oklahoma Recognizes Juvenile Right to be Competent to Stand Trial.
By: Amanda L. Feldman, Esq.

Oklahoma joins forty-five other states and D.C. in recognizing the right for juveniles to be evaluated for competency to stand trial prior to adjudication (exceptions: Alaska, Hawaii, Mississippi, and Rhode Island). Governor Fallin signed Senate Bill 457 into law, overturning an almost twenty year-old appellate court decision that competency is irrelevant for juveniles due to the rehabilitative nature of the delinquency system (G.J.I. v. Oklahoma, 778 P.2d 485 (Okla. 1989)). Competency is defined as a child’s ability to understand the proceedings against the child or assist in the child's defense. Oklahoma also codified conditions that would render a juvenile incompetent, including developmental or intellectual disability, and mental illness. Of particular note, is the inclusion of “developmental immaturity.”

Developmental immaturity is the combination of age and significant lack of skills not otherwise attributable to the aforementioned three conditions. The associated skills that impact competency include risk perception, future orientation, and susceptibility to peer/authority influence. Juveniles’ tend to give greater weight to rewards and minimize potential risk, which may impact their ability to assist in their defense. For example, juveniles may not communicate with attorneys valuable information due to mistrust of confidentiality, even if it the information may mitigate the type of disposition. Immature future orientation development also ties into juveniles’ ability to consult with counsel and their understanding of the adjudication process. A juvenile may want to plead guilty hoping to return home quicker without realizing the impact on future plans, such as college acceptance or employment. Juveniles are more likely to make decisions due to the influence of others. They may act oppositional to their attorneys to gain peer approval/avoid peer rejection. Thus, a juvenile’s decisions may be unduly impacted by others. Oklahoma’s inclusion of immaturity allows competency evaluators to consider these factors when providing their opinions to the court, rather than relying on the traditional disability conditions.
Splitting the Baby in Two: Legislating Shared Custody.

By: Lydia S. Antoncic, Esq.

Notions about which custody arrangements are in the “best interests of the child” may be headed for some major revamping. For some time there has been a presumption that a child needs a “home base” and that “alternating physical custody” could “further the insecurity and pain frequently experienced by the young victims of shared families.” Part of this belief comes from society’s mistaken view that divorced families are somehow “broken” and result in maladjusted children. However, psychological studies over the last thirty years are concluding the opposite, and find that children in joint physical custody arrangements are better adjusted than those in sole-custody arrangements, and on par with children in intact families.

One explanation for this is that any maladjustment usually stems from the absence of both parents in a child’s life.

Recent studies teach us that identifying a child’s attachment to her mother and/or father requires different measures. For example, secure attachment to the mother is usually identified in matters relating to sensitivity, or who the child turns to when in distress. Attachment to the father, however, occurs when a father provides security to the child while also encouraging exploration and play, teaching the child how to effectively regulate stress. Identification of these differences has emphasized the importance of having both parents participate in their child’s emotional development.

A number of state legislatures are taking note and creating a presumption in favor of joint physical custody arrangements. While New York has no such presumption, all that could change. S2382-201, if enacted, would create a shared parenting presumption in New York. The bill would amend Domestic Relations Law §240(1) and Family Court Act §654 and establish an order of preference in awarding custody of a minor, with the first preference being shared custody (unless the parties agree otherwise), followed by custody to either parent.

The purpose of the legislation, according to the bill’s legislative memo, is to insure that “both parents share in the care and upbringing of their children.” The bill’s legislative memo cites to psychological studies (including 38 state sponsored projects and reports from the National Institute of Mental Health) indicating that children of all ages benefit from the full participation of both parents, and that arrangements that effectively exclude one parent interfere with a child’s normal development. The memo notes that although nothing in current law prohibits awarding shared parenting, courts rarely do so. In fact, only a handful of New York courts have awarded shared parenting. Women’s groups have historically opposed shared custody legislation likely because statistically women are usually awarded primary physical

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custody. However, given recent passage of the Marriage Equality Act, it’s time to reexamine these positions.

