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I. Introduction

Broadly speaking the legal system must respond to the sexual, physical and emotional abuse of children on two levels - criminal and civil. My experience is in the civil realm - child welfare (agency), divorce and custody proceedings. Almost uniformly courts and statutes have stated that proceedings which are concerned with the future welfare of children are to be determined with the primary, paramount, or even only[1] consideration being the "best interests of the child". This is seen in the "new trilogy" of cases from the Supreme Court of Canada[2] which emphasize the "best interest" approach rather than the parental rights approach of the "old trilogy"[3].

The importance of going beyond the mere statement of there being a best interests test was recognized and discussed by Bayda, J. A. in his article "Procedure in Child Custody Adjudication, A Study in the Importance of Adjective Law"[4]. The article emphasizes the importance of procedural-evidence law in proceedings concerning children and suggests that statements of principle are only as good as the mechanisms available to serve (the principles).

In recognizing that the wishes and evidence of children are important factors in proceedings concerning their (the children's) future, the Court and counsel must attempt to have the process

as well as the goals serve the needs of children. Children are the focus of these proceedings. Their input is on the one hand critical, on the other problematic. That input may relate to their wishes or (factual) evidence. Different issues and questions arise in accordance with not only the nature of the proceeding, but with the type of input sought from the child and the age and maturation level of the child.

II. Wishes of the Child

A. In Divorce and Custody Proceedings

It is generally accepted that the wishes of a child are a legitimate and important consideration in the determination of custody proceedings.[5]

B. In Child Welfare Proceedings

The recognition of the relevance of the wishes of children is seen in case law[6] and legislation (both indirectly and directly). Section 33 of Ontario's Child Welfare Act[7] directs the court to consider whether the child is to be present or excluded from the hearing and presumes that a child over ten is entitled to be present. Some statutes direct that the child's wishes are to be given consideration[8].

C. Weight of Consideration

> "Even if the wishes of a child are obtained, there remains to decide, what significance should be attached to those wishes. It must be remembered that the purpose of obtaining those wishes is not to give effect to them, but to put the judge in a better position to decide what is in the best interests of the child.[9]

Generally, the older the child, the more significant his/her wishes will be regarded.

> "It seems to me that in this case when children are 14 and 16, their wishes become a very important factor indeed. I cannot recollect...any case in which a court has ordered children the age of these to live with a parent against their wishes."[10]

Pragmatically, as children get older and mature, it becomes increasingly difficult to enforce custody orders that run contrary to their wishes.

Younger children by their nature are less able to appreciate the divorce process and their possible role. They are psychologically and emotionally more vulnerable. The court may refuse to hear the wishes of the child on the basis that he/she is not old enough to form a mature opinion[11].

In determining whether a child has the maturity referred to, the court should presumably have evidence on the question, to aid it not only in the determination of the question of whether to hear the wishes of the child, but to help it assess the "wishes" if they are heard.

Apart from the age of the children, the court should, then, be examining the child's wishes as <u>one factor</u> and weighing them having regard to a wide variety of considerations, which may include:

1. the emotional and maturation level of the child. The child may be chronologically one age but developmentally, emotionally and intellectually another.

2. the circumstances (from the child's perspective) behind the wish or preference, i.e. going beyond the bare statement. Many, if not most, child abuse "offences"

are committed by someone the child knows. The "Badgely Report", for example, found from their National Child Protection Survey that close to 90% of child victims were victims of persons who were family members, guardians, or in a position of trust[12]. The child then is under tremendous pressure not only from family members but from the personal realization that his/her wishes may be destructive to the family unit or individuals therein. The wish to return to a parent may in reality be a wish to have the parent or situation change - that the abuse stop. Analogous is the finding or observation in MacDonald v. MacDonald[13] that despite a stated parental preference, "the learned trial judge found that the three boys loved both their parents and that their real desire was to live with both their parents."

3. the strength of the child's preference or wish. Where a child absolutely refuses to be with one parent most courts recognize the limited effect if not futility of contrary orders.

> "I assume for the moment that the learned trial judge is right in finding that the father by his conduct and his relationship with the children has turned them against the mother...nevertheless no matter how the feeling on the part of the daughter was induced it is present and real, and the daughter honestly now wants to be with the father"[14].

4. undesirable or improper influences on the child's preferences. This may range from a child's desire to be with a more permissive parent to the coercion of the child either by "inducement" or "poisoning".

> The trial judge in considering the wishes of the children "declined to give much if any weight to them, feeling as he did that they had been poisoned by their father against their mother"[15].

5. the wish as it relates to "the whole of the evidence".

> "There are occasions when the wishes expressed by a boy of 13 1/2 may count for very little. In many cases it is unfortunately plain that they are reflections of the wishes of one of the parents which have been assidiously instilled into the ward and not anything which could be called an independent exercise of his own will. Sometimes again the ward's wishes, although genuinely his own, are so manifestly contrary to his long term interests that the Court may feel justified in disregarding them"[16].

To properly consider the wishes of the child, the court must have information and evidence about the child's background, environment, development, emotional and intellectual maturity. The child who "wishes" to return to a parent may be "wishing" that that parent will stop drinking, stop sexually abusing them - in short wish that the parent will change, that the situation can be "normal". The "wish" may be the product of the coercion and influence of a parent or the situation. An examination of the "wish" involves putting it in perspective with <u>all</u> of the evidence available <u>and</u> ensuring that the evidence addresses issues that will allow the court to properly consider it and the custody issue generally. Evidence should be led that establishes "the intellectual, moral, emotional and physical needs of each child"[17].

D. Receiving the Wishes of the Child

There must be some distinguishment between courts obtaining the wishes or preferences of a child and evidence on factual issues from that child. There are a variety of ways in which the wishes of children come (directly or indirectly) before the court - these include:

1. statements from parties as to the "state of mind" of the children. Re Harris[18] per Gravely, J. at p. 182 "...statements are admissable not as to the truth of the facts in the statements but because of inferences that might reasonably be drawn from the fact that such statements are made". This exception to the hearsay rule is described as "Statements indicating an existing mental or emotional condition, or state of mind, or intention"[19].

2. the report and opinions of an expert witness will allow that person to relate the child's wishes (as stated to the expert) as a basis of the expert's opinion. This approach is often preferred.

> "A procedure involving a trained and competent third party, independent of the parents charged with the responsibility of ascertaining the child's opinions and preferences using such techniques which are most likely to yield genuine feelings and wishes, and be least harmful of the child, over such period of time as may be necessary, and thereafter reporting to the court, by giving testimony or otherwise, is the procedure to be looked upon with the most favour"[20].

