

LEGAL CONSIDERATIONS IN SEX ABUSE CASES IN FAMILY COURT

By Margaret A. Burt

Definition - Family Court Act 1012(e)(iii) - child under 18 years of age whose parent or other person legally responsible committed or allowed to be committed acts described in Rape 1st, 2nd or 3rd degree, Sodomy 1st, 2nd, or 3rd degree, Sexual Abuse 1st, 2nd or 3rd degree, Sexual Performance by a Child, Promoting Prostitution, Incest.

Legal Issues with Investigations

- **the medical exam problem**
- **advising the non-offending parent**
- **coordination but not coopting by law enforcement**
- **sequence and location of interviews**
- **role of validator**

Early Issues: Is there a “no reasonable efforts” possibility? Should the agency seek one? Should there be an attempt at a severe abuse finding at the Article 10 stage with clear and convincing evidence? Should there be an immediate filing of a severe abuse termination?

Evidentiary Considerations

- **lack of consent issue only for 17 year olds**
- **no corroboration requirement per se**
- **imminent danger question**
- **new issues with medical exams**
- **non-testimonial evidence can be ordered**
- **gratification issue**
- **special FCA 1046 rules that are helpful in sex abuse cases**
 - **derivative**
 - **res ipsa loquitur**
 - **child’s out of court statements with corroboration**
 - **some privileges are waived**
 - **medical records can be admitted if business records**

Evidentiary Possibilities

- **credible sworn testimony of child**
- **child’s out of court statements corroborated by other evidence such as listed or expert “validation” evidence**
- **child’s in court, sworn or unsworn but cross examined testimony as corroboration of out of court testimony**
- **medical proof**
- **eyewitness**
- **statements/confessions by respondents**
- **prior acts**
- **expert validation opinion testimony**

- **out of court statements by other children as cross corroboration**

Problematic Evidence

- **out of court statements of one co-respondent as to the other's action**
- **child's out of court statements corroborated only by other out of court statements**
- **res ipsa but no exclusivity of possession**
- **prior bad acts with no current misbehavior**
- **"typical offender" patterns**
- **"penile" test**
- **lie detectors**
- **out of court statements through "facilitated communication"**

Termination Theories

- **Abandonment for the parent who walks away; what if there was a stay away order?**
- **Permanent Neglect; the "denying parent" theory**
- **Permanent Neglect: the passive denier parent**
- **Severe or Repeated Abuse; easier process?**

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