

AMERICAN ACADEMY OF PEDIATRICS

Committee on Psychosocial Aspects of Child and Family Health

The Child in Court: A Subject Review

ABSTRACT. When children come to court as witnesses, or when their needs are decided in a courtroom, they face unique stressors from the legal proceeding and from the social predicament that resulted in court action. Effective pediatric support and intervention requires an understanding of the situations that bring children to court and the issues that will confront children and child advocates in different court settings.

When children pass through the doors into a courtroom, they enter a formal adult setting that is designed for the resolution of often contentious adult arguments. All children are anxious in a courtroom, but the setting and the nature of the stressors on the child depend on the nature of the court proceeding and the child's role in the process. Three situations typically bring children into court: child protection actions, contested parental divorce, and delinquency offenses. A child also might be a witness in a criminal proceeding as the result of an abusive incident. Only rarely will children need to be present for other types of cases, such as adoptions or traffic offenses.

This statement outlines common events affecting children in the US judicial system and delineates the different settings, events, expectations, and sources of conflict and stress that children are likely to experience. Key advances in law enforcement techniques, investigation of cases involving children, and state law and judicial policy have improved the ways that children participate in most courts. This statement reviews the new policies and procedures and provides guidance for pediatricians who work with children who must become witnesses.

CHILDREN AND THE TYPICAL COURT SYSTEM

Each state court system makes some provision for handling legal matters involving children. The legislature of Illinois was the first to recognize, in 1899, that matters involving children need to be handled differently from those involving adults. First, children are dependent on adults. Children also are developing emotionally and cognitively and have varying levels of understanding. Illinois founded the first "juvenile court," not a new court with its own administration and infrastructure, but a set of rules for Illinois county courts that would consider cases of children accused of crimes. After this institution was

developed, young offenders were not convicted as criminals but were found to be, or adjudicated, delinquents. This judgment emphasized education and rehabilitation rather than punishment. Juvenile courts were gradually adopted by all states.¹

In recent years, the number of children involved in the court system has increased owing to the meteoric rise in child abuse and neglect cases during the 1980s, the increased number of divorces with disputes about child custody, and the escalated number of serious crimes committed by children. These increases and the recognition that legal matters involving children and families need to be addressed differently than criminal matters or money disputes led many states to establish a specific family court with its own infrastructure and administration. This family court system addresses all types of cases that involve children: abuse and neglect or child protection, divorce, juvenile delinquencies, parentage, guardianship, and adoptions. Other states may continue to handle family cases by a court structure that primarily addresses civil or criminal matters. Pediatricians need to familiarize themselves with the court structure of their state and how it works for families.

Children are involved in the US court system in the following matters:

- *Child protection cases* involve children who are alleged victims of abuse or neglect. These matters include hearings involving the disposition of and/or placement of children, as well as the termination of parental rights, if there is a finding of child abuse or neglect, including child sexual abuse.
- Some states also include so-called status offenses in their child protection laws. A *status offense*, eg, truancy, underage drinking, is a crime because of the child's status as a minor.
- *Parental divorce* or *parentage* cases rarely require a child to testify; however, a child's testimony might be sought in acrimonious contested cases, in which there may be multiple opportunities for the pediatrician to act as a problem solver to prevent the child from unnecessary testimony.
- *Delinquency cases* involve children who would have been charged for a criminal act as adults. They also can be charged for status offenses.

In all these cases, the juvenile court system uses a process in which the aim is treatment and reparation, not punishment. Children, however, are increasingly being charged as adults for serious crimes, especially crimes involving acts of violence, and tried in the adult criminal justice system, where treatment and

The recommendations in this statement do not indicate an exclusive course of treatment or serve as a standard of medical care. Variations, taking into account individual circumstances, may be appropriate.

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reparation may not be available. If found guilty as adults, children may be sent to adult criminal correctional institutions.

CHILD PROTECTION CASES: CASES OF ABUSE, NEGLECT, AND CHILD SEXUAL ABUSE

Child protection cases are under the jurisdiction of juvenile or family court under the *parens patriae* role of the court, the state's interest in and responsibility for the well-being of all children in the state. The state, recognizing that the *parens patriae* role conflicts with common law reflecting children as chattel (personal property) of their parents, will exercise its authority with caution. Although no state now recognizes parental ownership and unrestricted control of children, each state is committed to protecting a family's autonomy and privacy and the parents' right to decide how to raise their children.

In this arena, a child witness may be asked to provide factual information to the court that might result in a determination to take the child into state custody. Depending on the state, the child may or may not be a witness and will be a party to the proceeding only on rare occasion. The child's case is brought to court by the state child protective agency that files suit against the parents. The child may or may not be represented by an attorney or have an appointed *guardian ad litem*. *Guardians ad litem* may be attorneys, or in some courts lay *guardians* are used. It is their responsibility to assess the child's interest and needs and present them to the court on behalf of the minor child; they serve as guardians only for the court proceeding.