3. separate counsel for the child. "Although hearsay evidence normally might very well be excluded under the usual rules of evidence, I can see no reason that the views of the parties through the mouth of their counsel, should not be presented to the court..."[21]

4. testimony of the child would seem to be recognized as generally inappropriate when the information sought is wishes or preference. In the words of Wright, J. at p. 15 Taberner v. Taberner[22]:

> "In proceedings such as these where the welfare of the children and the future of the family is in the care of the Court, it seems not only reasonable but desirable and necessary that the Judge should have some discretion to prevent the dispute between the parents from becoming, as it might here, a dispute on oath between children as to the parents' merits and conduct. In some cases that may be necessary. It goes against the grain of family life and uses the Court to set brother against brother. It should not be done where an impartial judgment, able to be fully informed otherwise, does not consider it necessary."

5. interview with the judge. This practice, though widely accepted both judicially and by statute is most controversial and fraught with issues and questions. These issues are thoroughly addressed by C. I. Jones in "Judicial Questioning of Children in Custody and Visitation Proceedings" (1984) 18 Family Law Quarterly, 43; and briefly summarized below:

-Where should the interview take place? Courtrooms and judges' chambers are intimidating for adults. Unquestionably the less formal the atmosphere the more at ease a child will be.

-When should the interview take place? Prior to, during or after the evidence is heard? A pre-hearing interview offers the advantage of allowing the child to impact upon the judge when he/she is most objective, prior to the formation of opinions based on evidence. It may also allow the parties to respond to factual information which the child may convey to the court. The post-hearing interview allows the judge to consider the evidence and determine whether an interview with the child is necessary or appropriate (see Taberner v. Taberner, supra). Further, the post-hearing interview, coming after the evidence (which presumably has been directed at the child) allows the court to relate (or attempt to relate) to the child when it has the most information about that child, his interests and activities.

-Should siblings be seen together or separately? Or both?

-Should the interview be recorded? It is suggested that to have a complete record of the proceedings it is essential that the interview be recorded.

-Should anyone else be present? Many courts interview the children in the presence of counsel for the parties. This adds at least two adults to an already intimidating situation. If the interview is recorded and counsel given

immediate access to that recording, a preferred arrangement may be for the court to see the child alone, then give counsel an opportunity to see the child with the court. This presumes that counsel may have some legitimate query of the child.

-What information should the court provide the child prior to the interview? The court should explain to the child the reason for the interview, and introduce any other persons who are present. The child should be given an opportunity to express what he or she knows of the proceedings - the court then is aware of the child's level of understanding and can correct or supplement inaccuracies or gaps. The court should offer to answer any questions the child has. The court should advise the child that the child does not have to answer questions. The court should make it clear that it, the court, is the decision maker, not the child, i.e. responsibility is the court's, not the child's. Confidentiality should not be promised.

-What questions should the judge ask? No list can be followed. Judges must be aware of the developmental and emotional level of the child. Questions should be short, simple and easily understood. The child should not be compelled to state a preference but given an opportunity to add information, including a preference.

The interview of the child is often described as unsatisfactory, superficial, and emotionally intimidating for the child. The child may see the judge as an authority

figure upon which his future depends. It will be one of that child's most significant life experiences. There is a responsibility, then, for both the court and counsel to make the child as comfortable as possible in the process. To do so the court must have not only a knowledge of child development generally, but information concerning the specific child before it.

III. Evidence of the Child

A. In Divorce and Custody Proceedings

In most such situations the information sought from children in divorce and custody proceedings is that of their "wishes" or preference. Courts have generally been clear in expressing a desire to avoid calling children as witnesses in family disputes, feeling that to do so risks further fragmenting and polarizing of the family and placing much emotional pressure on the child.[23] This is a common sense approach.

There are, however, occasions (whether original or variation proceedings) when evidence from the child is felt to be of import - especially when issues of child abuse are raised. In these situations, the methods and procedures of obtaining factual evidence from children should be similar (whether the proceeding is a private custody proceeding or agency-custody matter), assuming that "the best interests of the child" is the over-riding principle (in either proceeding).

I should comment, however, that it is my experience that in post-divorce situations there are increasingly allegations of child sexual or physical abuse brought by the custodial parent against the access parent, typically in an attempt to terminate all access. These situations present special problems - for both the courts and child welfare agencies. Often the report involves a very young child - and a concern (fondling or exposure) with no "physical" evidence. In these situations, the court and agencies should be <u>most</u> careful to examine the relationship between the parents - and the motivations of each. Is there a new step-parent? Difficulty with maintenance?

A desire to cut off even supervised access? A feeling that the access parent has offered no benefit to the child?

In advising child welfare agencies concerning these situations, my advice is (unless necessary to protect the child) to not become entangled in a legal process (i.e. apprehension) that is in reality between parents. An investigation is done, care taken that parents and child are placed in contact with and involved with appropriate professionals, and the "complaining parent" encouraged to (if he/she feels the circumstances warrant it) make an application to vary the existing order. The agency is not a party, is less likely to be seen as the "tool" of one parent, and thus better able to deal with both parents in "the assessment phase" and the aftermath of the litigation.

B. In Child Welfare Proceedings (With a Focus on Sexual Abuse Cases)

Often when children are the victims of physical, sexual or emotional abuse they are the only witness. The purpose of child welfare litigation is "to protect children"[24].

My experience in child welfare matters indicates that it is rarely necessary to call children as witnesses. Situations involving physical abuse, with bruising, broken bones and other injuries are normally documented by medical or other professionals. We are blessed in Nova Scotia with a Children's Hospital that is extremely sensitive to the needs and requirements of children within the legal/judicial system. Documentation is thorough and includes photographs, x-rays and video taping. Personnel are cooperative and sensitive to the need for testimony. Some have gone so far as to take law courses to enhance

appreciation of their role in abuse cases. One result of this kind of professionalism is that the agency is placed in a position to document "abuse" prior to trial.

Appropriate disclosure to counsel for parents should, then, make it clear that the abuse is "proven" and place the focus of counsel, the parties and the court where it should be - on the appropriateness and effectiveness of a therapeutic response to the abuse and program for same. At times court can be avoided altogether.

The effect of this kind of process is to reduce situations in which the abuse, per se, is in dispute (in court) and thus reduce the situations in which testimony from children is required. Certainly this is a preferred alternative, and one that can be enhanced with pre-trials and other procedures.

The role of agency counsel is critical to this process (of disclosure). Although I have acted as agency counsel for seven years, I have not been aware of <u>any</u> continuing education program that examines <u>the role</u> of agency counsel. Undoubtedly there are practices and procedures elsewhere that would enhance my (our) process and practice. Unfortunately there is no mechanism, that I am aware of in Canada, to provide for an exchange of views, ideas and procedures between such counsel. We can all read reported cases but these are, to a degree, the situations that have not worked.

Realistically, there are, however, situations in which the <u>only</u> way to prove abuse is to call the child as a witness. Perhaps the most frequent such situation involves the sexual abuse of the child where

-a parent or parent figure is the alleged perpetrator;

-that person denies the abuse;

-the spouse, if any, denies the abuse;

-criminal charges arise and are outstanding;

-there is little, if any, possibility of therapeutic intervention that will allow the possible return of the child to the family unit.

The child is placed in a position where he/she may have to endure, apart from the trauma of the abuse, testimony in a child welfare proceeding, criminal preliminary inquiry, and criminal trial. Each time the child would be "prepared" to testify. The child clearly is taken back to relive, and recount, the episodes of abuse over and over again. Apart from this stress, family typically are suggesting and the child is in all likelihood perceiving him/herself as being responsible for the break up of the family, damage to the perpetrator's reputation, possible loss of his job, and imprisonment. Indeed, I have seen situations where mothers have told daughters "quit lying, you will cause Dad's loss of job, us to lose our home..." The pressure on children in these situations is immense.

Stated another way,

"The child may feel the need to protect the abuser out of a confused sense of loyalty...The victim may be too young and inexperienced to know the activity is abnormal or may not be receiving adequate affection and attention in normal ways.
(However) Even...very young children are normally aware that what is, or has been happening to them is wrong.

> These guilt feelings are often played upon by the abuser as another means of keeping the child quiet. All of these factors contribute to the child's already low sense of self worth.
>
> Often a parent's first reaction on discovering that his or her child has been a victim of sexual abuse is to punish or scold the child. Even though this reaction does not seem logical, nevertheless, many families blame the child for 'bringing this calamity down on us'. This reaction occurs frequently in cases in which the abuser is a family member."[25]

The criminal justice system focuses, inter alia, on the rights of the alleged offender. I am not here proposing to discuss its role vis-a-vis the child witness. Suffice to say, however, that communication and cooperation between it and the child welfare system is desirable. My view is that this interaction is less than optimally serving the child/victim.

Surely, however, where two distinct judicial processes exist, one of which focuses upon the rights of an alleged offender, the other which focuses on the best interests of the child, one would expect them to have significantly different evidentiary rules and means of dealing with the child witness. Traditionally there has been, I would suggest, little difference. Some recent developments, especially in British Columbia, have made significant strides, however.

C. Competancy of Children

Most provincial evidence acts contain provisions similar to s. 16 of the Canada Evidence Act[26]:

> "s. 16 (1) In any legal proceedings where a child of tender years is offered as a witness and such child does not in the opinion of the judge, justice or other presiding officer understand the nature of the oath, the evidence of the child

> may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth.
>
> (2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence."

Case law suggests that children over fourteen are presumed to understand the nature of the oath.[27]

Where such a presumption is not operating, the court, when a child is offered as a witness, must conduct an inquiry as to whether the child understands the nature of the oath. Essentially the test is whether the child "understood the moral obligation to tell the truth".[28] "Moral" has been taken to refer to understanding the distinction between right and wrong, it not being necessary to examine a child on religious or spiritual beliefs or consequences of the failure to tell the truth.[29]

The question of unsworn evidence would seem, by virtue of s. 16 (of the Canada Evidence Act and similar provincial provisions) to depend upon the child's intelligence and understanding of the duty to tell the truth. There would seem to be little reason to accept unsworn evidence - the test is virtually the same as that for accepting sworn evidence.

It is not improper for those calling a child witness to instruct the witness on the nature of the oath prior to testimony. Indeed, in R. v. Bannerman[30], Dickson, J. A. suggested "Those calling a child have a duty to inform and instruct and failing the performance of their duty the Court should do it."

The nature of the discretion of the trial judge in qualifying a child witness was elaborated upon by Dickson, J. A. at p. 135 of R. v. Bannerman, supra.

> "The judge had the great advantage of observing and talking to the child...Where a trial judge with these advantages examines a child as to its understanding of the nature of an oath and determines that the child is competent to testify, his discretion, unless manifestly abused should not be interfered with. We must avoid appearing to be laying down what and how many questions must be asked. Each case will depend on its own facts and the impression that the child makes upon the judge will be of great importance."

D. Credibility of Children

It has been said on many occasions that children's evidence, even when sworn, must be viewed with care and caution.

> "The basis for the rule of practice which requires the Judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity for observation. 2. His capicity for recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility."[31]

The questionning of children and weighing of their evidence should be based upon an appreciation of their developmental stage and maturation level, not broad generalities. To the extent that this is the point of this "rule of practice" it cannot be argued with. It should be noted that there is little, if any, evidence to indicate that children are in a general sense less truthful than adults.[32] Some researchers have found that children are less likely to make inaccurate statements based on what he/she has seen or heard than adults.[33]

In view of the lack of any objective or scientific rationale for broad statements such as those made in R. v. Kendall, supra, one cannot help but feel that in these situations

> "...a young person's testimony should be heard and weighed by the trier of fact in the same manner as the testimony of any other witness in the proceedings...those who believe that fetters should be placed on the reception of young children's testimony by way of special competancy requirements should bear the onus..."[34]

E. Receiving and Considering the Child-Victim's Evidence

In considering the child-victim's evidence (in for example a sexual abuse situation), a number of factors deserve special attention - there is generally nothing to be gained by a child manufacturing allegations, testifying may create an emotional confrontation with parents or others that is in itself contrary to the child's interests, the child may be subjected to a number of pretrial interviews and professionals, the child may be asked questions that he/she has difficulty understanding - innumerable other factors could be added.

Traditionally where circumstances (such as the child's age, the desire to avoid a confrontation with parents or other factors) have mitigated against calling a child as a witness, the only way to receive the child's evidence was via exceptions to the hearsay rule which are at least potentially problematic in that they may not allow the court to rely on the child's out of court statements to prove the truth of their content. Examples include:

1. receipt of children's evidence as part of the basis of an expert opinion (this can allow video tapes of the child and expert);[35]

2. declarations of present bodily feelings or state of mind;

3. receipt of agency or medical file notes as "business records".[36]

"Excited utterances" (or the res gestae exception to the hearsay rule) are potentially a way to receive and rely on a child's out of court statements, but the requirements of this exception to the hearsay rule limit its applicability to very specific situations.

Similarly limited in application, but useful, are provisions such as s. 62 (a) of the Children's Services Act[37] which provide that the record from former protection proceedings involving a family can in some circumstances be admitted as evidence in later proceedings; thus allowing a court to avoid the needless recalling of a child witness.

There are, however, other available and developing procedures that can assist counsel and the courts. These include:

1. The exclusion of the parents from the courtroom for the testimony of the child-victim. The parents' counsel remains and is permitted a recess following direct examination of the child so as to consult with his/her client(s). The testimony is, of course, recorded. This type of procedure is or at least should be far less controversial in child welfare proceedings where the paramount concern is the child. It would seem reasonable to suggest that if there is evidence to indicate that the child may be harmed, or nothing gained by a face to face confrontation with the parent(s), then the court should act in a fashion consistent with its mandate to protect the child and do so.[38]

2. An extension of this sort of procedure is the use of closed circuit television examination of the child. Section 3 of Article 38.071 of the Texas Code of Criminal Procedure reads as follows:

> "The court, may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendent and the state...may be present... (or) may question the child...The court shall permit the defendent to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendent."

3. A series of cases in British Columbia have, it seems, had the effect of allowing hearsay evidence of a child to be admitted as proof of the contents thereof if it is in the best interests of the child to proceed that way. Three of these cases deserve mention:

(a) D. R. H. and A. H. v. Superintendent of Family and Children's Services (1984) 41 R. F. L. (2d) 337 (B. C. C. A.):

> "In that case the 5-year-old daughter had said things to a psychologist from which it could be inferred that her father had sexually abused her. The psychologist gave this evidence at a hearing under s. 13. Counsel for the parents objected to the evidence. After hearing all the evidence the hearing judge made an order granting permanent custody of the child to the

superintendent. The parents appealed, alleging several grounds of appeal. The most important for the purposes of this appeal was the allegation that the hearing judge had erred in admitting the evidence of the psychologist as to what the 5-year-old girl had told her as evidence of the truth of the facts asserted in it. In giving the judgment of the court, Hinkson J. A. held that in the circumstances hearsay evidence was admissible. He said as follows (pp. 340-41):

> 'However, in proceedings involving children this court has adopted another approach which is exemplified by the decision in R. v. Arbuckle (supra). In that case, which involved a proceeding under the Juvenile Delinquents Act...the judge of first instance had held it was a judicial proceeding to which the rules of evidence applied and that hearsay evidence was excluded. McFarlane J. A., delivering the judgment of the court, said at p. 385:
>
> > "There are helpful comments in the very interesting case, Official Solicitor to the Supreme Court v. K., (1965) A. C. 201, where the House of Lords considered the true character of judicial proceedings in the Court of Chancery relating to the care and custody of wards of Court and held, inter alia, that hearsay evidence was properly admissible in such cases."

In my opinion the principle discussed in R. v. Abbey, supra, should not be applied to the inquiry with which we are concerned. Rather, in this type of inquiry, the approach adopted in the Arbuckle case, supra, is to be followed. Thus a judge, conducting an inquiry of this nature, involving a child of tender years, who is too young to testify in the inquiry, can receive hearsay evidence and rely upon such evidence in coming to the decision as to whether or not the child is in need of protection.

> But a judge conducting such an inquiry must bear in mind that it is always a serious matter when the need for protection is said to arise as a result of sexual abuse by a parent, that hearsay evidence should be given no more than its proper weight, and that the weight to be given to hearsay evidence will be affected by whether or not direct evidence could be produced. However, in this type of inquiry, there is no inflexible rule that hearsay evidence is not admissible.'

We understand the Supreme Court of Canada has refused leave to appeal this decision (42 R. F. L. (2d) xxxv).

(b) G. H. and T. H. v. Superintendent of Family and Child Service (1984) 44 R. F. L. (2d) 179 (B. C. C. A.).

In this case a teacher's aid was called to testify concerning conversations had with an 8-year-old girl from which one could "reasonably infer" that the father had sexually abused the children (two). The evidence was admitted to prove the truth of the content (of the child's statements) but in doing so the trial judge stated that he must be "very careful to ascertain if the statements made had been made carelessly, mischievously, spitefully or to gain attention, or were misconstrued" (at p. 1982).

Evidence (from experts) indicated that the court "could not rely on what the children might tell me either under cross-examination in court or in any private interview, because I am not a person to whom they would be likely to reveal either the truth of

what happened or their innermost feelings" (at p. 182). The child who made the statements was at the time of trial "deeply disturbed".

The B. C. C. A. found that hearsay evidence of this nature could be admitted and relied upon in the discretion of the trial judge. In exercising this discretion "the ultimate concern must always be, as s. 47 of the Act provides, whether it is in the best interests of the child" (at p. 185). The B. C. C. A. specifically stated that this discretion does not exist only when the child is too young to testify.

(c) Superintendent of Family and Child Service v. Bartou et al, unreported decision No. A84232, New Westminister Registry, Selbie, Cty. Ct. J., B. C. (attached as Appendix "A").

The two B. C. C. A. cases were considered and it was determined that where hearsay evidence was to be admitted and relied upon the Court must have evidence that it is in the best interests of the child to proceed in that way.

Clearly, this line of cases from B. C. goes some distance towards alleviating many of the concerns and traumas that may result from the child-victim testifying. The expectation that the court be provided with a rationale for not hearing viva voce evidence from the child would not seem unreasonable. If there is a reason for not calling

the child it can be put forward. Significantly, these cases do not limit the reception of "hearsay" evidence (of the child) to experts. Nor is it limited to situations where the rationale for not calling the child is simply because of the child's age or maturation. The question of the admission of the evidence would seem to be resolved on a "best interests of the child" basis.

IV. Conclusion

Obtaining and considering children's wishes in custody litigation is accepted as appropriate. The precise methods and manner in which these wishes are to be obtained and considered is far less clear. There is a great deal of judicial discretion. Receiving evidence from children involves similar "discretions". The proper exercise of "discretion" requires that the court either be provided with or have a basic knowledge and sensitivity of child development principles generally and as they relate to the specific child before it. If the process is one that is to be given the philosophical base of being non-adversarial and/or to be determined by the best interests of the child, the court should ensure that it has the information necessary, both through self-education and making demands on counsel's presentations. The suggestion that the court is to be a clean slate upon which the parties engrave positions ignores the fact that courts have for years taken "common sense" views such as "status quo" and "tender years" and incorporated them into the decision-making process. Judicial bodies (as well as lawyers) should seek to obtain knowledge that goes beyond this, through interdisciplinary continuing education. The court should insist that the litigation process provide the Court with information that it needs to do justice to the "best interests" mandate. If the mandate is to serve the best interests of the child, the child should not be victimized by the failure of counsel and courts to give and use knowledge that will optimize the process for the child.

The importance of sensitivity and knowledge of the child's perspective of court process is even greater when the child's evidence is required for a protection proceeding - particularly in situations

involving sexual abuse. Many pressures and demands are placed on these children and the legal system is at times extraordinarily insensitive - in the McMartin (California Day Care) criminal proceeding, for example, the child witnesses are subjected to cross-examination by seven defense lawyers (see excerpt from "Newsweek", February 18, 1985 attached as Appendix "B"). Criminal proceedings, with their necessary focus on the rights of the accused, are of their nature less able to respond to the needs of the child-victim.

Civil child protection and custody proceedings, if their paramount concern is the best interests of the child, should, however, be able to respond procedurally to the best interests mandate. The B. C. cases referred to are an excellant example of such a response and should, it is suggested, be applauded.

FOOTNOTES

1. s. 16 (f), Proposed Bill C-47, An Act Respecting Divorce and Corollary Relief, 1985, Canada.

2. K. K. v. G. L. and B. J. L. (1985) 44 R. F. L. (2d) 113 (S. C. C.);
Racine v. Woods (1984) 36 R. F. L. (2d) 1 (S. C. C.);
Beson v. Director of Child Welfare (Nfld.) (1982) 30 R. F. L. (2d) 438 (S. C. C.).

3. Martin v. Duffell (1950) 4 D. L. R. 1 (S. C. C.);
Heptan v. Maat (1957) 10 D. L. R. (2d) 1 (S. C. C.);
McNeilly v. Agar (1958) 11 D. L. R. (2d) 721 (S. C. C.).

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s. 65 Children's Law Reform Act, R. S. O. 1980 c. 68.

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11. Simms v. Simms (1976) 38 A. P. R. 238 (Nfld. S. C.).

12. P. 217, Table 7.3, Report of Committee on Sexual Offences Against Children and Youth, 1984, vol. 1.

13. MacDonald v. MacDonald, (1976) 2 S. C. R. 259 at 263.

14. Per Davey, J. A. at p. 766, Shapiro v. Shapiro (1973) 33 D. L. R. (3d) 764 (B. C. C. A.).

15. Per Brownridge, J. A. at p. 298, Wakaluk v. Wakaluk (1976) 25 R. F. L. 292 (Sask. C. A.).

16. Per Cross, J. at p. 408, Re S (1967) 1 W. L. R. 396 (Ch. D.).

17. Per Bayda, J. A. at p. 299, Wakaluk v. Wakaluk (1976) 25 R. F. L. 292 (Sask. C. A.).

18. Re Harris et al (1976) 28 R. F. L. 181 (Ont. P. C.).

19. Sopinka and Lederman, Evidence in Civil Cases, Butterworths, 1974, p. 116.

20. Bayda, J. A. at p. 304, Wakaluk v. Wakaluk, supra.

21. C. v. C. A. S. of Metro Toronto (1980) 20 R. F. L. (2d) 259 at 263 (Ont. Cty. Ct.).

22. Taberner v. Taberner, (1972) 5 R. F. L. 14 (Ont. H. C.).

23. See Wakaluk v. Wakaluk, supra;
See Taberner v. Taberner, supra.

24. Per Jones, J. A. at p. 373, C. A. S. of Halifax v. Lake (1981) 45 N. S. R. (2d) 361 (N. S. C. A.).

25. M. Avery, "The Child Abuse Victim: Potential for Secondary Victimization" (1984) 7 Crim. Justice J. 1, at p. 6.

26. R. S. C. 1970, E-10.

27. R. v. Armstrong (1959) 125 C. C. C. 56 (B. C. C. A.).

28. Horsborough v. R. (1968) 2 C. R. N. S. 228 (S. C. C.) per Spence, J. at 258;
R. v. Caldwell, (1974) 10 N. S. R. (2d) 187 (N. S. C. A.).

29. R. v. Taylor (1970) 75 W. W. R. 45 (Man. C. A.).

30. R. v. Bannerman (1968) 48 C. R. 110 (Man. C. A.) at p. 136.

31. Per Judsen, J. at p. 220, R. v. Kendall (1962) 132 C. C. C. 216 (S. C. C.).

32. See literature review in Children's Competancy to Testify, Gary Melton, (1981) 5 Law and Human Behav. 73;
"The Child Abuse Witness: Potential for Secondary Victimization", Mary Avery, (1984) 7 Criminal Justice J. 1.

33. "The Potential of Children as Eyewitnesses: A Comparison of Children and Adults on Eyewitness Tasks", B. V. Martin, D. L. Holmes (1979) 3 Law and Human Behav. 295.

34. P. 372, Vol. 1, Sexual Offences Against Children, 1984, Robin F. Badgely et al.

35. Owen v. Owen, 1985, Feb. 1, N. S. S. C., S. C. No. 1201-22218.

36. Re Maloney (1971) 12 R. F. L. 167 (N. S. Cty. Ct.).

37. R. S. N. S., 1976, c. 8 as amended.

38. This approach has been adopted in Re Ray C unreported decision of Karswick, J., Ont. Prov. Ct., Jan. 8, 1980 (see pp. 178-179 Canadian Children's Law, N. Bala, H. Lilles, G. Thomson, Butterworths, 1982); Re Yvette L, unreported decision of Butler, J. F. C. (N. S.), May 15, 1985; and Re Stanley F (1978) 152 Calif. Rept. 5 (Calif. C. A.); s. 12 (4), Child Welfare Act, R. S. A. 1980, c. C-8 which gives the judge the discretion to exclude parents from a hearing.

39. G. H. and T. H. v. Superintendent of Child Welfare (1984) 44 R. F. L. (2d) 179 B. C. C. A. per Craig, J. A. at pp. 181-182.

No. A842342
New Westminster Registry

IN THE COUNTY COURT OF WESTMINSTER

IN THE MATTER OF THE FAMILY AND CHILD SERVICE ACT R.S.B.C. 1980, CHPT. 11 AND IN THE MATTER OF ELAINE EDITH BARTON, LORENA MARGARET ANDY, VICTORIA EDNA ANDY, CHESTER GERRY ANDY AND MARIE AMANDA BARTON

BETWEEN:

SUPERINTENDENT OF FAMILY AND CHILD SERVICE

APPELLANT

AND:

MARIE BARTON, ELAINE BARTON, CHESTER ANDY

RESPONDENTS

REASONS FOR JUDGMENT

OF THE HONOURABLE

JUDGE W.S. SELBIE

COUNSEL FOR THE SUPERINTENDENT:	J.J. THRELFALL
COUNSEL FOR CHESTER ANDY:	W.H. CAVE
COUNSEL FOR MARIE BARTON:	W.S. SANDERSON
COUNSEL FOR ELAINE BARTON:	GAYLE RAPHANEL
DATE OF HEARING:	APRIL 24, 1985

This is an appeal by the Superintendent of Family and Child Services from an Order made under the Family and Child Services Act that the children involved were not in need of protection under that Act and ordering the Superintendent to relinquish custody of them to the mother as soon as reasonably possible.

Ground 1 of that Appeal reads as follows:

> "1. THAT the learned Trial Judge erred in law in refusing to admit into evidence statements made by any of the children over 12 years of age to other persons on the grounds that the said children should be called as witnesses themselves."

This area of the law has recently been dealt with in our Court of Appeal in two separate decisions, D.R.A. and A.H. versus SUPERINTENDENT OF FAMILY AND CHILD SERVICES AND PUBLIC TRUSTEE (1984) 58 B.C.L.R. 103 and HARALDSON and HARALDSON vs. THE SUPERINTENDENT OF FAMILY AND CHILD SERVICES, (unreported B.C.C.A. December 19, 1984) Vancouver Registry, No. CA002428.

The D.R.H. case involved the question as to whether a phychiatrist could give hearsay evidence of what the five year old child involved had told him during his examination. HINKSON, J., in his decision said as follows:

> "The Act is intended to deal with children who are in need of protection. While the enquiry provided for by the Act is to be conducted upon the basis that it is a judicial proceeding, unlike some judicial proceedings it is not an adversay proceeding and there is no lis before the Court. It is an enquiry to determine whether a child is in need of protection and, as the Statute directs, the safety and well being of the child are the paramount consideration"...
>
> "In the present case, E. was too young to give evidence upon the enquiry, therefore she could not testify directly as to what had happened to her"...
>
> "The concern with admitting hearsay evidence and acting upon it when dealing with a grave allegation of misconduct on the part of a parent to a child is not to be overlooked. Clearly, no judge would be satisfied to act upon it in a case where direct evidence could be produced. But that consideration does not resolve the problem"...
>
> "... thus a judge conducting an enquiry of this nature involving a child of tender years who was too young to testify in the enquiry, can receive hearsay evidence and rely upon such evidence in coming to the decision as to whether or not the child is in need of protection.
> But a judge conducting such an enquiry must bear in mind that it is always a serious matter when the need for protection is said to arise as a result of sexual abuse by a parent, that hearsay evidence should be given no more than its proper weight, and that the weight to be given to hearsay evidence will be affected by whether or not direct evidence could be produced. However, in this type of enquiry there is no inflexible rule that hearsay evidence will be affected by whether or not direct evidence could be produced. However, in this type of enquiry there is no inflexible rule that hearsay evidence is not admissible."

The HARALDSON case involved two children, aged 8 and 9. In that case the Court was apprised by two medical doctors that it would not be in the best interest of the children to give evidence. In the result, hearsay evidence was allowed. CRAIG, J. in dealing with this point on appeal cited the D.R.H. case and in particular those portions of the judgment just referred to.

In his judgment, CRAIG J. said the following:

> "Mr. Christie, appearing for the parents on this appeal acknowledges the affect of the HOPKINSON (D.R.H.) decision but insists that it should not be extended to the circumstances of this case. He says that the determining factor in that case was that the five year old girl was too young to testify on an enquiry."

In dealing with the aspect, CRAIG J. said:

> "I do not think the passage to which I have referred supports the proposition that hearsay evidence is admissible only in the case of a child who is too young to testify.
> The ultimate concern must always be as S.47 of the Act provides whether it is in the best interest of the child. S.2 provides that the safety and well being of the child is the paramount consideration."

The Court then approved the reception of the hearsay evidence.

It seems obvious, therefore, that the discretion of the Magistrate in this area is not confined to age or, apparently, any other circumstance. The only consideration would seem to be what is in the best interests of the child and what is in the best interests of the child, in my view, is to be determined as a result of evidence presented to the Court.

In the M.H.R. case there was evidence as to the age of the child and the discretion was based on that circumstance. In the HOPKINSON case, there was the evidence of two doctors that it was not in the best interest of the child to give evidence and the discretion was based on those circumstances. From this, it seems to me that the principle can be found that in order to exercise a discretion to allow hearsay evidence, a court must have evidence before it which will satisfy it that the reception of the hearsay, rather than the viva voce testimony, is in the best interests of the child.

In the instant case, the court exercised its discretion by disallowing hearsay evidence in regards to three children, ages 17, 14 and 12. In seeking to have that evidence introduced, Counsel for the Superintendent had said as follows:

> "Your Honour, I had not intended on calling Victoria or Lorena or Chester or the infant, obviously, Marie. The reason that I had not intended on calling them is that I did not feel it would be in their best interest to be present at this hearing and to have to give evidence. It's our... it's the Superintendent's position that these are extremely disturbed children. At this point, they are starting to settle into hopefully a routine in Bella Coola, and to bring them down, especially in terms of the sort of interaction that goes on between the mother and the children, would only cause more disruption within themselves".

Further on, the Counsel for the Superintendent commented:

> "...but certainly that evidence should go in and standing in the position of the Superintendent, who is in loco parentis, I am submitting that it is not in the best interests of the children to be called."

There was no evidence on this issue - simply Counsel's statement.

The question becomes, in my view, whether such a statement should be considered sufficient to satisfy a court that it is in the best interests of the children not to give evidence. It is obvious that the learned Provincial Court Judge felt that it was not. He said:

> "It seems to me then that the law in British Columbia is as set out by our Court of Appeal at page six, the Court can in matters of this kind receive hearsay evidence and rely upon where the child is of tender years, bearing in mind, of course, the concerns set out on page five.
>
> What is a child of tender years? There is no magic cut-off point I suspect because not all children are the same. There are some children who are mature beyond their years and others who are immature for their years.
>
> In this case there are five children, as I say, ranging from fourteen months to seventeen years. There is no evidence as to the capabilities or competency of any of the children and I am assuming for the purposes of this decision that they are average children. (The underlining is mine). Because of the nature of this case and the principles set out in section 2 of the FAMILY AND CHILD SERVICE ACT I will hold that any statements made by the twelve, fourteen or seventeen year old children to the social worker will not be admissible through the mouth of the social worker.
>
> In arriving at this conclusion I have considered section 2 of the FAMILY AND CHILD SERVICE ACT, the age of the child and the likelihood of damage to the child from having to come to court to testify in this case.
>
> I will order then accordingly."

In my view it is incumbent on the party wishing to depart from the ordinary rules of evidence and have hearsay evidence admitted in matters such as this to satisfy the Court, by evidence, that it is in the best interests of the child to proceed in that way. A simple statement, as here, with no evidence to support it, that the Superintendent or his Representative in Court did not feel that it was in the best interests of the child was not sufficient to satisfy the learned Provicial Court Judge and with that I agree.

I do not find that the Court erred in ruling as it did in regards to the reception of hearsay evidence of these three children.

The second ground of appeal is:

> "(2) THAT the learned Trial Judge erred in law in holding that he must look only at the circumstances as at the date of apprehension or since the last apprehension and therefore failing to give sufficient or any weight to evidence or circumstances prior to the date of apprehension;"

This ground is based in my opinion on a misinterpretation of the Judge's remarks by the Appellant. The learned Provincial Court Judge said:

> "The Superintendent has used a shot-gun technique going back several years and several apprehensions and now says because of all the past behaviour the children are in need of protection. I simply cannot agree.
> All of the witnesses are credible but no one witness can tell of anything that would indicate that the circumstances as at the date of the apprehension or since the last apprehension, placed the children in need of protection. No doubt on previous apprehensions the children were in need of protection but it appears that the children did indeed improve, as suggested by Counsel for the mother, as did the mother since the last apprehension."

In his argument, Counsel for the Superintendent argues that the words "I simply cannot agree" imply that the Court has found that it cannot or should not go back several years and several apprehensions in making a determination on the present matter.

To use the words of the learned Provincial Court Judge I also simply cannot agree with that interpretation. In my view what the Court was saying was that it could not agree that the children were in need of protection. I am bolstered in this view by the fact that the Court, over a five-day period, heard copious evidence on prior apprehensions and prior conduct of the parties and referred to such evidence in its reasons.

Counsel for the Appellant cited the case of THE CHILDREN'S AID SOCIETY OF EASTERN MANITOBA V. D., a decision of JOHNSTON, Provincial Judge, 1979, 5 W.W.R. 172. In that case the learned Provincial Court Judge said as follows:

> "Although the arguments of counsel have supplanted amore substantial statment of the factual details because it is important in this case to establish the working ground rules for the law before giving consideration to the evidence, I share a firm and steadfast belief that evidence relative to an apprehension of alleged continuing or gradual deterioration of a parent to provide suitable care for his or her child is not restricted in time to the previous discharge date. A child may be apprehended for apparent neglect on more than one occasion. Evidence being considered separately, from one hearing date to the next, may mean a fragmented accumulation of important evidence. This limits the whole kaleidoscope of the full canvas colours from being seen and considered. In appropriate cases one is called upon to observe a foreground of current detail without a background, a pecture lacking in-depth perspective. Each earlier concern may not be of a sufficient degree to demand an order subsequent to apprehension, but the aggregation of each piece in the design may sustain the whole."

With this statement I do not disagree. It is my view that if it could be said in the instant case that the learned Provicial Court Judge refused to take into consideration all the circumstances surrounding the prior apprehensions then he would have been wrong in law. However, as I have indicated, I do not find that that is the case and in the circumstances, I do not find that the learned Provincial Court Judge erred in law in this area.

Grounds 3 and 4 of the Appeal deal with the weight that the learned Provincial Court Judge placed on the evidence. I indicated to Counsel that I would hear argument on those grounds dependent on my rulings on the two points of law in Grounds 1 and 2. Having now ruled, I would invite Counsel to set the matter down to argue the weight and sufficiency of the evidence if they choose to do so. If they do not so choose, then having

ruled as I have, the Appeal is dismissed.

New Westminster, B.C.

May 1, 1985.

WSS:lm

PETER MARCUS

Donald and Cindy Buchan with their children: 'I'd like people to know that we are not guilty'

The Youngest Witnesses

Is there a 'witch hunt' mentality in sex-abuse cases?

A high-ranking lawyer in the California attorney general's office, Brian Taugher has spent his career molding the state's criminal-justice system. But last summer he found himself on the other side of the table, accused of child abuse by a nine-year-old girl who said Taugher had fondled her at his own daughter's slumber party. In a trial that came down to the issue of Taugher's word against the child's—none of the other girls sleeping in the same living room at the time heard or saw anything—a jury deliberated for 5½ days before finding him not guilty. His boss welcomed him back, but he hasn't fully shaken the stigma. "You never quite recover from something like this," Taugher says. "It changes how you act with your family, with your kids." And Taugher has another worry: that well-publicized acquittals such as his own may cast doubt on all child-abuse cases. "This has been tragic for me personally," Taugher says, "but my situation is not typical. Most cases are well founded."

That may be so. But as child-abuse reports have taken on epidemic proportions, a backlash of skepticism has developed. Says Douglas J. Besharov, a visiting law professor at William and Mary University, "What was hidden 20 years ago isn't today, and that's good. But now we're also getting reports that are just junk." Many cases come down to the testimony of a young victim—unsupported by physical evidence—against an adult. That may not be enough evidence to persuade a jury. But it is more than enough for an indictment—and, in many cases, a ruined reputation.

A child-abuse indictment is sure to generate headlines. But some of the most celebrated cases have fallen apart, the victims of sloppy investigative work or the inherent problems of children's testimony. In the Bronx a grand jury refused to indict a 62-year-old grandmother who allegedly molested children in a day-care center. In Orange County, Calif., prosecutors dropped charges against an elementary-school principal when his young accuser admitted he had only changed her soiled underwear and not fondled her. In the most dramatic episode, lurid reports of child-abuse rings in Jordan, Minn., resulted in criminal charges against 24 adults—most of which were dropped last fall after the first trial ended in an acquittal.

WALLY FONG—AP

McMartin: Seven months of testimony

'Disturbing': The pendulum of enforcement, it seems, has swung too far. "Child protective services, the district attorney and the police ignored child molestation for so long that now they're going the other way," says Paul Abramson, a UCLA psychology professor who often works with prosecutors. "They should take every accusation seriously, but they should avoid a rush to judgment." That view was echoed in December by a grand jury in Austin, Texas, that heard a string of abuse cases. In an unusual move, the 12 jurors wrote to Judge Thomas D. Blackwell, saying that while they supported vigorous prosecution of child abuse, ". . . we have observed a disturbing tendency to accuse persons too readily, without due consideration for the consequences of an ill-founded or false accusation."

In one of the cases the Austin jurors refused to indict James Dafoe, who runs the Treehouse Day Care Center with his wife, Darla. Three children accused him of fondling them. Dafoe denied the charges and passed three polygraph tests. While the children's testimony failed to sway the jurors, the state's Department of Human Resources is taking a harder line. "I don't agree with the grand jury," says DHR regional director Irma C. Bermea. "It doesn't mean he isn't guilty." Bureaucrats, of course, cannot imprison citizens on their own authority, but the department still hopes to close Dafoe's business.

Not all the notorious cases have collapsed. A judge in Los Angeles has listened to seven months of pretrial testimony in the case of 77-year-old day-care-center owner Virginia McMartin and much of her staff. Forty-one children have accused seven teachers and aides of a variety of sexual molestations—and of making gruesome threats that kept them silent. Two children have taken the stand; though rattled under cross-examination by seven defense attorneys, both have stuck to their stories.

At its most basic level, the entire issue comes to this: can children be believed? The law now assumes that children who are old enough to know the difference between right and wrong can be treated as adults; every state but Nebraska permits the con-

viction of a molester on the uncorroborated testimony of a child. "We're just not supposed to believe that children do or can lie," says Tim Stanton, a social worker at California's Naval Hospital Clinic at El Toro Marine Corps Station. "I was trained in school to believe that the child wouldn't bring up such an awful topic if it were a lie." Stanton's faith has been shaken because in the last two years he has treated a half dozen children who either fabricated or knowingly embellished stories of sexual abuse. "Of course some kids lie," says Lucy Berliner, a Seattle social worker and a recognized authority on abused children. But she goes on to add: "There is no shred of evidence that kids lie about sexual assault any more than adults do. The important thing is that abused kids are coming forward for the first time."

Morris (with anatomically correct dolls): Too much zeal?

Custody: The real problem may not be the children but the adults. In an essay in the Journal of Social Issues, University of Denver psychology Prof. Gail S. Goodman suggests that children may be entirely reliable as witnesses to events they actually saw or experienced, but they may also be suggestible to accounts of events that did not happen. In other words, an investigator may be able to plant an idea that a child then embraces as his or her own. Or a parent: one of the most potent weapons in a custody fight against an ex-spouse is an allegation of abuse, observes Lesley Wimberly, cofounder of the California chapter of VOCAL (Victims of Child Abuse Legislation). Against such charges, she says, "practically speaking there is no defense."

In criminal cases, the susceptibility of children to suggestion has become the first line of defense. Lawyers for accused molesters aim to put the investigation itself on trial. In large measure that is what has happened in the tangled and mangled Jordan, Minn., cases. They started typically enough, with complaints by two mothers and their daughters that a local trash collector had sexually abused the girls. The accused, a previously convicted molester named James Rud, confessed and implicated 15 others. (He later recanted the accusations.) As the investigation grew, 45 adults reportedly became targets, and 24 were eventually charged. Much of the evidence came from children accusing parents and neighbors. The only trial so far—of Robert and Lois Bentz—ended in acquittal. On the eve of a second trial, Scott County prosecutor Kathleen Morris, who was coming under criticism over the zeal of her investigation, dropped all charges and turned the files over to state and FBI agents. A report by Minnesota Attorney General Hubert Humphrey III is due this week. Humphrey could recommend reinstating the charges—or, some suspect, issue a stinging rebuke of Morris.

In the meantime, lawyers for the accused families have argued strenuously that the real abusers in Jordan are Morris and her staff. "The children," says defense psychologist Ralph Underwager, "were brainwashed." After the initial charges were filed, many of the children were taken from their parents and placed in foster homes. Then, according to defense lawyers, they were repeatedly interviewed by prosecutors or social workers who encouraged them to spin detailed stories by rewarding them for strong answers. In a transcript of a hearing that was obtained by NEWSWEEK (box), a five-year-old girl who told of being touched in her groin by her father acknowledged that she had been

A Five-Year-Old Takes the Stand

One year ago "Jane Doe" was taken from her parents, who were among the 24 adults charged with sexual abuse in Jordan, Minn. The charges were dropped before trial, but authorities fought the efforts of Jane's parents to get her back. The transcript below is excerpted from the child's testimony last month in a hearing to determine whether she should be returned to the custody of her parents. Five-year-old Jane was still in a foster home last week.

Direct examination

Q. *Did anybody ever hurt you when you were living in your real home?*

A. Yes.

Q. *. . . What was that?*

A. Spanking.

Q. *. . . Was there anything else?*

A. Yes.

Q. *What was the other thing?*

A. Touched on the private parts.

Q. *. . . What are your private parts?*

A. Crotch.

Q. *. . . Did anybody ever touch you, other than your crotch, in your private parts? Do you remember?*

A. My butt.

Q. *. . . You said somebody touched you in your crotch with their finger; is that right or is that wrong?*

A. Right.

Q. *. . . Did anybody tell you you should make those things up, that they weren't true?*

A. No.

Q. *. . . . You didn't make them up?*

A. No.

Q. *Did they really happen then if you didn't make them up?*

A. Yes.

Cross-examination

Q. *Do you remember when Tom [a social worker] said, 'Now it's time to practice for court . . .'?*

A. Yes.

Q. *. . . And you practiced saying 'I'm telling the truth' with Tom, didn't you?*

A. Yes.

Q. *And you practiced with Tom saying that your mom and dad touched you in the private parts, didn't you?*

A. Yeah.

Q. *. . . And during practice, if you gave a wrong answer, Tom would correct you, wouldn't he?*

A. Yeah.

Q. *. . . . And they kept telling you, 'You have bad secrets,' didn't they?*

A. Yes.

Q. *And before you were taken away from your real parents, you didn't have any bad secrets, did you?*

A. No.

Q. *. . . . You told a lot of people it was just pretend, didn't you?*

A. Yeah.

Q. *And you kept telling them that nothing happened last year, didn't you?*

A. Yes.

Q. *But they wanted you to tell them that something happened, didn't they?*

A. Yes.

coached by a social worker. Defense lawyer Marc Kurzman quotes the oldest son of Greg and Jane Myers as admitting that he made up detailed stories of abuse because "I could tell what they wanted me to say by the way they asked the questions."

For the moment Morris is not speaking in her own defense. But she is continuing with her job; a fortnight ago she won a child-abuse case against a couple who abused their children in Shakopee, Minn. Life isn't smooth for the former defendants either. "I lie in bed and think how much I'd like people to know that we are not guilty," says Cindy Buchan, who was arrested with her husband, Donald, a Scott County deputy sheriff. The Buchans were luckier than some defendants; they got their children back after their case was dropped. Still seeking vindication, the Buchans, the Myers and other former defendants have filed multimillion-dollar lawsuits against Morris and other officials. "I told my daughter," Buchan says, "that we want these people to pay for making you and us cry every day."

Script: The defense in the McMartin day-care case is trying to follow the Jordan script by charging that the testimony of the young witnesses was elicited through leading questions. But, says Kee MacFarlane, the director of Children's Institute International, a nonprofit organization that helped conduct the investigation, "you have to ask leading questions because children are programmed not to tell. If we had asked them, 'What happened at school?' we wouldn't have the case we have now."

To defense lawyers, child-abuse cases are no different than any charges. "Convicted child molesters get prison sentences," says Robert Berke, president of California Attorneys for Criminal Justice. "It's important that there be safeguards for defendants." Another California bar group sponsored a seminar last year teaching defenders how to undermine young witnesses. The message: intimidate, mock or confuse the child who, for the moment, is an enemy.

But the child is also a child. Wisely, trial judges and states are experimenting with different techniques to help young witnesses, including videotaping testimony and working with children in informal settings rather than courtrooms (NEWSWEEK, May 14, 1984). The system must be stretched to its limits to accommodate both the defendant's right to a fair trial and the desire to avoid abusing the child on the witness stand. That is why Loyola Marymount University law Prof. Gerald Uelmen believes that a cooling of what he calls "a Salem witch-hunt hysteria" is so necessary. Anything else is an invitation to a backlash. Says Josephine Bulkley, director of the American Bar Association's child-abuse project, "What worries me is that we may go back to the belief that kids can't be believed." And that would be an abuse therapists couldn't cure.

ARIC PRESS with MARY HAGER in Washington, PATRICIA KING in Chicago, TESSA NAMUTH in New York, DIANE SHERMAN in Los Angeles and SHARON WALTERS in San Francisco

QUESTIONS

1. Is it proper to characterize child protection proceedings as non-adversarial and inquiry-like as has been done by the B. C. C. A.?

2. Does the "best interests" test have any procedural or evidentiary implications?

3. Should judges "interview" children to determine their wishes?

4. Is the court a passive or active participant in the determination of a child's best interests? How?

5. If children are felt to be suggestable, should their cross-examination be restricted?