Various states and countries have recognized the benefits of an “equal” or shared residential custody preference. Under the proposed New York bill, where shared parenting is being considered, both parties would be required to submit a proposed parenting plan. Where shared parenting is disputed, the party requesting sole custody would have the burden of proof to demonstrate that shared parenting is not in the child’s best interests. If a court concurs, it must state the reasons for not awarding shared parenting in its decision.

People often get divorced because they disagree on things like different parenting styles or preferred activities, which force them to grow apart. Their children, however, have a right to be exposed to these differences to better understand their parents as well as themselves. Aside from benefitting children, a shared parenting presumption would greatly reduce costly custody litigation and re-litigation. A child needs the active involvement of both parents, and with the exception of cases involving domestic violence or severe acrimony, shared parenting is almost always in a child’s best interests.

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8 See, West’s Ann.Cal.Fam.Code § 3040; See also, In the Interests of Children, National Family Law Section, Canadian Bar Association, pp. 8-10 (June 2010) (referencing statutes in Belgium, Denmark and Australia that state a preference for shared residential custody); Children Need Both Parents Even After Divorce, National Review, May 18, 2015 (discussing Wisconsin’s legislative presumption that shared parenting is in the child’s best interests).
Parents and Divorce: How to Put the Children First.
By: Lydia S. Antoncic, Esq.

As a divorce attorney, I often hear folks saying “my kids come first,” but many often don’t realize how that fully plays out during a divorce. Having had the privilege of representing many kids in Supreme and Family court, I can say with confidence that the most important way that you can put your children first is to only do battle when there is absolutely no other choice. The two of you may no longer be right for each other, but that doesn't mean that you are no longer a family, just a different kind of family. Finding a way to partner with your soon-to-be ex to create that new post-divorce family is the biggest gift that you can give to your children.

So how do you do that? First off, consider mediation. Mediation is where a neutral third-party helps you and your spouse reach agreements that you can both live with. Neither of you will get everything you want, but you will make the decisions together, as opposed to leaving your family’s fate in the hands of the court system. Second, decide what’s really worth fighting over, and of those things, make sure that there is truly no room for compromise.

Custody is often the biggest source of contention, but it doesn’t have to be. Don’t confuse physical and legal custody, and unless there’s domestic violence or abuse, it makes little sense to fight over the latter. Legal custody is about who makes “major” decisions regarding the child (things like medical procedures, education and religion). In joint legal custody situations both parents are involved and participate in the decision-making process. Before doing battle over legal custody ask yourself: Do I really not trust my ex to have our child’s best interests at heart when considering major decisions? Would my child want their other parent excluded? And often overlooked, do I want the burden of making these major decisions (and potential mistakes) on my own. As I learned through my own personal experience when my ex-husband died, it is scary to make major decisions involving your child without having input from the only other person on the planet that loves your child as much as you do.

Physical custody is about where the child lives. This can be joint (50/50 or any variation), or primary physical custody to one parent with the other having parental access (visitation). This is the area most couples fight about, as it not only decides where the child will primarily live, but who pays child support to who (in 50/50 cases the higher earning spouse pays the other). But even here, it is important to remember that your child needs both parents. Your ex may parent differently than you do, and in most cases, that’s not only OK, but will result in your child being better-rounded.

The whole idea of marriage being forever is outdated—and evolved at a time when the average life span was about 35. Being divorced does not mean your family is “broken,” and it’s important that your child gets that message. Be creative about including your ex in major events in your child’s life, so that your child never feels like he/she comes from a “broken” home, but just a different type of family—one where mommy and daddy don’t live together anymore, but still respect each other and are there for the child 100%. It is hard for kids to have two graduation parties, two bar/bat mitzvahs, two birthday dinners, etc. Again, this may not be possible in some situations, but it is well-worth the effort.
Issues involving finances can be more difficult because every family member will have to adjust to the fact that two households cannot be supported in the same manner as one. If one parent is stay-at-home this often means going back to work, and if one or both parents are working, it can mean looking for higher-paying work with longer hours. This can create frustration on all sides, but remember that, except in rare cases, both parents want the highest standard of living for their children, making this is another good opportunity to partner with your ex as to how to achieve that and teach your children that there are things more important than money.

