



Update

CHILDPROOF: ADVANCED TRIAL ADVOCACY FOR CHILD ABUSE PROSECUTORS
APRIL 25 - 30, 2010
NATIONAL ADVOCACY CENTER
COLUMBIA, SOUTH CAROLINA

Designed for small groups of experienced child abuse prosecutors, childProof offers participants a high student to faculty ratio. Faculty are experienced child abuse prosecutors and specialists in forensic pathology, linguistics and courtroom demonstration. Course materials include an extensive medical bibliography covering the most common injuries in child abuse cases including abdominal, internal and genital injuries.

CHILDPROTECT: TRIAL ADVOCACY FOR CIVIL CHILD PROTECTION ATTORNEYS
LIMITED SPACE AVAILABLE! APPLY BY
APRIL 29, 2010
JULY 19-23, 2010
WINONA, MINNESOTA

ChildProtect addresses a critical need for trial advocacy training for child protection attorneys and for collaboration between the child protection and criminal justice communities. This five-day intensive course will be offered at the National Child Protection Training Center's state of the art training complex, which offers students five moot court rooms, four forensic interview training rooms, and a "mock house" in which to conduct simulated child abuse investigations. ChildProtect will be presented by experienced prosecutors, civil child protection attorneys, child development professionals, and physicians. Victor Vieth, Executive Director of the National Association to Prevent Sexual Abuse of Children, will guide students through this rigorous trial advocacy course. Topics will include: Court Procedures; Ethical Issues; Effective Trial Strategies; Issues of Neglect; Direct Examination; Preparing Children for Court; Expert Witnesses; Psychological Issues; Cross Examination; and Typical Defenses. Students will have the opportunity to hone the skills necessary to manage, evaluate and try civil child protection cases by participating in mock trial exercises and receiving courtroom and individual DVD recorded critiques on: Direct and Cross Examination of the Medical, Psychological, Social Worker, and Profile Expert Witnesses; and Direct Examination of the Child Witness and the Petitioned Parents.

EQUAL JUSTICE FOR CHILDREN: INVESTIGATION AND PROSECUTION OF CHILD ABUSE
MAY 17-21, 2010

Moving Beyond Frustration with "Bad Moms:" Charging Accomplice Liability in Child Abuse Cases

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Tajanay Bailey is dead because her mother's boyfriend beat her to death when she was just four years old. Charity chose her boyfriend over her four-year-old daughter. Without the participation of her mother Charity, the boyfriend could not have killed her. Without Charity's assistance, the boyfriend would have had no access to the child. Tajanay's "mother" had multiple opportunities to intervene, to protect her own child, to work with Child Protection to save her child, but she abandoned her child—at one point she laughed while her daughter was being abused—and now that child is dead.²

Accomplice liability is a way for the law to recognize that child abuse can be a criminal enterprise with multiple participants who encourage, facilitate, and benefit from the abuse . . . even when the abuse occurs at the expense of a parent's own child. It allows those who facilitate abuse and those who allow abuse to continue when they have a duty to protect a child to be held responsible for their failure to act. In a robbery case, prosecutors do not simply charge the offender who held the gun and took the money. We charge the lookout person, the getaway driver, and the accessory after the fact who sells the stolen merchandise or helps the robber to hide from police. We do this on the theory that without assistance, the primary offender might be deterred from committing the crime or at the very least, might not be successful in committing the

Often in these situations, the accomplice is not charged, either because there is little recognition of the role that the accomplice plays or because prosecutors need the testimony of the accomplice. When prosecutors do not, however, hold all participants in the abuse accountable, they are sanctioning this behavior. By not holding accountable the parent who repeatedly subjects her child to abuse at the hands of her significant other, prosecutors send a message to parents everywhere that the behavior is acceptable. Without criminal intervention, it remains a possibility that the abused child will be returned to the accomplice, potentially exposing the child to further abuse at the hands of the parent's new partner.

When considering *whether* to charge an accomplice, prosecutors should ask some basic questions:

- **What is the accomplice's duty to the child:** Prosecutors must ask what duty the accomplice owed to the child. Where the accomplice is a parent or legal guardian, the existence of a duty is obvious. In other circumstances, however, liability for the well-being of the child may not be so clear. Stepparents, extended family, or friends of the perpetrator may all be aware that a child is being abused but may have no duty to report the abuse or to intervene. The lack of duty certainly would not entitle a

- **Articulation of specific behavior by the accomplice:**

Prosecutors must detail what exactly the accomplice did or failed to do. Often times, the arguments made in court focus on what the accomplice actually knew about the abuse, arguing that if the defendant never saw the offender hurting the child, how was the accomplice supposed to do anything about it? Some states impose a “should have known” standard. For instance a Connecticut Court of Appeals found that a stepfather could be held responsible for his failure to act to protect his infant stepdaughter on the theory that he had to have noticed her obvious physical injuries.⁴ The original opinion on this case cites to a line of cases from other jurisdictions recognizing that the “[c]riminal liability of parents based on a failure to act in accordance with common-law affirmative duties to protect and care for their children is well recognized in many jurisdictions.”⁵ In other instances, the prosecutor may have evidence of direct participation in the abuse. Where one parent holds the child while the other inflicts the beating, or where a mother videotapes the sexual abuse of her child by another, there is little question as to the nature of the accomplice’s role, such that he/she becomes more of an aider/abettor of the abuse than when an accomplice simply fails to stop abuse from happening.

