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INTRODUCTION

Children cannot survive without adult care and protection. Adults do not always provide adequate care and protection to children however. Each state has, therefore, developed laws which relate to child protection, mandate reporting of abuse, and establish systems to investigate and treat problems of abuse and neglect within the family. These laws are a reflection of the state’s compelling interest in the welfare of its children.

Awareness of child maltreatment has increased with the publicity of horrendous forms of abuse perpetrated against children by the persons responsible for their care. News stories about fatal beatings, ritualistic sexual abuse, or gross deprivation of children arouse outrage against the perpetrators, and against the systems designed to offer protection when caretakers fail to do so. This outrage is a reflection of the community’s compelling interest in the welfare of its children.

The United State Advisory Board on Child Abuse and Neglect reports that child abuse and neglect represent a national emergency. Pennsylvania has seen an increase in child abuse reports from 13,703 in 1981 to 23,361 in 1991 with 4,689 being substantiated in 1981 and 7,986 in 1991. The greatest increase in reports made, and reports substantiated, is in regard to sexual abuse. In 1981, 1,547 sexual injuries were reported; in 1991, that number had risen to 6,351. Certainly, the great majority of these cases

4. Id.
5. Id. In 1991, 75.9 percent of sexually abused children were girls and 24.1 percent were boys. Id. 643 of the sexual abuse injuries were inflicted by perpetrators identified as female and 2100 sexual abuse injuries were inflicted by perpetrators identified as male. Id.

Because the greatest percentage of cases reported involved female victims and male perpetrators, throughout this paper the author will refer to that type of situation. This paper is in no way intended to be limited to that particular relationship.
were not publicized so as to arouse community outrage. But, do those children, who are so misused and betrayed by their caretakers, warrant any less the interest of a concerned community? The question is whether abuse and neglect of children are to be classified primarily as a "family problem" or as a "crime?"

Most parents experience frustration with their children. We do not want to prosecute and punish someone for doing something we ourselves might have done or thought of doing. The more severe the result, however, the more we disassociate ourselves from the behavior and redefine it as criminal. Significantly, response by governmental agencies is defined by this societal attitude. This paper looks at the management of child abuse by legal systems in Pennsylvania.

**PENNSYLVANIA APPROACH**

As in many other states, Pennsylvania's statutes [to combat child abuse] contain relevant criminal offenses. However, Pennsylvania was one of the first states in the country to adopt a non-criminal approach to child abuse prevention . . . [t]he law presumed that many, if not most, of these [intrafamilial] relationships could be salvaged without resort to the criminal justice system and all its stagnitizing repercussions . . . .

This non-criminal approach was taken in Pennsylvania with a view toward encouraging reporting of suspicions of child abuse by persons outside the family. It was also adopted because of the belief in the early 1970s that attempts at criminal prosecutions would not be successful due to the reluctance or inability of children and family members to testify.

Noting significant increases in the number of reports, severity of reports, and reports of repeated abuse, the Pennsylvania District Attorneys Association argued in 1979 for a change in the laws on child abuse.

[T]he theory that child abuse is a "problem" and not a "crime" and should
be handled through counseling rather than the criminal process is no longer viable. Reporting provisions which bypass law enforcement authorities are inadequate to protect both the abused child and other children in the family who are potential abuse victims. . . perpetrators of serious, violent crimes are permitted to continue their abusive behavior.9

Social service practitioners and researchers likewise recognized that the manner of dealing with abuse as solely a family problem limited alternatives for case management. Traditional social work methods involving voluntary agreements between family members coupled with encouragement by a caseworker to follow through with counseling or parenting programs are effective if all parties recognize the problem and are motivated to change. If that motivation is lacking, child protection agencies can petition the juvenile court and thereby assure protection from abuse by family members by placing the victim in substitute care or by securing a court order that parents comply with a plan of treatment. Sanctions by the juvenile court impact on the victim much more than on the perpetrator, however, because it is only the victim who can be removed from the home, family, and friends, and this removal may not be the “help” he or she wants or needs.

Disclosure of sexual abuse nearly always places the child in a more vulnerable position; she will be subjected to great pressure to recant or deny the allegations.10 Separation of the perpetrator and the child during initial intervention is essential, but removal of the offender from the home rather than the victim is more desirable to protect the child and prevent risk of her being, or feeling, identified as responsible for the problem.11

The insidious nature of the child abuse problem, most especially sexual abuse, warrants stronger alternatives for case management. Specifically, it warrants alternatives that hold the abuser rather than the abused accountable. "The traditional CPS (Child Protective Service) model which uses Juvenile Court to order families to treatment is ineffective with sexually abusive families because it does not have the authoritative power of the criminal justice

9. Id.
11. Sgroi, Handbook of Clinical Intervention at 103. This same approach is proposed by Jon Conte, in his article The Justice System and Sexual Abuse of Children, 58 Social Services Review 558-67 (December 1984). He believes that removal of the child from the home can punish her by disrupting her life further and can communicate to her that she is responsible for the sexual abuse. Id at 565.
system."

Change in the Pennsylvania Child Abuse law was not forthcoming until 1982 when a series of highly publicized cases of child abuse stimulated the legislature into action. At that time the Child Protective Services Law was amended to mandate the child protective services agencies to receive and promptly investigate all reports of suspected child abuse and to refer reports of homicide, serious bodily injury, sexual abuse, and abuse by non-caretaker perpetrators to law enforcement agencies. Under the new law, the

14. Child Protective Services Law (CPSL), 15 Pa Cons Stat Ann § 2215(a)(10) (Purdon Supp 1985). The law was recodified in August, 1991 and is now found at CPSL, 23 Pa Cons Stat Ann §§ 6301 et seq (Purdon 1991). The pertinent sections are as follows:

Section 2. Findings and purpose - abused children are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment. It is the purpose of this act to encourage more complete reporting of suspected child abuse and to establish in each county a child protective service capable of investigating such reports swiftly and competently, providing protection for children from further abuse and providing rehabilitative services for children and parents involved so as to ensure the child's well-being and to preserve and stabilize family life wherever appropriate. However, nothing in this act shall be construed to restrict the generally recognized existing rights of parents to use reasonable supervision and control when raising their children.

Section 15. Confidentiality of records. - (a) Except as provided in section 14, reports made pursuant to this act including but not limited to report summaries of child abuse made pursuant to section 6(b) and written reports made pursuant to section 6(c) as well as any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county children and youth social service agency or a child protective service shall be confidential and shall only be made available to: (among others)

(1) A duly authorized official of a child protective service in the course of his official duties, multidisciplinary team members assigned to the case, and duly authorized persons providing services pursuant to section 17(8).
(2) A physician examining or treating a child or the direction or a person specifically designated in writing by such a director or any hospital or other medical institution where a child is being treated, where the physician or the director of his designee suspect the child of being an abused child.
(3) A guardian ad litem for the child.
(4) A duly authorized official or agent of the department in accordance with department regulations or in accordance with the conduct of a performance audit as authorized by section 20.
(5) A court of competent jurisdiction pursuant to a court order.
(6) A standing committee of the general assembly, as specified in section 24.
(7) The attorney general.
(8) Federal auditors if required for federal financial participation in funding of agencies provided that federal auditors may not have access to identifiable reports.
(9) Law enforcement officials in the course of investigating cases of (i) homicide,
civil agency is required to conduct its own investigation but, must

sexual abuse or exploitation, or serious bodily injury as perpetrated by persons whether related or not related to the victim; (ii) child abuse perpetrated by persons who are not family members or (iii) repeated physical injury to a child under circumstances which indicate that the child’s health or welfare is harmed or threatened.

(10) Law enforcement officials who shall receive reports of abuse in which the initial review gives evidence that the abuse is homicide, sexual abuse or exploitation, or serious bodily injury perpetrated by persons whether related or not related to the victim, or child abuse perpetrated by persons who are not family members. Reports referred to law enforcement officials shall be on such forms provided by and according to regulations promulgated by the department. For purposes of section 15 (a) “serious bodily injury” means bodily injury which creates substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

(11) County commissioners, to whom the department shall forward specific files upon request, for review when investigating the competence of county children and youth employees.

* * *

(b) At any time, a subject of a report may receive, upon written request, a copy of all information except that prohibited from being disclosed by subsection (c) contained in the statewide central register or in any report filed pursuant to section 6.

(c) The release of data that would identify the person who made a report of suspected child abuse or person who cooperated in a subsequent investigation, is hereby prohibited unless the secretary finds that such release will not be detrimental to the safety of such person.

Section 16. Child protective service responsibilities and organization: local plan

(a) unless the department finds it is unfeasible, every county children and youth social service agency shall establish a “child protective service” within each agency. The child protective service shall perform those functions assigned by this act to it and only such others that would further the purpose of this act. It shall have a sufficient staff or sufficient qualifications to fulfill the purposes of this act and organized in such a way as to maximize the continuity of responsibility, care and services of individual workers toward individual children and families. The child protective service of the county children and youth social service agency shall be the sole civil agency responsible for receiving and investigating all reports of child abuse made pursuant to this act, specifically including, but not limited to reports of child abuse in facilities operated by the department and other public agencies, for the purpose of providing protective services to prevent further abuses to children and to provide or arrange for and monitor the provision of those services necessary to safeguard and ensure the child’s well-being and development, and to preserve and stabilize family life wherever appropriate; provided, however, that when the suspected child abuse has been committed by the agency or any of its agents or employees, the department shall assume the role of the agency with regard to the investigation and directly refer the child for services. Further, where suspected child abuse has occurred and an employee or agency of the department or the county children and youth social service agency or a private or public institution is a subject of the report, the department, agency or institution shall be informed of the investigation so that it may take appropriate action.

* * *

(d) Each child protective service shall make available among its services for the prevention and treatment of child abuse multidisciplinary teams, instruction and education for parenthood, protective and preventive social counseling, emergency caretaker services, emergency shelter care, emergency medical services, and the establish-
also cooperate with law enforcement.\textsuperscript{15}

This approach by the Pennsylvania legislature reflects the dichotomy of societal attitudes about child abuse by keeping the less serious abuse in the social service arena and allowing for criminal prosecution of more extreme cases. In 1982, 1,994 sexual injuries and 51 fatalities were investigated by Child Protective Services.\textsuperscript{16} The change in the law requiring referral to law enforcement became effective that year and 703 referrals were made to law enforcement;\textsuperscript{17} 4,043 referrals were made to law enforcement in 1983\textsuperscript{18} and 8,077 in 1991.\textsuperscript{19} Thus, as a result of the new law, those alleged seriously abused children are afforded protections of both the civil and criminal justice systems in Pennsylvania.

**DIFFICULTIES IN MANAGEMENT: ATTEMPTS TO REMEDY**

Various considerations related to the ability of the victim to participate in the protection process require recognition by social service and law enforcement personnel if intervention is to be effective. For example, a child who has been betrayed by a trusted caretaker is expected to cooperate and talk freely with a variety of strangers in a variety of settings.

The demands of the social services and criminal justice system often mean that a child victim of a sexual assault may be interviewed about the assault as many as a dozen times - by a social services investigator, the police, the

\textsuperscript{23} Pa Cons Stat Ann §§ 6301 et seq.

\textsuperscript{15} Id.


\textsuperscript{17} Id.


local prosecutor's office, therapists, and many others. This would be a great strain on any adult, let alone a child already under extreme stress.\textsuperscript{20}

The difficulty with this expectation of cooperation with multiple interviews is that the victim may be feeling rejected by friends and family and fearful of consequences threatened by her perpetrator if the secret was revealed. She may be feeling great pressure from all the adults who are trying to help her. Moreover, a delay of one full year from disclosure to criminal disposition is not unusual, and this is a very long time in the life of a child.

Efforts to reduce the stress of the intervention process on the victim are necessary in order to effectively deal with the problem of child abuse.

Legislators have acted to confront the problem and to aid children through the criminal process. The various legislative enactments include: special hearsay exceptions, closed-circuit television testimony, courtroom closure, speedy disposition, use of anatomically correct dolls, child considered competent to testify without prior qualification.\textsuperscript{21}

Coordinated multidisciplinary efforts at investigation and treatment are believed to be necessary for successful prosecution of child abuse. Communities across the country have developed a variety of programs to improve their response to child abuse by as-


\textsuperscript{21} National Center of Prosecution of Child Abuse, \textit{Investigation and Prosecution of Child Abuse} ch VII 1-16 (American Prosecutors Research Institute 1987). A breakdown of states with these enactments is as follows:

- Special hearsay exceptions 25
- Closed-circuit testimony 25
- Courtroom closure 11
- Speedy disposition 15
- Use of dolls 5
- Competent without qualification 19
- Coordination and Cooperation
  with involved agencies 30

Alabama, California and Minnesota have the greatest number of legislative provisions to aid child victims in prosecutions. Pennsylvania legislation has included all but speedy disposition and courtroom closure. Id at ch VII 1-16.

See also, National Institute of Justice, \textit{When the Victim is a Child} 65-82 (National Institute of Justice, March 1992).

As of December 1988, 26 states have enacted statutes relating to special hearsay; 36 states allow videotaped testimony, 29 allow closed-circuit testimony, and 33 enacted statutes allowing presumption of competency. Id at 49.
sisting victims while holding offenders accountable. Although this is not legislated in Pennsylvania, county Child Protective Service agencies are mandated to cooperate with law enforcement agencies and, at the county level, agencies develop protocols with local law enforcement agencies to coordinate initial joint interviews of child victims. Training programs for investigators, designation of specialized child abuse prosecution teams, and specialized counseling programs for victims and offenders have developed across the state. Similarly, community efforts at education, identification and prevention have increased.

Neither the victim, the offender, the family, the next generation of children in that family, nor the well-being of society as a whole can benefit from continuing secrecy and denial of ongoing sexual abuse. The offender who protects an uneasy position of power over the silent victims will not release his control unless he is confronted by an outside power sufficient to demand and to supervise a total cessation of sexual harassment.

The counselor alone cannot expect cooperation and recovery in an otherwise reluctant and unacknowledged offender. The justice system alone can rarely prove guilt or impose sanctions without preparation and continuing support of all parties within an effective treatment system. All agencies working as a team give maximum promise of effective recovery for the victim, rehabilitation of the offender and survival of the family.

**The Response of Pennsylvania Courts**

As the foregoing indicates, Child Protective Service agencies, law enforcement agencies, clinicians, and communities have begun to coordinate efforts to combat child abuse. Legislators have acted to confront the problem and to aid children through the criminal process. Pennsylvania has mobilized to deal with serious child abuse as both a family problem and a criminal justice problem. Unfortunately, the Pennsylvania courts have not joined in that effort. Recent decisions indicate that from the perspective of our appellate courts, child abuse is to remain classified as a family problem. By denying considerations to protections of a child victim in the crim-

22. National Center of Prosecution of Child Abuse, *Investigation and Prosecution of Child Abuse* ch VII 1-16 (American Prosecutors Research Institute 1987). Eleven programs are described from the following states: California, Texas, Florida, Illinois, Alabama, Colorado, New York, Hawaii, Virginia, Oregon, and Georgia. Although they vary somewhat in methodology, protocols all involve efforts at joint interviewing by CPS and law enforcement to limit the number of interviews of a child, regular staffing by agency personnel, and referral for treatment. Id at ch VII 1.

inal prosecution of her offender, our courts limit state protection to the social service approach.

**Testimony**

Due to the intimidating and stressful aspects of testifying in open court in front of the perpetrator, juvenile court cases exclude the public and sometimes allow the child to testify in the judge's chambers. A number of states have even enacted legislation which allows for alternatives for taking testimony in criminal court by using videotape or closed circuit television.\(^{24}\)

In examining the constitutionality of such legislation, the United States Supreme Court in *Maryland v Craig*\(^{25}\) held that a state's interest in the physical and psychological well-being of child abuse victims may at times be important enough to outweigh a defendant's right to face his accusers in the courtroom.\(^ {26}\) In those such cases, the Court held testimony by closed circuit television was authorized.\(^ {27}\) The Court recognized "that states have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment and [t]hat a significant majority of states has enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy."\(^ {28}\)

The Pennsylvania Supreme Court, however, declined that protection to children, holding in *Commonwealth v Ludwig*\(^ {29}\) that the Confrontation Clause of the Pennsylvania Constitution does not

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27. Id at 3167.

28. Id.

29. 527 Pa 472, 594 A2d 281 (1991). In the case, Ludwig was charged with various sexual offenses against his five year old daughter. *Ludwig*, 594 A2d at 282. Because the child had undergone "emotional freezing" at the preliminary hearing and her therapist testified that psychological progress she was making subsequent to that event would be impaired if the child had to testify in front of her father, the trial court allowed the child to testify by closed-circuit television. Id at 281. The procedure balanced the welfare of the child against the appellants right to confrontation. Id. The Supreme Court reversed the trial court's decision, focusing on the language of Pennsylvania's Constitution, Article I, Section 9, ensuring the right of the defendant to meet witnesses "face to face." Id at 282. The court distinguished the United States Supreme Court decision in *Craig* by stating that, unlike the United States Constitution which reflects a "preference" for face to face confrontations, the Pennsylvania Constitution "clearly, emphatically, and unambiguously requires a 'face to face' confrontation." *Ludwig*, 594 A2d at 284.
permit the infringement of a defendant's constitutional right to meet a witness face to face.\textsuperscript{30} The \textit{Ludwig} court stated that "[w]e are cognizant of society's interest in protecting victims of sexual abuse. However, that interest cannot be preeminent over the accused's constitutional right to confront the witnesses against him face to face."\textsuperscript{31}

Justice Nix dissented, calling the majority opinion a demonstrably incorrect attempt to latch onto stylistic differences between the Federal and Pennsylvania Constitutions when the substantive right protected was identical.\textsuperscript{32} Justice Flaherty also dissented, stating that the right to face to face confrontation was not absolute and that the decision could be "a virtual license for any miscreant to abuse very young children who, predictably, will be unable to accuse the criminal to his face."\textsuperscript{33} Justice Flaherty called attention to "[t]he now well-documented, widespread incidence of perverted adults preying upon defenseless children [that] has caused a need to provide realistic protection for children in our society."\textsuperscript{34}

In 1986, Pennsylvania's General Assembly enacted a statute authorizing the use of closed-circuit television testimony once good cause was shown.\textsuperscript{35} The express declaration of policy behind this statute is "to promote the best interests of children . . . [and] to provide children with additional rights and protections during their involvement with the criminal justice system."\textsuperscript{36}

Although the decision in \textit{Ludwig} did not specifically address the constitutionality of the video-taping statute, the ruling in that case effectively makes the use of this procedure to aid child witnesses a violation of a defendant's constitutional right to confrontation. Pennsylvania courts have, therefore, held form over substance in this area of protection of children by a literal interpretation of the Constitution. The state's interest in the physical and psychological well-being of child abuse victims is not sufficiently important to outweigh a defendant's right to face his accuser in a direct face to face manner. In Pennsylvania, victims of abuse must face their

\begin{itemize}
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id at 285.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id at 289.
\item \textsuperscript{34} Id at 290.
\item \textsuperscript{35} Child, Victims and Witnesses Act, 42 Pa Cons Stat Ann § 5985(a) (Purdon 1992). This statute was enacted after the trial in \textit{Ludwig} and was in effect at the time of the Supreme Court decision. The Court acknowledged the statute in a footnote and stated that its constitutionality was not at issue. \textit{Ludwig}, 594 A2d at 282.
\item \textsuperscript{36} 42 Pa Cons Stat Ann § 5981 (Purdon 1992).
\end{itemize}
abuser in open court, even though his confrontation rights can be protected in ways that will lessen additional trauma to the young victim, such as the closed-circuit television testimony authorized by the United States Supreme Court.

The only resolution to the position taken by the Pennsylvania Supreme Court is in a constitutional amendment. Senator Steven Greenleaf (R-Montgomery County) has sponsored Senate Bill 1115 to start the process of amending Pennsylvania's Constitution in response to the Ludwig case. The "face to face" requirement of Article I, Section 9 would instead read, as does the United States Constitution, "be confronted with the witnesses against him" so that use of videotaped depositions or closed-circuit television testimony would be allowable.

Fortunately, the Pennsylvania State legislature does not intend to see child protection efforts frustrated by holding children to adult standards in criminal courts.

**Privacy**

The Pennsylvania courts have further minimized protections to children in the criminal court setting by eroding protections of the Rape Shield Law. Pennsylvania's Rape Shield Law is designed to provide certain protections to victims of sexual abuse by excluding evidence of chastity or promiscuity so as not to distract from the legitimate issues involved in a sexual abuse prosecution.38 Few exceptions to this protection have been allowed. These exceptions are: (1) inquiries regarding relevant evidence which would tend to disprove the allegation; (2) opportunity to provide alternative ex-

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§ 3104. Evidence of victim's sexual conduct:
(a) General rule. - Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.
(b) Evidentiary proceedings. - A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).
planation for physical evidence; and (3) opportunity to demonstrate specific motive for complainant to bring false charges.\textsuperscript{39} For an exception to be allowed, an adequate specific proffer must be made and found to be relevant, more probative than prejudicial, and not merely cumulative of other unprivileged impeachment or rebutted evidence.\textsuperscript{40} There is "no authority for . . . ‘fishing expedition’ style intrusions on Rape Shield law protections . . . ."\textsuperscript{41}

In a recent case, \textit{Commonwealth v Wall}\textsuperscript{42}, the Pennsylvania Superior Court found a proffer sufficiently specific when presented with uncontested evidence that a twelve year old victim had prior experience as a prosecutrix in a sexual assault case.\textsuperscript{43} That case had resulted in the child’s removal from her home and placement with an aunt who harshly disciplined her. The defense contended that the aunt’s discipline may have prompted the child to fabricate a claim of sexual abuse against her uncle in order to be removed from that home.\textsuperscript{44}

Evidence of specific hostility toward a defendant has been considered relevant, and therefore admissible, but in \textit{Wall}, evidence of hostility toward a \textit{third} party was authorized. It was deemed relevant because the defense laid a foundation to show that the victim’s peculiar knowledge of the content, and potential consequences of a sexual abuse claim, may establish why the victim might have fabricated a claim against an adult male in a home she may want to leave.\textsuperscript{45}

The \textit{Wall} court held that, although "the mere fact that a complainant was previously victimized is itself wholly irrelevant, . . . where . . . otherwise admissible facts render evidence of previous participation in a materially similar prior prosecution genuinely exculpatory, such facts may not be excluded from trial."\textsuperscript{46} Here, the otherwise admissible facts included evidence of the child’s fear of physical punishment by her aunt, the timing of her allegations of sexual abuse as immediately following a violent argument with her aunt, and an unsuccessful attempt on her part to seek police protection from her aunt.\textsuperscript{47}

\textsuperscript{40} \textit{Nieves}, 582 A2d at 347.
\textsuperscript{41} Id at 349.
\textsuperscript{42} \textit{—— Pa Super ——}, 606 A2d 449 (1992).
\textsuperscript{43} \textit{Wall}, 606 A2d at 454.
\textsuperscript{44} Id at 458.
\textsuperscript{45} Id at 462.
\textsuperscript{46} Id at 466.
\textsuperscript{47} Id at 461.
In Wall, the child testified that she had engaged in a variety of sexual acts with her uncle in exchange for protection from her aunt’s severe discipline. The Wall court reasoned that the victim’s prior history of sexual abuse should have been admitted to allow the defense to establish that the victim may have fabricated a claim of sexual abuse against her uncle instead of claiming physical abuse by her aunt in order to be removed from that home. The difficulty in this reasoning is that in prior cases in Pennsylvania, the fact that a victim stated she had been previously raped or had made repeated and unbelievable claims of sexual attacks by others, or that a child learned nomenclature and sexual techniques from a prior sexual assault was found not to be an adequate basis to serve as an exception to the Rape Shield Law. Rather, evidence has only been admitted when it tended to prove that the victim might have fabricated the sexual abuse claim against the defendant by a showing of witness bias and hostility toward the defendant, and a motive to seek retribution against him.

48. Id at 452.
49. Id at 462.
50. Commonwealth v Troy, 381 Pa Super 326, 553 A2d 992, 997 (1989). The defendant wanted to attack the victim’s credibility by introducing evidence that she had been raped previously. Troy, 553 A2d at 997. That was disallowed based on the Rape Shield Law because defense of consent was not made. Id at 997.
51. Commonwealth v Coia, 342 Pa Super 358, 492 A2d 1159, 1161 (1985). In Coia defendant was convicted of sexual offenses against a fifteen year old. Coia, 492 A2d at 1160. He was to introduce evidence that the victim had made repeated and unbelievable claims of sexual attacks upon herself by others in the past. Id. The evidence was precluded as irrelevant, prohibited by the Rape Shield Law, not exculpatory, and unnecessarily prejudicial to the victim because unproven. Id at 1161.
52. Commonwealth v Appenzeller, 388 Pa Super 172, 565 A2d 170, 171 (1989). Appenzeller was convicted of sexual offenses against a three year old neighbor child. Appenzeller, 565 A2d at 171. He appealed arguing he should have been allowed to question the victim and her mother about a prior sexual assault of the victim to show a source for her knowledge of sexual activity. Id at 171. The court held that the evidence was irrelevant to appellant’s defense because the child’s credibility was never under attack as to the identification of her attacker. Id. “A child no less than an adult is protected from having her prior sexual history paraded in public and having unfair inferences drawn by a jury therefrom. This is particularly true where, as here, the prior history involved another assault.” Id at 172.
53. Commonwealth v Black, 337 Pa Super 548, 487 A2d 396, 399 (1985). Black appealed his conviction of sexual offenses against his thirteen year old daughter claiming that the Rape Shield Law was applied to exclude evidence of the victim’s prior sexual conduct with her brother which would have showed her bias toward him. Black, 487 A2d at 398. Black claimed that the child made the allegations after a violent argument between he and the victim’s brother which resulted in the brother leaving the home. Id. Further, Black alleged that because she had an on-going sexual relationship with her brother, she was angry at her father for this and wanted him out of the home so the brother could return. Id.
For example, in *Commonwealth v Smith*, the court excluded evidence of the past sexual history of the victim which had been offered for a general attack on the victim's credibility, stating that "the holding in *Black* . . . should be viewed quite narrowly as later cases have applied it only where the victim's credibility was allegedly affected by *bias against* or *hostility toward the defendant*, or the victim had a motive to seek retribution." The *Smith* court found no such evidence. Further, the court noted that the defendant had ample alternative means to attack the victim's credibility and therefore, application of the Rape Shield Law in order to exclude the evidence of prior sexual acts was appropriate.

The *Wall* court had allowed prior sexual history to be introduced into evidence to show that bias and hostility against a *third party* might have been the basis of a fabrication against a defendant while acknowledging that other evidence was available to challenge the credibility of the victim. Because the victim's testimony was uncorroborated and the evidence of past sexual history was an "undisputed matter of record," the *Wall* court distinguished this case from *Commonwealth v Johnson* where evidence of past sexual conduct of a child was excluded because the possibility of Court admitted the evidence because it was offered to show specific bias against and hostility toward appellant and motive to seek retribution by, perhaps, false accusations. Id at 399. The Court stressed, however, that not all material evidence is necessarily admissible and even when logically relevant "the victim's prejudice or lack of credibility may be excluded if it would so inflame the minds of the jurors that its probative value is outweighed by unfair prejudice." Id at 401.

54. ___ Pa Super ___, 599 A2d 1340 (1991). The defense theory in *Smith* was that the thirteen year old victim accused the defendant of rape only to avoid her grandmother's possible anger upon learning that she had had sexual intercourse with someone. *Smith*, 599 A2d at 1343. No evidence of fear of the grandmother's reaction was presented to the extent the victim would allege rape. Id. A rape test had been done and showed evidence of recent sexual activity but the victim, although she had the opportunity to name the defendant as the perpetrator, did not do so, and this was more indicative of a lack of bias toward him. Id at 1344.


56. *Smith*, 599 A2d at 1344.

57. Id.

58. *Wall*, 606 A2d at 463.

59. 389 Pa Super 184, 566 A2d 1197 (1989). The defense wanted to impeach the testimony of an eyewitness claiming that he was the actual perpetrator and had intimidated the victim to blame the defendant. *Johnson*, 566 A2d at 1201. The Court said that "where the proposed testimony is lacking in bias, hostility or motive to seek retribution against the defendant by victim it has been held to be inadmissible." Id at 1200. The Court concluded that the Rape Shield Law was a bar to admissibility of testimony of prior sexual conduct of the victim unless it has probative value which is exculpatory to the defendant. Id at 1202.
prejudice outweighed the probative value.\textsuperscript{60}

Justice Olzewski dissented in \textit{Wall} stating his belief that evidence of the child's previous victimization by her mother's paramour was irrelevant.

It is difficult enough for victims of sexual assault to relive the traumatic events of the assault which is being prosecuted.\textsuperscript{61} To force a victim to recount an assault for which a separate perpetrator has already been tried and convicted would discourage serial victims from bringing forth allegations.\textsuperscript{61}

Therefore, the decision rendered in \textit{Wall} allows evidence of a child's removal from an abusive home to be used to try to establish why the victim might fabricate a specific type of allegation against a subsequent caretaker or other household member when she is alleging further abuse in substitute care. The problem with this decision is that, abused children are abused in substitute care settings. In 1991, there were 257 substantiated reports of child abuse in substitute care settings (these involved children placed by juvenile court in agency approved settings); 184 of these cases involved sexual abuse.\textsuperscript{62}

Certainly evidence of probative value which is exculpatory to the defendant must be admitted to comply with due process guarantees. Other state courts have acknowledged a due process exception to their rape shield statutes, or have created new exceptions.\textsuperscript{63} In Washington, the court does not apply its rape shield statute to prior sexual abuse of a victim, but only to evidence of prior sexual activity or misconduct of a victim.\textsuperscript{64}

In New Jersey, an exception to the rape shield statute provides for introduction of evidence of an alternative source for an infant's sexual knowledge, but, such evidence is limited to that knowledge,

\textsuperscript{60} Id.
\textsuperscript{61} \textit{Wall}, 606 A2d at 467.
\textsuperscript{63} Comment, \textit{Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence}, 1985 Wis L Rev 1219, 1270. New Hampshire, Minnesota, Louisiana, Nevada and Ohio acknowledge due process exceptions while Michigan and Wisconsin along with Pennsylvania have created exceptions. Id.
\textsuperscript{64} \textit{State v Markle}, 118 Wash 2d 424, 823 P2d 1101, 1109 (1992). The defense attempted to establish that the child had a motive to fabricate allegations of sexual abuse against the defendant by arguing that she had been abused by his son, and that she was angry because he had not responded to her complaints to him about that. \textit{Markle}, 823 P2d at 1103. The evidence of the son's prior abuse was excluded, not by the rape shield protection, but because of the defendant's inability to establish a motive for fabrication, despite having several opportunities to make a satisfactory offer of proof. Id at 1108.
and cannot be considered to attack character or credibility.\footnote{65}

In its analysis of that issue, the New Jersey Supreme Court noted that

\[\text{[t]he majority of out-of-state courts agree that the prior sexual abuse of a youthful victim is relevant to rebut the inference that the complainant could not describe the details of sexual intercourse if the defendant had not committed the acts in question.}\footnote{66}

\footnote{65. \textit{State v Budis}, 125 NJ 519, 593 A2d 784, 794 (1991). Budis was convicted of aggravated sexual assault of his cousin's nine year old daughter. \textit{Budis}, 593 A2d at 786. On appeal the conviction was reversed. The New Jersey Supreme Court affirmed that decision. Id. The trial court had prohibited testimony about details about the victim's sexual abuse by her step father, relying on the rape shield statute. Id at 787. Limited cross examination about the allegations and the investigation was allowed, but not about the circumstances or nature of the abuse by the stepfather. Id. The supreme court held that the probative value of that evidence as an alternative source for the child's sexual knowledge outweighed its possible prejudicial effect. Id at 788. The court reasoned that consistent with policies of protecting victims and preserving integrity of trials, the statute limits exceptions to admission of evidence of a victim's previous sexual conduct and prescribes the circumstances under which the trial court may consider the evidence to be relevant. Id. The defendant here argued that by restricting the purposes for which the evidence may be admitted, the statute deprives him of a defense. Id. The court stated that the probative value of prior acts depends on clear proof that they occurred; that they are relative to a material issue; and that they are necessary to a defense; and when offered to show a child's knowledge of sexual acts, relevance depends on whether the prior abuse closely resembles the acts in question. Id at 790. The court said that the likely trauma to the child and the degree to which admission of the evidence will invade the child's privacy must be considered in assessing the prejudicial effect of such evidence. Id. Prejudice may be diminished if evidence can be adduced from sources other than the child, such as official documents involving conviction or by stipulation. Id at 791. The proper balance of relevance and prejudicial effect depends on the facts of each case and varies considerably with the age of the victim. Id. The court held the evidence of this child's prior abuse relevant because the crux of the defense is not that the child fabricated, but that she initiated the acts and evidence of an alternative source of her sexual knowledge is crucial. Id. The court said that the trial court should deliver an instruction on the limited purpose of the evidence and expressly instruct the jury that it may not consider the evidence as an attack on the child's character or impeachment of her credibility. Id at 794. The instruction must indicate that the relevance of prior sexual history is limited to the victim's knowledge of sexual acts. Id. In his dissent, Judge O'Hern stated: [i]n the vast majority of cases involving adult victims in which consent may be considered to be critical to the defense, the evidence sought to be introduced here would be totally inadmissible. Evidently, because of an assumption that children are naive or innocent, the majority believes that we must counteract that assumption by permitting the very indignities to be inflicted on this child victim that we would not inflict on an adult victim. Id.}

\footnote{66. Id at 791 citing \textit{State v Oliver}, 158 Ariz 22, 28, 760 P2d 1071, 1077 (1988) (evidence of prior sexual abuse relevant to show ability to fabricate); \textit{State v Jacques}, 558 A2d 706, 708 (Me 1989) (prior sexual abuse of victim admissible to rebut the inference of child's inability to describe accurately acts of sexual intercourse); \textit{Commonwealth v Ruffen}, 399 Mass 811, 815, 507 NE2d 684, 687 (prior sexual abuse of ten-year-old relevant to show child's personal knowledge of sexual acts and terminology); \textit{Summit v State}, 101 Nev 159, 163-64, 697 P2d 1374, 1377 (1985) (evidence of prior sexual abuse relevant to rebut infer-
In Oregon, evidence of sexual behavior which relates to the motive or bias of the alleged victim can be admitted. Evidence relating to the victim’s hostility toward the defendant and an accusation of sexual abuse against another man by the child’s friend is not “sexual behavior,” however, and does not come within the exceptions provided by the rape shield statute.

In Illinois, the rape shield statute precludes admission of evidence of the sexual history of the victim unless it relates to sexual conduct with the defendant. When knowledge of sexual activities becomes an issue, however, due process precludes application of the rape shield statute.

ence that sexual abuse described by six-year-old complainant must have occurred or she could not have described it; State v Baker, 127 NH 801, 805, 408 A2d 1059, 1062 (1986) (due process requires admission of prior sexual experience of youthful victim to show knowledge of sexual acts); People v Ruiz, 71 AD2d 569, 570, 418 NYS2d 402, 403 (1979) (prior sexual experience of victim admissible to show ability to describe acts of sexual intercourse); State v Pulizzano, 155 Wis 2d 633, 651-53, 456 NW2d 325, 333 (prior sexual abuse relevant to show alternative source for sexual knowledge).

67. State of Oregon v Wattenberger, 97 Or App 414, 776 P2d 1292, 1295 (1989). Defendant was convicted of sexual abuse of the four year old child of his paramour. He appealed arguing that the trial court erred in failing to conduct an in camera inspection of Children’s Services Division records relating to the victim to determine whether they contained exculpatory evidence. On that basis, the judgment was vacated and the case remanded. Wattenberger, 776 P2d at 1292. The defendant also argued that the trial court erred in denying his motion to introduce evidence of the child’s past sexual conduct. Id. He sought to show that after the alleged incident for which he was accused, the victim was abused by five other persons; that the victim and her mother were angry with him; and that within a week of the complaint against him, another child who lived in the home with the victim accused another man of sexual abuse. Id at 1293. The court concluded that the evidence was not sexual behavior as the term is used in the rape shield statute and, therefore, was not admissible. Id. The court rejected defendant’s argument that the evidence could establish bias or motive to falsely accuse him. Id at 1294.

68. Id at 1293.

69. People of Illinois v Sandoval, 135 Ill 2d 159, 552 NE2d 726, 732 (1990). Defendant was convicted of “date rape.” Sandoval, 552 NE2d at 727. His conviction was reversed on appeal, but the Illinois Supreme Court reversed the appeal court. Id. The issue concerned admissibility of the sexual history of the victim under the state’s rape shield statute. Id. The defendant attempted to introduce evidence that the victim had anal sex with other men, and that she brought the complaint against him because he had rejected her. Id at 728. The court reasoned that the evidence of prior sexual practices of the victim sought to be introduced would not reveal bias, prejudice, or motive to testify falsely. Id at 733.

70. Illinois v Mason, 219 Ill App 3d 76, 578 NE2d 1351, 1353 (1991). Mason was convicted by a jury trial of aggravated sexual assault of a seven year old female. Mason, 578 NE2d at 1353. Testimony that the child had viewed sexually explicit videotapes and that she put things into her vagina was prohibited by the trial court on the theory that it was barred by the Illinois rape shield statute. Id at 1353. On appeal, the court held that the rape shield law does not apply to the facts in the case. Id. The court reasoned that the rape shield statute applies to prior sexual activity or reputation but not viewing of pornographic videotapes. Id. Further, the court held that the policies behind the statute, to prevent harassment and humiliation of victims and to encourage victims to report, cannot justify deny-
Because Pennsylvania courts will allow prior sexual history of a victim to be admitted to show evidence of bias and hostility, not only toward a defendant, but also toward a third party as a basis of theory of fabrication of specific allegations, investigators must be very thorough in this area. It is to be expected that motive to fabricate is dealt with in the initial investigative and validity assessment process. Joint interviews by trained interviewers, multidisciplinary case conferences prior to prosecution, and an adequate preparation of child witnesses are essential to the successful prosecution of child sexual abuse, and the Wall decision holds professionals in the field accountable for strict standards in those areas.

Prosecutors must be aware of the special problems in child abuse cases. When arguing pretrial motions regarding admissibility of a victim's prior sexual history, prosecutors must demand specific proffers of evidence relating to motive to fabricate or alternative sources of sexual knowledge. In situations when evidence of an adult victim's sexual history would be precluded, the child victim's privacy should similarly be protected.

Voir dire questions should be used carefully to both educate jurors about child sexual abuse and to disclose juror bias. It is important to ask potential jurors whether: they or any friends or family members have been accused of abuse; they view the problem as a family matter beyond governmental intervention; they have difficulty listening to descriptive sexual language; they tend to question the credibility of young children; and whether they would tend to disbelieve that a victim was biased against this defendant because she was previously abused by someone else.

Further, prosecutors must request jury instructions which state that evidence of prior abuse was allowed to show knowledge but not to be considered as an attack on character.

Probably nothing is more important, however, than adequate preparation of the child for testimony. Prosecutors must meet with
the child on several occasions to establish a comfortable rapport. Discussion of the child’s feelings toward the offender is critical in order to properly explain the criminal process. For example, a child who loves her offender and does not want to see him go to jail, needs to be helped to understand that he has a problem and without assistance from the judge he may hurt other children. If the child is frightened of the offender, she must be helped to understand that his power is in the secret and that her telling what happened eliminates his power. The prosecutor must explain the process of questioning and cross-examination and anticipate defense questions about motive to fabricate.

Because children take cues from adult behavior, prosecutors must remain confident and comfortable with the child throughout the process.

CONFIDENTIALITY

Allegedly the courts will not allow “fishing expeditions” in order to gather undisputed evidence of past sexual abuse resulting in removal from the home. The Pennsylvania Superior Court, however, recently rendered a decision which almost routinely gives defendants access to information of that sort which is contained in Child Protective Service agency files, even though the United States Supreme Court has authorized greater protection of those records. In Pennsylvania v Ritchie,71 the United States Supreme Court stated

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71. 480 US 39 (1987). This case involved defendant Ritchie’s trial for various sexual offenses of his daughter. Children and Youth Services had conducted an investigation separate from the police investigation as required by the Child Protective Services Law. Ritchie, 480 US at 43. In pretrial discovery Ritchie subpoenaed Child Protective Service files related to the immediate charges as well as records of a previous report of abuse. Id. The Children and Youth agency refused to release the records per the confidentiality section of the law and Ritchie moved for sanctions. Id. He argued that he was entitled to the information because the file might contain names of favorable witnesses and other unspecified exculpatory evidence. Id at 44. The trial court refused to disclose the Children and Youth Services files. Id. Ritchie was convicted and appealed arguing that his confrontation rights had been violated because the Children and Youth Service files had not been disclosed. Id at 45. The superior court ruled that Ritchie was not entitled to full disclosure but rather the trial court was to examine the file in camera and release verbatim statements made by the victim to defendant and full record to defense counsel to allow him to argue relevance of the statements. Id. The Pennsylvania Supreme Court concluded that defense was entitled to review the entire file to search for any useful evidence. Id at 46. The United States Supreme Court noted Ritchie’s argument that the Children and Youth Services files might contain statements by the victim which were inconsistent with her trial statements or reveal that the girl acted with improper motive that failure to disclose the Child Protective Services file violated the Confrontation Clause. Id at 51. The Court did not agree that defendant should be granted full access to the Children and Youth Services files but found that in camera review
that "[a] defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files" and found that "Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the Children and Youth Services files be submitted only to the trial court for in camera review." The Court further stated that allowing full disclosure of child abuse files would frustrate the state's efforts to encourage reporting and protect victims.73

Despite this interpretation, which would tend to offer some protection to child abuse victims by maintaining the confidentiality of therapy notes and treatment efforts, the Pennsylvania Superior Court in Commonwealth v Kennedy74 reinterpreted the Child Protective Services Law to allow full disclosure of Child Protective Service files to defendants.75 The Court found in camera reviews by the trial court would protect the interests in ensuring a fair trial. Id. The Court stated that allowing full disclosure would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child abuse information. Id at 60. Due to the difficulty in detecting and prosecuting child abuse and the particular vulnerability of the victim, the Court said it is essential that the child have a state-designated person to whom she can turn with assurances of confidentiality. Id. The State's purpose in protecting children and encouraging reporting would be frustrated if confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse, simply because a trial court may not recognize exculpatory evidence. Id at 61. See note 14 for provisions of the Child Protective Services Law.

72. Id at 59.
73. Id at 60.
74. ___ Pa Super ___, 604 A2d 1036 (1992). Kennedy appealed his conviction for sexual offenses against his step-daughter. Kennedy, 604 A2d at 1038. Prior to trial he had sought discovery of Child Protective Service files and sought review of the record of the child's counseling sessions. Id. In camera review of all records was conducted by the motions judge. Nothing material to the defense was found. Id. The trial court also conducted in camera review and found no information relevant to the defense. Id. The superior court reversed the conviction and remanded the case for a new trial based, not on a violation of appellant's constitutional rights, but on the basis of the language of the Child Protective Services Law. Id at 1039. Reasoning that cases validated by the civil agency may form the basis of criminal prosecution, the court stated that the information contained in Child Protective Services files is of critical importance to the accused. Id. The court focused its analysis on the confidentiality provisions of the Child Protective Services Law, specifically 11 Pa Cons Stat Ann § 2215(b) (see note 14). It distinguished the United States Supreme Court analysis in Ritchie by stating in a footnote, that Ritchie involved analysis only of subsection 2215(a) (see note 14). While the Child Protective Service agency maintained that § 2215(b) limits the information provided to a subject of a report who requests it, the Court stated that the provision entitles a subject requesting all information in the file relative to the investigation maintained by the local Child Protective Services or by the Department of Public Welfare (in the Statewide Central Registry) with the exception of the name of the reporter pursuant to § 2215(c). Kennedy, 604 A2d at 1039. See note 14.
75. Kennedy, 604 A2d at 1039.
too restrictive.\textsuperscript{76}

In \textit{Kennedy}, although the investigating agency (Child Protective Services) informed the court that information of a therapeutic or rehabilitative nature might be part of one master file related to the child and family, the court did not deal with that reality. Rather, it stated that the Child Protective Services could, in fact, be in violation of the Act if investigation files were not maintained separately from files related to other agency aspects of case management.\textsuperscript{77} Therapy records not contained in the Child Protective Services file or which are not in possession of the Commonwealth cannot be accessed by a defendant based on the absolute privilege of 42 Pa Cons Stat Ann section 5945.1.\textsuperscript{78} This statute was created to protect confidential communications between the sexual assault counselor and the victim.\textsuperscript{79}

Judge Johnson concurred that therapeutic records not in the possession of the prosecution need not be released.\textsuperscript{80} He dissented, however, regarding the release of the Child Protective Service files because he believed that a stepfather did not qualify as a "subject of a report."\textsuperscript{81} He further stated that \textit{in camera} review of the Child Protective Service files sufficiently protected defendant's rights and that the court had "[g]uided by Ritchie . . . approved the procedure . . . in \textit{Commonwealth v Higby}''\textsuperscript{82} and \textit{Commonwealth v Dunkle}"\textsuperscript{83}

\begin{itemize}
\item \textit{Kennedy}, 604 A2d at 1045, 1047. The court explained this by referring to the recent supreme court case \textit{Commonwealth v Wilson/Aultman}, --- Pa ---, 602 A2d 1290 (1992) which interpreted § 5945.1 as precluding release of any confidential communications made by the victim and providing rape crisis center clients with the same confidentiality received by rape victims who seek private psychotherapeutic treatment. \textit{Kennedy}, 604 A2d at 1045. The \textit{Wilson/Aultman} court stated that the statutory privilege provides even greater protection than did the statute assented in the Ritchie case. \textit{Kennedy}, 604 A2d at 1046.
\item Id at 1049.
\item Id.
\item 384 Pa Super 619, 559 A2d 939 (1989).
\item 384 Pa Super 317, 561 A2d 5 (1989), rev'd on other grounds, --- A2d ---
\end{itemize}
In *Higby*, the defendant had been denied his pretrial motion for discovery of Child Protective Service records. The trial court had refused him access upon its finding that the records contained no material evidence of an exculpatory nature. The superior court had affirmed the trial court decision, concluding that the trial court "complied with the law with respect to the Children's Services records."

In *Dunkle*, the trial court had, upon defendant's motion for discovery, conducted an *in camera* review of the Child Protective Service records in possession of the Commonwealth. It had also provided the defendant with various statements made by the victim. The court had instructed the defendant that if he believed the records contained other discoverable evidence and presented a colorable argument that the material existed, they would be released. The defendant argued that this situation was distinguishable from *Ritchie* because, unlike in *Ritchie*, the prosecution had access to the file. The superior court rejected this argument as well as the alternative argument that the victim waived her confidentiality by releasing the records to the Commonwealth. The court stated that "the [defendant] appears to believe that the victim has no interest in seeing her abuser brought to justice . . . [h]is unsubstantiated argument in this regard is offensive in its obvious disregard and insensitivity to the victims of sexual abuse and the difficulty encountered by the Commonwealth in detecting and prosecuting the offender." The court concluded that the trial court had afforded the defendant all the protections he was entitled to under *Ritchie*.

Significantly, these cases are not reconciled in *Kennedy*; they are not even mentioned in the majority opinion. The *Kennedy* decision changes prior approved practice of *in camera* review of Child Protective Service files while authorizing absolute privilege for therapy records. In fact, however, Child Protective Service records

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84. *Higby*, 559 A2d at 939.
85. Id.
86. Id at 940.
87. *Dunkle*, 561 A2d at 5.
88. Id.
89. Id at 9.
90. Id at 10.
91. Id.
92. Id.
93. Id.
do contain therapy reports. The Child Protective Service agency is mandated not just to investigate, but to provide and monitor rehabilitative services to family members, and to keep records. Although the court focuses on one specific provision (11 Pa Stat § 2215(b)) in granting full disclosure of the Child Protective Service file, analysis should focus instead on giving effect to all provisions of the statute to effectuate legislative intent. Certainly in camera review of Child Protective Service records accomplishes that while still satisfying defendant's constitutional rights as seen in Ritchie.

In the absence of compelling reasons to justify more expansive compulsory discovery rights under the Pennsylvania Constitution than under the Constitution of the United States, the interpretation of the confrontation and compulsory process clauses of the Sixth Amendment, and of the due process clause as well, by the United States Supreme Court in Pennsylvania v Ritchie should provide the framework for decision under our Constitution.

Rather than providing a rationale to justify more expansive discovery, the Kennedy decision, in essence, baits the hook for the defendant's "fishing expeditions" into the victim's history with Child Protective Service agencies. The balancing of victim's confi-

94. See note 14.

§ 1921. Legislative intent controls:
(a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
(b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.
(c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
(1) The occasion and necessity for the statute.
(2) The circumstances under which it was enacted.
(3) The mischief to be remedied.
(4) The object to be attained.
(5) The former law, if any, including other statutes upon the same or similar subjects.
(6) The consequences of a particular interpretation.
(7) The contemporaneous legislative history.
(8) Legislative and administrative interpretations of such statute.
Pub L 1339, No 290, § 3 (December 6, 1972).

96. Commonwealth v Lloyd, 523 Pa 427, 567 A2d 1357, 1370 (1989) (Larsen, joined by Papadakos, dissenting). In this case the Pennsylvania Supreme Court held that appellant was entitled to in camera review of hospital records of treatment of a six year old victim of sexual abuse. Lloyd, 567 A2d at 1360. Lloyd had been convicted of rape, statutory rape and indecent assault of a six year old child who attended a daycare center where he was employed. Id at 1357. Justice Larsen wrote an emphatic dissent: "[t]he majority of this Court now continues the assault upon this young rape victim's personal integrity, assists in further invasion of her privacy . . . [t]hus does the criminal 'justice' system become an active accomplice in the violation of another rape victim." Id at 1360.
dentiality with the defendant's right to discovery was found necessary in *Ritchie* to guard the state's compelling interest in protecting its child abuse information. "Difficulties arise with defense attorneys' potentially divided loyalties and pro se defendants whose obligation of confidentiality cannot be assured, or to whom disclosure would have an adverse effect on the child."97

In Oregon, child protective service files are discoverable by means of *in camera* inspection by the trial court.98 Although the confidentiality of the records is not absolute by statute, inspection of the records by the adverse party is not deemed appropriate.99 Further, the *in camera* inspection must be conducted by the trial judge and cannot be delegated to a party or counsel.100

Likewise, in Massachusetts the *in camera* inspection of confidential records is used to determine whether possibly privileged information should be disclosed.101

Although the United States Supreme Court in *Ritchie* held that the interests of the defendant and of the commonwealth were fully protected by *in camera* inspection of Child Protective Service files,102 the *Kennedy* court found this too restrictive. One must question what interests the court is protecting by allowing a full disclosure of the Child Protective Service record of damage to a child resulting from her family's failure or inability to properly care for her.

Child Protective Service agencies could establish a procedure of maintaining investigation files separate from service files, but the dual functions of investigation and rehabilitation may not be well served by that. The Department of Public Welfare which regulates and monitors the actions of Child Protective Service agencies has not, as yet, addressed this area of case management.

97. *Oregon v Warren*, 304 Or 428, 746 P2d 711, 714 (1987). Defendant was convicted of sexual abuse of a seven year old girl. *Warren*, 746 P2d at 712. The court of appeals vacated the judgment and remanded the case for *in camera* review of CPS records holding that notes of caseworker's conversations with witnesses regarding events to which they testify are discoverable. Id. The supreme court affirmed. Id.

98. Id at 714.

99. Id.

100. *Oregon v Lewis*, 310 Or 541, 800 P2d 786, 788 (1990). The court on motion of the district attorney issued a writ of mandamus that the judge was without authority to allow defense counsel to inspect children's service records and that he must conduct an *in camera* inspection of the records himself outside the presence of the parties to determine whether they contain information subject to discovery. *Lewis*, 800 P2d at 787.


102. See note 71 and accompanying text.
The Department has, however, joined Philadelphia County in its petition for allowance of appeal of the *Kennedy* case, and will file an amicus brief if allocatur is granted.

**Conclusion**

Looking at *Ludwig*, *Wall*, and *Kennedy* together, it is apparent that whatever limited protections are, or could be, available to child victims of sexual abuse in the prosecution of their abusers are being eroded by the Pennsylvania courts. The courts are thereby defining such abuse as a family problem rather than a criminal one, and thus limiting resources to deal with the problem to child protection laws and juvenile courts.

Children are not miniature adults. They think, talk, act differently. They are vulnerable and dependent on adults and that is what enables adults to misuse them. That status is what makes it so difficult for children to face their offenders in a courtroom full of adult strangers. That status is what allows adults to question and re-question their competence and credibility. Children violated and betrayed by trusted caretakers must find their safety and protection from the State. That is the state's compelling interest. Child sexual abuse is both a family problem and a crime. In order to effectively protect victims of intrafamilial sexual abuse, offenders must be held accountable through the criminal justice system. The state interest in children must be sufficiently compelling to allow child victims access to that protection. Unlike their offenders, who expected adult behavior from them, the State must recognize their status and hold them to realistic expectations, even as regards the criminal courtroom. Courts must do more than voice concerns for victimized children. Because the child's status is the reason for the state's compelling interest in protection, courts should not ignore that status in the protection process.

Somewhere in Pennsylvania, a child is asking for help, and our courts are not listening.

*Barbara Jollie*