Telling your children you love them and are there for them is easy. What’s not so easy is to keep them in mind when doing battle with your ex—or better yet finding the strength to not do battle at. In the end, your kids will thank you for it.
Representing Child Abuse Victims - Forensic Interviewing Tips, Vol. 34, No.4.
By: Claire Chiamulera, Legal Editor, ABA Center on Children and the Law

In Part 1 of this article, Joanne Solchany, PhD, ARNP, looked at child development stages for children from infancy through adolescence and highlighted how trauma interplays with these stages. In Part 2, Julie Kenniston, MSW, LISW offers guidance on forensic interviews with child victims in court. In Part 3, Steven Kelly, JD, will share tips on developing a litigation strategy in criminal court. The articles are based on a webinar developed for Navy Special Victims Counsel and co-hosted by the ABA Center on Children and the Law and the Center for Professional Development on October 16, 2014.

The secret to successful forensic interviews with child abuse victims? Developmental sensitivity.

"I'm going to tell you how to take information about development and put it into your language so you can maximize the amount and accuracy of information you get from children and minimize potential trauma," said Julie Kenniston, MSW, LISW. As Kenniston framed her presentation for attorneys who represent child sexual assault victims she boiled down her approach to three key elements:

1. Give three interview instructions.

After introducing herself and asking something about the child to establish rapport, Kenniston lays out three basic instructions before starting a forensic interview. The instructions empower children during the interview process

Correct me if I make a mistake. With younger children, it may help to give an example (e.g., Question: "If I said you were 30, what would you think?" Answer: "I'm NOT 30! I'm 6." Let them know that's what you want them to do - tell you when you're wrong and correct you.

Say "I don't know." Don't guess. Use this question to illustrate: "If I asked you what I had for breakfast this morning, what would you say?" The child should say "I don't know." Follow up by saying that's what you want them to say when they don't know the answer.

Say "I don't understand." Be clear that it's ok for the child to speak up and say he doesn't understand something. It is especially important in the court process where words are often long and have different meanings (court = place to decide legal issues AND place to play basketball).

2. Use Narrative Event Practice (NEP)

At the core of a successful forensic interview is Narrative Event Practice. "NEP will make the biggest difference in determining if a child is competent," said Kenniston. She explained that it demonstrates three elements of competency (see box). NEP also teaches kids how to communicate and makes them the expert in telling their own situations, she said. NEP is an interviewing tool that allows the interviewer to practice asking questions with the child before an actual forensic interview.
How does NEP work? Kenniston outlined the steps:

- Pick a neutral topic (e.g., something the child told you she was interested in, but avoid questions relating to the abuse or trauma).
- Ask the child to tell you everything about the topic.
- Don't interrupt and allow pauses.
- Follow up with "narrative inviting" questions to elongate the conversation and teach the child how to talk with you (e.g., "So John, I heard you say that you got ready for soccer. Tell me all about that versus "What color is your uniform?" that invites a one-word response.)
- Focus on actions - what the child did (e.g., getting ready for soccer versus description of field). Research shows much richer information is obtained by focusing on what the child did.
- Listen to the child's ability to describe activities in logical sequence.

In addition to helping determine a child's competency, the approach offers benefits to the child. It helps engage the child and prepare him for the courtroom experience. Kenniston noted how NEP allows the interviewer to explain and practice with the child how information will be shared. Through NEP, the interviewer shows the child she will listen and pay attention, that she is interested in what the child has to say and won't interrupt, and that the child is the expert in his own life details and will have the chance to share them.

NEP also benefits the interviewer by providing a baseline of the child's ability and willingness to communicate. Through narrative inviting and posing open-ended questions, it provides data that is unsolicited or suggested by the interviewer. The interviewer is able to get a sense of the child's perception of events and ability to observe. Information shared through NEP can be corroborated by a multidisciplinary team in investigative activities after the interview. The interviewer can also refer back to NEP if the child is having trouble communicating or using fewer words during a forensic interview ("Remember when we talked about how you got ready for soccer...")

3. Focus on Who, What, Where Questions

When questioning children, questions tend to fall into seven types:

- Who
- What
- Where
- When
- How an
• How many times
• Why

All children should be able to answer the first three questions: who, what, where. Kenniston cautioned against venturing into when, how long, how many times, and why questions, all of which can create problems. When questions create issues because it's often hard for kids to recall time. Similarly, how long questions are time-based. It is unrealistic to expect kids to give a number in response to how many questions. Why questions often make a child feel blamed and create confusion because they ask for someone else's motivation for doing something.