- **How the accomplice’s behavior affected the child:** Prosecutors also should be able to explain how the accomplice’s action or inaction affected the child. For instance, on an inflicted burn case where the mother inflicts a burn and the father sees the injury but fails to get medical attention, a physician could offer testimony about the risk of infection, the pain, and the continuation of the burn injury all stemming from the failure to get medical attention. Depending on the state’s statutes, that father could be charged as an accomplice after the fact in addition to filing some type of child neglect charge. In another case, however, a mother might become aware that her boyfriend is sexually abusing her son, confront the boyfriend and the abuse stops even though the mother continues to leave the child alone with the abuser. It is unlikely that the mother could be charged as one who had aided or abetted in abuse; however, charges of child neglect should be considered based on the risks to which she subjected her child.

- **Type of conduct covered under the laws of your jurisdiction:** Some states have laws that make child neglect a serious felony. For instance, in Indiana, Child Neglect resulting in serious bodily injury carries a penalty of 6–20 years, while Child Neglect resulting in death carries a penalty of 20–50 years.⁶ In states like this, it may not be necessary to charge a defendant as an accomplice to the primary offense when the neglect laws carry such significant penalties. In states without such protection, charging a defendant as an accomplice to the child’s murder or as a conspirator in the sexual abuse may be the only way to accurately reflect the accomplice’s degree of participation in the offense. Prosecutors also need to know how their states’ laws account for accomplice behavior. Some states, under the common law, account for liability in terms of degrees of

principal liability.⁷ Other states hold accomplices to be as responsible as the primary offender. Prosecutors may also wish to charge a participant as a conspirator, particularly in cases involving prostituted children, the exploitation of children or the production of sexual images of children. Other scenarios would include a parent who hides the child’s bruises, inflicted by another, from plain observation or where a parent convinces a child to recant allegations of sexual abuse by agreement with the abuser.

- **Are there any co-existing forms of abuse that precluded the accomplice from protecting the child?** Prosecutors must look at the accomplice’s actual capacity to take action under the circumstances in the home. It is not unusual to hear an accomplice assert that she too was being abused and was, therefore, unable to act on behalf of the child. When faced with this claim, prosecutors should carefully evaluate the account of abuse and seek independent evidence. Prosecutors should weigh the alleged domestic abuse victim’s level of participation in the child abuse: there is a significant difference between inaction in the face of awareness of abuse and participating directly in the abuse. For instance, in a case where a child is diagnosed with failure to thrive and is so malnourished that the primary caretaker is charged with starving the child, if investigation were to reveal that the child’s other parent was also being denied food by the perpetrator and was routinely beaten, even during her pregnancy, prosecutors should strongly consider not charging the mother, even though it was theoretically possible for her to stop the starvation. On the other hand, a state’s laws may specifically address the defense of duress, restricting the use of the defense in situations where death or serious bodily injury occurs.

The application of accomplice liability statutes gives child abuse protection professionals, law enforcement and prosecutors a strong tool in the fight to end child abuse. It is imperative that we send a clear message to those who permit the abuse of their children and choose not to intervene that they will be held responsible and will face the consequences of their inaction. The common sense use of these laws will give our children a better opportunity for a safer life.

¹ Acting Director, National Center for the Prosecution of Violence Against Women, National District Attorneys Association.

² State of Indiana v. Charity Bailey, 49G010711MR252560 and State of Indiana v. Lawrence Green, 49G010711MR252693

³ *People v. Rolon*, 160 Cal.App.4th 1206, 1219 (Cal. App. 2008).

⁴ *State v. Miranda*, 715 A.2d 680 (Conn. 1998), reversed on certain convictions but “risk of injury” conviction upheld at *State v. Miranda*, 878 A.2d 1118 (Conn. 2005).

⁵ *Id.* at 215

⁶ Indiana Code 35-46-1-4 (b) (2 and 3).

⁷ Code of Virginia § 18.2-18. “ In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree ”

⁸ Arizona Criminal Code 13-412: “The defense provided . . . is unavailable for offenses involving homicide or serious physical injury.”