The investigation of alleged child maltreatment leads to court action and also may have implications for how the court is able to proceed in making its judgment. Allegations of child abuse are brought by the state child protection agency after its investigation. When there has been serious physical harm and for almost all allegations of child sexual abuse, a law enforcement investigation also is accomplished. Many jurisdictions have developed programs to allow child protective service workers and police to do a joint investigation, thereby reducing the number of times that children must retell their experiences, while providing a gentle and supportive environment for the children. Some jurisdictions now have data indicating that a thorough and complete investigation reduces the need for child testimony (Unpublished data, the Chittenden Unit for Special Investigation, year-end report, 1996 [CUSI, 50 Cherry St, Suite 102, Burlington, VT 05401]).

Whether children should testify is a difficult decision in cases of physical abuse and neglect. Several studies have described the emotional effects of testimony on children who have been sexually abused. Some researchers believe that children benefit from facing their abuser.² They suggest that when children see the abuser take responsibility for his or her acts, their sense of self-worth and personal safety improves. Others are concerned that child witnesses will experience distress sufficient to affect the reliability of their testimony and exacerbate their feelings of victimization and stigmatization.³ In

addition, when children are asked to serve as a witness against a family member with whom they might have positive attachments and negative experiences, they are being placed in the awkward position of "sentencing" a family member.⁴

This question was recently reviewed by the National Institute of Justice of the US Department of Justice.^{2,5-7} Of the studies published to date, no agreement has been reached as to whether the effect of testimony on children is positive or negative. All children had high levels of anxiety before testimony. Maternal support of the child witness, if available, contributed to improvement in the child's mental health, and, perhaps most important, the emotional health of most children improved with time regardless of a positive or negative court experience.

Pediatricians need to be aware of the possible emotional effects of being a child witness in the child protection system and be prepared to work with child protective service workers, other human service professionals, and lawyers to help determine if a child should testify and to help find solutions that protect the child.

DIVORCE PROCEEDINGS

In 1994, there were 1 191 000 divorces in the United States.⁸ It is estimated that approximately 10% of divorces with minor children involve court-contested custody. The rate of return to court for changes in custody agreements for these initially contested cases is quite high.

Divorce proceedings exist to sever the marriage contract between a husband and wife; legal precedent is traced to contract law. Because children were not part of the contract, they are not parties to the divorce proceeding. The state, in its *parens patriae* role of protecting the well-being and best interest of all children in the state, has an interest in how the parties (parents) provide for children of the marriage as the marriage contract is dissolved. But the state expects that parents will make appropriate plans for their children and will intervene only when it views that the children are at risk of harm. When parents cannot decide, the judge will write an order to provide for the children, and the parents are expected to comply with the divorce decree. Visitation is seen in most jurisdictions as a parental right that will be restricted or denied only when harm to the child is likely to result.

In a contested divorce complicated by parental acrimony, anger, or allegations of abuse, most courts will take a much stronger interest in providing for the future safety and nurturance of children. Many courts will appoint *guardians ad litem* for minor children. In highly contested matters, attorneys may be appointed to represent children directly. Occasionally, *guardians ad litem* will seek information from professionals involved with their charges, and pediatricians might be asked for information about a child's health and factors that might assist the court to decide about the competency and appropriateness of the parents. *Pediatricians are cautioned to be knowledgeable of laws of confidentiality, which are state-specific.* Sharing information with any party requires written

permission provided by *both* parents or the direction of a court order. Even a subpoena for records requires caution and clarification. If the subpoena is not from the court but on behalf of one parent (party), the written permission of the court or the other parent is recommended. Although information that the pediatrician might share is important to the court, it rarely will constitute the full and thorough evaluation the court may require for determination of custody.

In some instances, a court may order a formal custody evaluation. This evaluation generally will be performed by mental health professionals, sometimes in a team, who will assess the child and each parent individually. Such an evaluation often will include a visit to each parental home, psychological testing, and child and parent interviews. The mental health professional performing this evaluation may contact a pediatrician for information that can be most useful in the preparation of the custody evaluation. *Again, appropriate permissions to share information must be provided to the pediatrician.* In some cases, a parent will hire a mental health professional or other expert solely for the purpose of testifying at the custody trial. Owing to the lack of input from the other parent, the pediatrician should view an involvement with such one-sided evaluations with caution. Although the professional services of the pediatrician are not covered by the family's health insurance, the court will direct one or both parties to pay for the evaluation. It is appropriate to ask the interviewer who will bear financial responsibility for pediatric consultation and reports.

The role of the pediatrician in family divorce has been discussed in a previous statement by the American Academy of Pediatrics.⁹ It involves anticipatory guidance and support during the various stages of the divorce process and reconstitution of family function. If children are to serve as witnesses in divorce cases, the pediatrician needs to address with the family issues specific to child witnesses.

Generally, children will not be asked to testify in a divorce proceeding except those that are hotly contested. The fact that the child is asked to testify should alert the pediatrician to the possibility of severe family dysfunction and is an indication to consider a mental health referral to support the child during this period of stress and adjustment.

Most court jurisdictions make strong efforts to avoid testimony by children in court, believing that this asks children to choose one parent over the other. Although only limited published data support this view, it seems prudent to avoid the risk of a guilt reaction about the parent not chosen. For example, Vermont has statutory limitations on children's testimony. For any child to testify, the judge must be convinced that the child's testimony is necessary to assist the court in determining the issue before it, that the value of the child's testimony outweighs the potential detriment to the child, that the evidence sought from the child is not reasonably available by any other means, and that an attorney will be appointed for the child to protect the child's specific interest.¹⁰

JUVENILE CASES: DELINQUENCY

Children are charged with delinquency when their acts would have been criminal had they been committed as adults. A child charged with a crime should be represented by an attorney, who is court-appointed if necessary.

Minor children are unable technically to tell their attorneys how they would like the case handled. For example, if the attorney presents a plea bargain, can a minor child make the decision to accept or reject the attorney's recommendation? Many states provide for the emancipation, by statute or judicial rule, of older minors charged with certain crimes, just as states provide for emancipation in certain decisions about health care. Younger children will need a *guardian ad litem* in this setting, which ideally would be the child's parent. If necessary, a court-appointed *guardian ad litem* might be provided.

The extent of the authority of the *guardians ad litem* or when the child's wishes should be a determinative factor is not settled in most states. If the child is a teenager and the *guardian ad litem* wants to proceed differently than the child wants, different states will resolve this dispute in different ways. If the *guardian ad litem* is a parent, the court may dismiss the parent and appoint a disinterested *guardian ad litem*, while another court will determine that the child is old enough to direct a legal defense.

COMPETENCY

The legal system is especially interested in 3 questions about a child's competence as a witness: 1) Can the child receive and relay information accurately? 2) Does the child know the difference between telling the truth and telling a lie? 3) Does the child understand the need to tell the truth in court?

Children can be competent witnesses. Younger children may not remember with as much accuracy as older children, but the poignancy of an event may enhance their memory. A 3- or 4-year-old's ability to recall major events is excellent, although less important information is less well remembered. A lack of accuracy may be attributable to the following: 1) poor recall of an event or sequences in an event, 2) misinterpretation or confusion about an event, 3) suggestibility, 4) delusion or other mental disorder, 5) intellectual disabilities, and 6) intentional deception initiated by the child or resulting from adult coercion. Nurcombe⁴ has reviewed the competency and creditability of child witnesses, and the literature in this field is growing.¹¹

SUPPORT IN THE PEDIATRIC OFFICE

Pediatricians are an important source of support for children who may be witnesses, from the initial contact through preparation for court appearance and the legal negotiation process until after the court proceedings. Most legal cases are settled without trial. If the pediatrician has had a long-term relationship with the child and the child's family, the pediatrician may be able to help parents find out-of-court solutions to family issues. The pediatrician should attempt to keep the legal process in the child's best

interest and to help the child maintain a healthy adaptation to a stressful experience. The pediatrician also should address the psychological effect of the event responsible for the child's court appearance. Mental health referrals might be the most appropriate way to assist the child and family in their adjustment about the court proceedings. However, pediatricians who are experienced and knowledgeable about court proceedings and children's common reactions may successfully provide brief interventions that help the child and family.

The role of the pediatrician in child abuse and neglect, child sexual abuse,¹² and family divorce⁹ has been discussed in previous statements published by the American Academy of Pediatrics. Separate attention must be devoted to preparing a child for the stress that accompanies a legal hearing or other out-of-court involvement with the legal system. Pediatricians can help prepare children for court appearances by explaining what will occur and that the child will always be accompanied by a supportive person, such as a parent. Pediatricians can help minimize the anxiety of children by explaining that they will not be judged on their performance in the courtroom, that efforts will be made to ensure safety from recrimination, and that questions should be answered to the best of their ability. Pediatricians can also help parents, lawyers, and judges to find solutions to protect children.

Because of the stressful events before and surrounding a court appearance by a child, a follow-up visit with the pediatrician is indicated after a child appears as a witness. Children should be assessed for behavioral manifestations of acute stress (eg, sleep disorders, somatic complaints), adjustment, and functional status (eg, school performance, resumption of usual activities, physical functioning, social functioning, and mental health).

CONCLUSION

Pediatricians can provide important guidance and support for children involved in the legal system. With their understanding of child development and the special knowledge and relationship with the child and knowledge of the legal proceedings, pediatricians are equipped to be a unique resource for support, consultation, care, and advocacy. With some families, the pediatrician's involvement may encompass the entire process, from the initial stressful event to the resolution of the proceeding and healing of the family. In other cases, the pediatrician will be involved only for brief interventions during the often extended court proceedings. Mental health referrals may be indicated, including referrals to therapists with special legal expertise. Application of the principles outlined in this statement can lead to more effective support and to a better outcome dur-

ing and after the child's experience as a witness in a legal proceeding.

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