Who, what, and where ask for concrete information that most children can handle. Younger children, especially, are concrete and literal in their thinking. Questions seeking more abstract information may cause a child to shut down or guess.

Kenniston's three elements—clear interview instructions; Narrative Event Practice; and who, what, where questions—will kick start a successful forensic interview with a child victim. Try them out in your next child interview to see if they help focus interviews and bring positive results.

Claire Chiamulera is CLP's editor.

**NEP and Child Competency**

What makes a competent witness? Kenniston outlined these elements:

- Ability to recollect and recall Information—demonstrate there is a memory you are accessing and verbally sharing it.
- Ability to perceive information accurately.
- Ability to differentiate truth from lies—demonstrate this knowledge and know what will happen if a lie is told. (For many years, competency determinations focused considerably on this element and demonstrations of the child's understanding of truth and lies. More recent research finds just saying "Do you promise to tell the truth?" is the critical piece, Demonstrations of understanding of truth and lies do not provide information on whether the child will actually tell the truth.)
- Ability to speak from personal knowledge of the facts.
- Interviewers can use NEP to establish these competency elements.
Representing Child Abuse Victims: Criminal Court Strategies, Vol. 34, No.6
By: Claire Chiamulera, Legal Editor, ABA Center on Children and the Law

In Part 1 (March 2015), Joanne Solchany, PhD, ARN P, looked at child development from infancy through adolescence and how trauma interplays with these stages. In Part 2 (April 2015), Julie Kenniston, MSW, LISW offered guidance on forensic interviews with child victims in court. In Part 3, Steven Kelly, JD, shares tips on developing a litigation strategy in criminal court. The articles are based on a webinar developed for Navy Special Victims Counsel, co-hosted by the ABA Center on Children and the Law and the Center for Professional Development on Oct 16, 2014.

If you represent a child abuse victim in criminal court, you may feel you have the lower hand. "Your client is not a party. Everyone will remind you of that," said Steven Kelly, 3D, a victims' rights lawyer, describing some of the challenges. Kelly heads a crime victim litigation practice at Silverman, Thompson, Slatkin and White, LLC in Baltimore, MD. He shared his tips for attorneys representing child abuse victims in criminal cases.

Identify the Child's Rights
A common client question is "What can I assert?" said Kelly. He stressed that clients have procedural rights. These include the rights to be informed of relevant proceedings, be present at proceedings affecting them, receive restitution, be protected, and be afforded privacy and confidentiality.

Beyond these rights, Kelly described child victims' rights in criminal court as "a new frontier in law." He explained that "the criminal justice system is a closed system and you are an outsider. You need to arm yourself and show that other courts have recognized victims' rights." (See Recognized Child Victims' Rights below for some recognized child victims' rights violations.)

How? "There is a body of law that can help," said Kelly. He encouraged child victim advocates to consult three organizations:

- Victim Law—has a resource guide for attorneys on victims' rights that includes cases and statutes on a variety of topics.
- National Crime Victims Law Institute—provides technical assistance, and amicus and appellate support on victims' rights.
- National Center for Victims of Crime—network of civil lawyers representing child crime victims and offering assistance with civil law matters (custody, guardianship).

Victim advocates located in law enforcement agencies and at state Child Advocacy Centers may also be good resources when identifying your client's rights.

Kelly also advised sitting down with the child victim, child's parents/caregivers, the child's therapist, and others who may have insights about the child. Use this time to gather
information about what the child wants, any fears the child has about the legal process, what rights the child has, and how to protect those rights.

**Assert the Child's Rights**

"Because victims' rights are weak, you need to be very proactive in your approach to protect their rights," said Kelly. A good place to start is with the prosecutor. Kelly urged child victims' advocates to take these steps:

**Reach out to the prosecutor early in the case:**

- Call the prosecutor first. Explain you're there to help, not run the criminal case.
- Express that you can serve as a conduit because you communicate with the child, the child's therapist, and others involved in the case. You don't have the same obligations regarding communications that the prosecutor has (e.g., turning over communications in discovery).
- Offer to act as a buffer between the child, child's support network, and the prosecutor.
- Ask about the defense lawyer and flag any issues the prosecutor sees.
- Remind the prosecutor that she needs to consult with you about pleas, releases, and restitution.

**Enter your appearance at proceedings immediately.**

Demand your client's rights, in writing, in a document that is filed with the court (many states have a victim notification form). Make the court aware you want to assert your client's rights by making a record with the court.

**Pursue Victim Impact Post-Trial**

While you may not succeed at trial, "you often will score major victories post-trial with victims' rights," said Kelly. He urged child victims' advocates to gauge their clients' interest in pursuing victim impact after trial. Victim impact protects two important victims' rights, he said. First, it protects the child from re-victimization, and second it gives a face and voice to the victims.

When pursuing victim impact, Kelly stressed that the court needs to understand the child has been impacted. "Show how," he said. Most child abuse victims will only recover money through restitution, so it is key to show the financial, as well as the emotional, impact, he said. With quick actions early in the case and a creative approach to identifying and pursuing child victims' rights, attorneys representing child victims can help shape the victims' rights landscape in criminal court. Post-trial also offers good opportunities to protect child victims and prevent victimization by pursuing victim impact.

*Claire Chiamulera* is CLP's editor.

**Recognized Child Victims' Rights**

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Child's privacy not being protected through redaction. Federal rules require redaction of child victims' names. It is also possible to request redaction of names of adults who are connected to the child victims.

Testimonial accommodations. In many cases, testifying in open court may not be good for the child and alternatives (2-way closed circuit television, video depositions, support people) may be used. Most victims will want accommodations. Steps to take: 1) get the prosecutor's consent to accommodations in advance; 2) file a motion for accommodations well before trial. 3) line up an expert witness if required to prove need for accommodation.

Attempts to exclude child victim/victim's advocate from court proceeding. Be prepared to address (1) your client's right to be present, and (2) your right to speak on your client's behalf. Intrusive discovery (abuse by defense attorneys). Defense attorneys will seek every available record (e.g., social media postings). Steps to take: Resist these requests. Learn what information the prosecutor has and intends to share. File a motion seeking a protective order if necessary to prevent re-victimization through intrusive discovery.
By: ABA Center on Children and the Law, ABA Child Custody and Adoption Pro Bono Project (2008)

Introduction

Child custody and visitation disputes are among the most difficult for judges to decide. These disputes entail complex legal, social, cultural, economic, mental health, and related issues. They require judges to predict likely future behavior and outcomes, rely increasingly on competing expert testimony, and ultimately depend upon a broad, indeterminate standard of the “best interests of the child.” This best interests standard demands that courts decide cases in a way that ensures the well-being of children. For guidance, judges often have little more to consider than factors listed in the relevant state statute.

Case law on the best interests of the child is not always instructive. While the child’s best interests form the basis of most decisions, trial courts often recite the factors without making specific findings concerning each element. In many states, an appellate court opinion on best interests provides minimal guidance, because the lower court decision is only reversible if there was an abuse of discretion. To a child, therefore, the need for the trial court “to get it right” is all the more important, since reversal on appeal is unlikely.

We hope that this book will facilitate your decision making in a child's best interests with information on the following topics:

- Managing the contested child custody case.
- Representation for the child in complex custody cases.
- Understanding child and youth development to minimize the negative impact of divorce and separation on children and their families.
- Evaluating the parent-child relationship, parenting impairments, and parenting skills.
- Determining the types of mental health, home study, and other evaluations needed when making child custody decisions.
- Selecting appropriate professionals to conduct assessments.
- Considering complex issues such as supervised visitation, relocation, alleged domestic violence or sexual abuse, third party claims, and joint custody.

Although this book only addresses child custody decision making in civil child custody cases, we anticipate that it will be useful to you when you preside over other types of cases in which the best interests of the child standard applies, such as dependency, adoption, and guardianship cases. This guide will also benefit children’s attorneys and guardians ad litem who make recommendations to courts based on the best interests standards.

Find full Judge’s Guide at: