1995

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Terminating the Parent-Child Legal Relationship as a Response to Child Sexual Abuse

Donald C. Bross*

I. INTRODUCTION

Child sexual abuse involves sexual contact with children whose consent is inadequate or impossible, who lack equality, who are coerced, or who are not protected from inappropriate sexual contact.¹ Sexual abuse evokes reactions from the public ranging from anger and fear to confusion and avoidance.² Moreover, sexual abuse of a child within a family creates enormous difficulties for intervention including presentation,³ recognition,⁴ meeting the necessary legal standard of proof,⁵ and determining the effectiveness of treatment. Even if child

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¹ For example, some of these elements are found in the definition offered by Drs. Ruth and C. Henry Kempe: "Sexual abuse is defined as the involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend, to which they are unable to give informed consent, or that violate the social taboos of family roles." RUTH S. KEMPE & C. HENRY KEMPE, CHILD ABUSE 43 (1978).


³ See generally Rosemary S. Hunter et al., Sexually Abused Children: Identifying Masked Presentations in a Medical Setting, 9 CHILD ABUSE & NEGLECT 17 (1985) (explaining that in medical settings, "presentation symptoms" are the reasons the person originally seeks the doctor).

⁴ See generally Jan Bays & David Chadwick, Medical Diagnosis of the Sexually Abused Child, 17 CHILD ABUSE & NEGLECT 91 (1993) (surveying advances over the past 20 years in the medical community's diagnosing child sexual abuse); David L. Corwin & Erna Olafson, Overview: Clinical Identification of Sexually Abused Children, 17 CHILD ABUSE & NEGLECT 3 (1993) (summarizing the discussion of child sexual abuse in several sources); David Finkelhor, Epidemiological Factors in the Clinical Identification of Child Sexual Abuse, 17 CHILD ABUSE & NEGLECT 67 (1993) (detailing epidemiological evidence of child sexual abuse). "Recognition" is defined as perceiving clearly, acknowledging, or taking notice of a condition in a definite way.

⁵ JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES §§ 3.28-.29 (2d ed. 1992). In criminal proceedings, the prosecution must prove that abuse occurred
sexual abuse is proven in court, a court may simply order a treatment plan which is ultimately unsuccessful. In such a situation, the only means of providing the child with long-term freedom from sexual abuse may be to sever the legal ties between parent and child.

This Essay focuses on the termination of the parent-child legal relationship as a possible legal response to intrafamilial child sexual abuse. For the purposes of this Essay, intrafamilial child sexual abuse includes abuse committed by a parent, stepparent, sibling, or other relative. This Essay first discusses the impact of such sexual abuse on children. Next, it addresses the varied types of legal interventions possible when child sexual abuse is indicated and discusses their availability. Then, focusing on when treatment of the offender is possible, this Essay examines when termination of parental rights is necessary. Finally, this Essay reviews termination decisions of the nation's courts to determine the degree to which judicial opinions are consistent with the literature on treatment, and whether there are any observable trends in judicial decisions concerning termination based on child sexual abuse. This Essay concludes that a relatively high percentage of termination decisions are upheld on appeal, reflecting appropriate judicial appreciation of the harms to children in cases of intrafamilial child sexual abuse.

II. INTRAFAMILIAL CHILD SEXUAL ABUSE: ITS IMPACT ON CHILDREN

Child sexual abuse occurs with alarming frequency. Substantial research indicates that such abuse has harmful short-term and long-term effects on child victims. Such data supports the establishment of legal intervention for the purpose of protecting children who experience intrafamilial sexual abuse.

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6. Because of the complexity of the issues surrounding termination, this Essay will take a multidisciplinary approach to its analysis. Terminating the parent-child legal relationship brings to the surface the most significant due process protections in child welfare law, so it is especially important to consider the full impact of any termination decision. See, e.g., Lehman v. Lycoming County Children’s Servs. Agency, 458 U.S. 502, 511 (1982); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981).

7. See infra part II.

8. See infra part III.

9. See infra part IV.

10. See infra part V.

11. See infra part VI.
A. Incidence and Prevalence of Child Sexual Abuse

The frequency of child sexual abuse is disconcerting. Five studies completed between 1940 and 1978, involving mostly middle-class populations, indicated that the percentage of females reporting sexual abuse ranged from seventeen to twenty-eight percent. In a 1985 poll, researchers interviewed 2626 adults from the fifty states. Among this representative sample of Americans eighteen years old or over, twenty-two percent reported sexual abuse as a child; analyzed by gender, twenty-seven percent of the women and fifteen percent of the men reported being sexually abused as children. Almost all of the adults reported that the abusive experience had a permanent impact on their lives.


13. Lois Timinick, The Times Poll: 22% in Survey Were Child Abuse Victims, L.A. TIMES, August 25, 1985, at A1. Given that the sponsor of the research was a nationally recognized newspaper, and that the poll-taker was one of the most respected independent polling organizations in the world, the results of the survey are generally deemed reliable. Id. See generally David Finkelhor et al., Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics and Risk Factors, 14 CHILD ABUSE & NEGLECT 19 (1990) (summarizing the results of the national survey).

14. Finkelhor et al., supra note 13, at 19. Those surveyed defined sexual abuse as intercourse (over 50%), sodomy, touching, fondling, or similar contact in 93% of the reports, and only seven percent defined sexual abuse as non-contact voyeurism, exposure, being forced to watch sexual intercourse or other non-contact experiences. Id.

15. This conclusion is supported by other studies. For example:

In 1976 confirmed cases of sexual abuse represented only 3.2 percent of all child abuse reports, and by 1982 these reports had increased to 6.9 percent of confirmed cases of child abuse. The National Center on Child Abuse and Neglect indicated in its study published in 1987 that there had been an estimated 2.25 million cases of child abuse reported and over 1.5 million cases confirmed in that year alone, and that those reported cases indicated an incidence rate of child sexual abuse at 2.5 children per 1,000 per year. This was a tripling of national incidence since 1980.


Moreover, it merits emphasis that sexual abuse may rarely be the sole form of maltreatment in the home. Academic literature and recent research indicate that many children who suffer sexual abuse, experience physical and emotional abuse as well. For example, a self-administered, anonymous questionnaire was given to 668 middle class women within a gynecological practice in an attempt to study the health consequences of childhood maltreatment. Tamara P. Moeller et al., The Combined Effects of Physical, Sexual, and Emotional Abuse During Childhood: Long-Term Health Consequences for Women, 17 CHILD ABUSE & NEGLECT 623, 623 (1993). Fifty-three percent of the survey’s participants reported some type of childhood abuse: 7% reported physical abuse only; 6.9% reported sexual abuse only; 15% reported emotional abuse only; 1.7% reported physical and sexual abuse; 11.2% reported physical and emotional abuse; 5.8% reported sexual and emotional abuse; and 5.4% reported sexual, physical, and emotional abuse.
Thus, the prevalence of child sexual abuse is probably sufficient itself to justify good faith efforts to reduce the problem. Considered together with the documented long-term and short-term effects of such abuse, the need for appropriate legal intervention, including terminating parental rights in some instances, becomes only more apparent.

B. The Short-Term and Long-Term Effects of Child Sexual Abuse

In contrast to the relative consistency throughout the United States as to how to define child sexual abuse, individuals widely disagree as to the effects of sexual abuse on children. The disagreement may be due to the recent nature of the literature on child sexual abuse. In any event, this review of the documented effects of child sexual abuse must be viewed as part of intense and continuing investigations.

16. Although there are many forms of conduct which constitute the sexual abuse of a child, most reporting laws reflect the same spectrum of activity. For example, one author described the range of recognized conduct:

At its extreme, "sexual abuse" includes sexual intercourse and "deviate sexual intercourse." Sexual intercourse may occur without orgasm and without complete penetration of the penis into the vagina. "Deviant sexual intercourse" includes "sodomy," or anal or oral intercourse, fellatio, cunnilingus, and anilingus. As a matter of law, most states define it as any "contact between the penis and the anus, the mouth and penis, or the mouth and the vulva."

These acts, however, may be only the last step in a steadily worsening situation. For this reason and because of their inherent harmfulness, exhibitionism and improper sexual touching or contacts are also considered sexual abuse. They include the digital manipulation, rubbing, or penetration of the young person's genitals or intimate parts, including the fondling of the buttocks or a female's breast.

Parents and other caretakers, however, often touch the private parts of children, especially younger ones, for entirely innocent reasons—to change a diaper, for example, or to give an affectionate pat on the behind. To exclude these normal parental touchings, child abuse statutes mandate reports only when the touching is for the purpose of sexual arousal or gratification (of either the adult or the child).


18. Most of the studies on the effects of child sexual abuse have occurred in the latter two decades of the twentieth century.
Nevertheless, experts currently describe a broad range of short-term and long-term effects on sexually abused children.

Researchers have extensively documented the short-term effects of child sexual abuse. One study reported that the majority of intrafamilial victims of child sexual abuse suffer "initial effects,"19 including sleep disorders, eating disturbances, fears, phobias, depression, guilt, shame, and anger.20 Using standard mental health measures, other researchers found that seventeen percent of sexually abused children aged four to six met the criteria for "clinically significant pathology."21 The results were even more dramatic for those in the seven to thirteen-year-old age group, forty percent of whom met the criteria for clinically significant pathology.22 In addition, researchers found substantially elevated levels of aggression and antisocial behavior in victims of childhood sexual abuse,23 as well as other short-term effects on sexual and social functioning.24

Long-term effects on victims of child sexual abuse include self-destructive ideation and behaviors.25 Other effects include increased rates of anxiety, tension, nightmares, and sleeplessness.26 Studies also report that victims experience dissociation,27 feelings of isolation, ...

19. As utilized in this Essay, "initial effects" are those occurring within a two-year period as described in the summary by Finkelhor. Browne & Finkelhor, supra note 17, at 143-44.
20. Browne & Finkelhor, supra note 17, at 147 (citing S.C. Anderson et al., Psychosocial Sequelae in Intrafamilial Victims of Sexual Assault and Abuse (April, 1981) (paper presented at the Third International Conference on Child Abuse and Neglect, Amsterdam, Netherlands)).
21. Id. "Clinically significant pathology" is a conclusive term meaning that a reasonable therapist would recommend treatment for such children. Id.
23. Id.
24. Browne & Finkelhor, supra note 17, at 150-52.
26. Self-destructive ideation and behaviors" refers to suicidal thoughts and behaviors.
27. Frank W. Putnam, Dissociative Phenomena, in 10 REVIEW OF PSYCHIATRY 145, 149 (Alan Tasman & Stephen Goldfingers eds., 1991). "Dissociation is a process that produces a discernible alteration in a person's thoughts, feelings, or actions so that for a
and lower self-esteem.\textsuperscript{28} Another study of long-term consequences of sexual abuse found that sixty-four percent of the incest survivors complained of fear of or conflict with husbands or sexual partners as compared to forty percent of the control group. Thirty-nine percent of the survivors never married.\textsuperscript{29}

Researchers also link Post-Traumatic Stress Disorder (PTSD) to experiences of childhood incest. In one study, seventeen women in treatment, an average of seventeen years after their final incest experiences, met the criteria for PTSD.\textsuperscript{30} Researchers have since found that PTSD is common among childhood sexual abuse survivors.\textsuperscript{31} In some of those victims who did not exhibit PTSD symptoms, researchers have observed other long-term interpersonal effects. For example, studies show that the patterns of human relationships or attachments which a child acquires in early life tend to reappear in adult life, so that avoidant personalities, dependency, self-defeating person-

\begin{quote}
period of time certain information is not associated or integrated with other information as it normally or logically would be.” \textit{Id.} at 145.
\end{quote}


29. \textit{Id.} at 157 (citing Karin C. Meiselman, \textit{Incest: A Psychological Study of Causes and Effects with Treatment Recommendations} (1978)). These results are supported by another study which found that 79% of the individuals in an incest sample were experiencing moderate to severe problems relating to men and that 40% never married. \textit{Id.} (citing Christine A. Courtois, \textit{The Incest Experience and Its Aftermath}, 4 \textit{VICTIMOLOGY} 337, 337-47 (1979)).

30. See Frederick H. Lindberg & Lois J. Distad, \textit{Post-Traumatic Stress Disorders in Women Who Experienced Childhood Incest}, 9 \textit{CHILD ABUSE & NEGLECT} 329, 329-35 (1985). PTSD is particularly debilitating as can be surmised from the following reported symptoms:

The reexperiencing of the trauma as evidenced by at least one of the following: (1) recurrent and intrusive recollections of the event; (2) recurrent dreams of the event; (3) sudden acting or feeling as if the traumatic event were reoccurring, because of an association with an environmental or ideational stimulus.

The numbing or responsiveness to or reduced involvement with the external world, beginning some time after the trauma, as shown by at least one of the following: (1) markedly diminished interest in one or more significant activities; (2) feelings of detachment or estrangement from others; (3) constricted affect.

\textit{Id.} at 331 (quoting \textit{American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders} 236-39 (3d ed. 1980)).

31. See generally Anderson B. Rowan et al., \textit{Posttraumatic Stress Disorder in a Clinical Sample of Adults Sexually Abused as Children}, 18 \textit{CHILD ABUSE & NEGLECT} 51 (1994) (discussing post-traumatic stress disorder in people who were sexually abused as children); David A. Wolfe et al., \textit{Factors Associated with the Development of Posttraumatic Stress Disorder among Child Victims of Sexual Abuse}, 18 \textit{CHILD ABUSE & NEGLECT} 37 (1994) (explaining symptoms associated with post-traumatic stress disorder in individuals who were sexually abused as children).
aliti disorder, and borderline personality disorder are overrepresented among sexually abused subjects.32

Research on general child maltreatment, including sexual abuse,33 suggests that poor educational performance, health problems, and low levels of achievement in adult life are additional long-term consequences for some victims.34 Citing various studies, the American Humane Association reports that abused or neglected children were fifty-three percent more likely to be arrested as juveniles, thirty-eight percent more likely to be arrested as adults, and thirty-eight percent more likely to be arrested for a violent crime.35

Preliminary results of increased research on the effects of child sexual abuse indicate short-term and continuing effects stem from abusive sexual experiences of children. These results suggest legal intervention is warranted based on the severity of the effects alone.

III. LEGAL INTERVENTION IN GENERAL

The impact of child sexual abuse should support a variety of legal means to intervene for the purpose of protecting child victims. While the legal system offers a number of proceedings that might achieve this effect, lack of utilization or improper choice of forum may defeat their effectiveness.

A. Primary Methods of Legal Intervention

Legal intervention can occur through a variety of proceedings. The two primary methods are through criminal prosecution of the abuser.


"Avoidant personalities" involve a "pervasive pattern of social discomfort, fear of negative evaluation, and timidity." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 351 (3d ed. rev. 1987). "Dependency" is a "pervasive pattern of dependent and submissive behavior." Id. at 353. Individuals with "self-defeating personality disorder" are repeatedly involved in relationships or situations that are self-defeating and avoid or sabotage pleasurable experiences. "Borderline personality disorder" involves a "pervasive pattern of instability of self-image, interpersonal relationships, and mood." Id. at 346.

33. These studies consider child sexual abuse as part of the constellation of various forms of child maltreatment, including physical abuse and various forms of neglect.

34. AMERICAN HUMANE ASSOCIATION, CHILD PROTECTION LEADER 2 (March 1994).

35. Id. at 1-2 (citing LAWRENCE A. GREENFIELD & STEPHANIE MINOR-HARPER, WOMEN IN PRISON, BUREAU OF JUSTICE STATISTICS REPORT 1 (1991) (reporting that 41% of female inmates surveyed said that they had been sexually or physically abused)).
and civil protection proceedings under child abuse and neglect laws. The choice between pursuing a remedy in one proceeding over another may depend on the facts of the particular case, a particular strategy, or the purposes for the proceedings themselves.

For example, commentators report several factors which indicate whether child sexual abuse will result in criminal prosecution, including the seriousness of the abuse, whether the abuse occurs inside rather than outside the family,\(^{36}\) and the presence of maternal support.\(^{37}\) In some cases, the State may be justified in seeking both criminal prosecution and termination of the parent-child legal relationship.\(^{38}\)

If the facts do not indicate a clear choice of proceedings, then strategy may play a key role in deciding whether and how to intervene legally. For example, the standard of proof may influence the choice between a civil or criminal intervention.\(^{39}\) Furthermore, especially in termination cases, a child advocate may want to seek civil terminations in tandem with criminal prosecutions,\(^{40}\) especially given the greater likelihood for delay or reversal in criminal proceedings. Finally, if a

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36. Proportionately, more cases of extrafamilial child sexual abuse are prosecuted than cases of parental or familial abuse. See Theodore P. Cross et al., Prosecution of Child Sexual Abuse: Which Cases Are Accepted?, 18 CHILD ABUSE & NEGLECT 663, 664, 677 (1994). Other factors increasing the likelihood of prosecution include: the presence of oral-genital abuse, the use of force, the duration of the abuse, and the presence of physical or eyewitness evidence. Id. at 669.

37. Maternal support increased the likelihood of prosecution and, conversely, lack of maternal support decreased the chances of prosecution. Id. at 669. This has important implications for analyzing the appropriate use of criminal and civil proceedings in dealing with severe intrafamilial child sexual abuse. In terminating the parent-child legal relationship in child protection proceedings, a lack of maternal support is often seen as a crucial basis for freeing a child for adoption. See infra part V.B.2.

38. For a flagrant example of facts supporting both interventions in the same case, see In re Armentrout, 485 P.2d 183 (Kan. 1971) (civil termination case as to nonprotective mother); State v. Jones, 466 P.2d 283 (Kan. 1970) (criminal conviction of stepfather).

39. For example, the amount of evidence that would uphold a civil termination ruling may fall far below the standard of proof required for a criminal proceeding. This is because in a criminal proceeding, the prosecutor must prove that the criminal abuse occurred beyond a reasonable doubt, while in a civil proceeding, the proof must be by preponderance of the evidence.

A review of appellate decisions reveals the disparity in the standard of proof. See, e.g., James v. Texas Dep't of Human Servs., 836 S.W.2d 236, 244 (Tex. Ct. App. 1992) (noting that the evidence would not suffice for a criminal conviction, but constituted clear and convincing evidence for termination of the father's parental rights).

40. Specifically, some cases can be read as warning against relying on a criminal conviction as proof of the abuse in a civil proceeding. See In re Sonia G., 204 Cal. Rptr. 498, 501 (Cal. Ct. App. 1984); In re Lockwood, 67 Cal. Rptr. 497, 498-99 (Cal. Ct. App. 1968).
child advocate relies on the possibility of a favorable criminal ruling to support a subsequent termination order, a child advocate loses the opportunity to present facts inadmissible in a criminal trial but admissible in civil proceedings. In other instances, the choice between criminal prosecution of child sexual abuse and civil protection proceedings depends upon the different purposes of the proceedings. Criminal law’s goal is to punish and deter crimes against children by holding an individual perpetrator accountable. In contrast, civil child protection proceedings almost never result, even indirectly, in the imprisonment of the perpetrator. Rather the purpose of a child protection proceeding is to assure the safety of a particular child. The civil system achieves this safety through treatment of the child, parents, or family; through placement of the child in foster care if the home is not safe; or through freeing the child for adoption if such a result is unavoidable. Indeed, in some instances, permanently freeing the child for adoption may guarantee the child long-term freedom from sexual abuse better than a short criminal sentence for the perpetrator. The effects of short jail time or other sentences are particularly uncertain when the convicted familial offender does not receive treatment or when treatment is unsuccessful. Especially when treatment of the offender is not accomplished or is unsuccessful, terminating the parent-child legal relationship through civil proceedings is usually the best long-term solution.

Despite the ability of the legal system to protect the child, child sexual abuse rarely results in the initiation of legal proceedings. A study of three counties, which included 833 substantiated reports of all types of intrafamilial child maltreatment, found that only four percent of the reports led to filings in criminal court, and only twenty-one percent of the incidents led to filings of civil dependency and

41. For child protection agency lawyers and guardians ad litem who believe that termination is justified, the lesson appears to be not to rely on any aspect of the criminal process to achieve termination. By immediately proceeding with the juvenile or family court process to termination where appropriate, all the court proceedings affecting the child’s life are processed simultaneously instead of sequentially. This is particularly important in the lives of children for whom time is always of the essence. See, e.g., In re D.D.F., 801 P.2d 703, 708 (Okla. 1990), cert. denied, 500 U.S. 922 (1991) (finding that even though the father’s appeal of a criminal conviction was not final, and therefore could not be used as a basis for termination, his rights to his adopted daughters could be terminated in the civil protection proceeding based on clear and convincing evidence introduced at the civil trial).

42. One county was studied in each of three states: Delaware, Colorado, and California.
neglect proceedings.\textsuperscript{43} Thus, legal proceedings only occur in a small percentage of substantiated incidents of child abuse and neglect.\textsuperscript{44}

\textbf{B. \ Other Methods of Legal Intervention}

Tort and divorce proceedings are other civil law responses to child sexual abuse within the family,\textsuperscript{45} although it appears that families use these remedies less frequently than traditional legal interventions. The law of intrafamilial torts has changed greatly in recent years. For example, a Utah court allowed monetary recovery against a stepfather who sexually abused his adopted daughter notwithstanding a claim of intrafamilial tort immunity.\textsuperscript{46} Prerequisites for receiving such recoveries include a supportive, non-abusing parent, a family’s willingness to suffer the distress which accompanies a lawsuit, and whether the family has adequate personal and financial resources. Not surprisingly, few such cases have been reported.

Commentators have begun to write about child sexual abuse allegations incident to divorce. Some commentators assert that the


\textsuperscript{44} Focusing for a moment on the larger issue of termination, the infrequency of legal proceedings indicates that termination is only considered by a court in a relatively small number of intrafamilial child sexual abuse situations. This effect is amplified by two studies which suggest that civil filings in child protection matters increase the likelihood that families adjudicated for abuse will remain in treatment and unified as families. \textit{See generally} Anna Maria Irueste-Montes & Francisco Montes, \textit{Court-Ordered vs. Voluntary Treatment of Abusive and Neglectful Parents}, 12 CHILD ABUSE & NEGLECT 33 (1988) (reporting findings of a study conducted in Colorado Springs, Colorado); David A. Wolfe et al., \textit{The Importance of Adjudication in the Treatment of Child Abusers: Some Preliminary Findings}, 4 CHILD ABUSE & NEGLECT 127, 127-36 (1980) (reporting findings of a study conducted in Florida). This implies that courts can afford careful attention to the circumstances, management, and legal process of cases in which termination is a consideration.

\textsuperscript{45} Extrafamilial abuse is also addressed through criminal and tort proceedings. Civil actions for sexual abuse occurring outside the family also include day care or foster child care license removal hearings and central registry hearings to retain names of perpetrators where the degree of proof meets state standards for retaining the record.

It is also possible for termination of a parent-child legal relationship to arise out of a child custody dispute. \textit{See, e.g., In re Marriage of Woffinden}, 654 P.2d 1219, 1220-21 (Wash. Ct. App. 1982) (awarding custody of the children to the father, despite the trial court’s finding that the father engaged in sexual intercourse with his daughter from ages six until twelve and explaining that the evidence of prior misconduct failed to prove that the father was presently unfit); \textit{see also In re N.H.}, 383 N.W.2d 570, 571-73 (Iowa 1986) (upholding termination of father’s parental rights at mother’s request, incident to post-divorce decree proceedings).

allegations have become too frequent.\textsuperscript{47} Others appear to believe that allegations of child sexual abuse incident to divorce are often untrue, unlikely, or at best difficult to ascertain when the allegations arise in the context of a custody dispute.\textsuperscript{48} The largest available empirical study on this subject found that the issue of sexual abuse was only raised in two percent of the divorce proceedings involving 9000 families over a six-month period.\textsuperscript{49} Thus, divorce proceedings do not account for a significant number of termination proceedings.

The remainder of this Essay will focus on the most common origin for termination proceedings—civil petitions alleging child abuse and neglect filed by state agencies. The context for analysis of such cases and their legal resolutions is addressed in the following sections.

**IV. TREATMENT OF CHILD SEXUAL ABUSE**

In assessing the possibility of terminating parental rights, the most important factor that courts consider is the treatment available to the parties and the anticipated effectiveness of that treatment. This Part generally discusses the issues surrounding treatment of the victim, treatment of perpetrators, and treatment of other family members. It then briefly discusses court-ordered versus voluntary treatment and

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\textsuperscript{49} Pearson, *supra* note 47, at 294. The author summarized her findings as follows: [While these allegations might be increasing, they are hardly rampant. Other popular conceptions were also called into question by this study. For example, these cases are not limited to accusations against fathers. Indeed, mothers accused the child's father in only half the cases. The rest involved third parties, mother's new partners, stepfathers, and others. Nor did we find that sexual abuse allegations in contested cases were more likely to be unfounded than in cases in the general population. In half the cases with allegations, abuse was believed to have occurred, in 33 percent no abuse was believed to have occurred, and in 17 percent no determination was reached by either a court evaluator or CPS [Child Protective Services] worker. Even when the allegation was unfounded, most of the experts we interviewed believed the reports were made in good faith.]

*Id.*
concludes by discussing indications of untreatability and factors bearing on treatment failure.

A. Treatment of Victims, Abusive Parents, and Families

1. Treatment of Victims

Treatment of a child who was the subject of sexual abuse is particularly important in the context of legal proceedings; without it, a victim usually bears the consequences of child sexual abuse alone. A child may suffer changes in living conditions through government placements or other alterations in family dynamics. The disruptions in family life may result in increased blame on the victim for any problems that the family must address. This blame further debilitates the victim, who often is already subject to inappropriate expectations or pressures. Thus, the primary goal for the legal representative of the child should be to obtain an evaluation of the victim so that parties can make treatment decisions and establish a baseline of communication.

Information about a child’s current situation is invaluable in determining the appropriateness of the outcome from the child’s perspective. In addition, analyzing the treatment of the victim along with his or her progress, provides insight into the nature and implications of any maltreatment suffered, which may in turn speak to the parenting skills, attitudes, and capacity necessary for the child’s future care. In addition, the information may prove useful to a court’s decision making process regarding the possible termination of parental rights.

2. Treatment of Abusive Parents

Within a family, the goal of treating abusive parents is to alter “distorted, destructive, [and] maladaptive” parental patterns. Although literature on treatment is growing, there exists only a limited number of rigorous studies concerning the effects of treatment on abusive parents. The lack of rigorous studies places a premium on the experience of the evaluator and treatment professional asked to assess treatability, recommend appropriate treatment, and determine treatment effectiveness. One should note that in termination decisions to date courts have rarely discussed therapists’ qualifications. Yet, at least some future termination proceedings will likely focus on this subject,

including data on an individual therapist’s success in producing favorable treatment outcomes.

3. Treatment of Families

Therapists recommend many different approaches to treating families who experience incest. Similarly, there are many different success rates. One representative study supports a view that treatment can decrease the recurrence of abuse. Researchers in England, acknowledging the initial work of American investigators,\(^5\) reported that no recurrence of sexual abuse appeared to have occurred in sixty-nine percent of the 120 families treated.\(^5\) The study was unable to determine whether abuse occurred again in fifteen percent of the families, while it confirmed the recurrence of abuse in the other sixteen percent.\(^5\) Importantly, the therapists reported that in sixty-five percent of the cases in which they were involved, a protective mother separated the victim from the father.\(^5\) In only five percent of the cases, they reported other structural changes in the marital, parental, or parent-child relationship which were viewed as assuring a safe context for the child.\(^5\) Such findings highlight the importance of separating the abuser and the victim, even if treatment approaches with long and respected traditions are present. This data also emphasizes the importance of a protective parent.

The degree to which family members who were not directly involved in the victimization either knew or should have known of the abuse turns out to be very significant in many court decisions. At the very least, in situations where other family members fail to protect an abused child, courts question the overall patterns of communication and role responsibilities within the family. Another possible termination scenario involves one or both parents’ failure to intervene in abuse among siblings.

B. Court-Ordered Treatment vs. Voluntary Treatment

Studies on the effects of court intervention are still limited. One study involving physical abuse found that families involved in court-
ordered treatment plans are more likely to complete treatment and remain intact than are those who voluntarily undertake treatment.\textsuperscript{56} Another study found that families under court-ordered treatment are less likely to drop out of treatment or to leave the jurisdiction than are families that voluntarily seek treatment.\textsuperscript{57} When drugs or alcohol are factors in abuse situations, however, a court order, which does not appear to aid in the treatment of the parents, appears to aid in child protection.\textsuperscript{58}

C. Indications of Untreatability or Treatment Failure

Although courts currently emphasize whether a treatment plan is in place, the effectiveness of that treatment may be an even more important consideration in deciding whether to terminate the parent-child legal relationship. Researchers have long recognized that some families are simply "untreatable."\textsuperscript{59} In such cases, terminating the parent-child legal relationship seems justified. Of course, termination should not be advocated in every situation of child sexual abuse. In fact, the majority of families may respond to treatment. Citing three

\textsuperscript{56} Wolfe et al., supra note 44, at 131.
\textsuperscript{57} Jueste-Montes & Montes, supra note 44, at 36.
\textsuperscript{58} See Michael S. Jellinek et al., Serious Child Mistreatment in Massachusetts: The Course of 206 Children Through the Courts, 16 CHILD ABUSE & NEGLECT 179, 183 (1992). It should be noted that studies of the effects of court intervention in child sexual abuse cases are restricted to impressionistic reports. Historically, the most influential of these is the whole-family treatment program pioneered by Henry Giarretto and his colleagues in Santa Clara, California. See Giarretto, supra note 51, at 263 (explaining the California treatment program).
\textsuperscript{59} See KEMPE & KEMPE, supra note 1, at 103-06; see also David P.H. Jones, The Untreatable Family, 11 CHILD ABUSE & NEGLECT 409, 410 (1987). The latter researcher proposed the following typology of "untreatability":

1. There are some families who simply will not change. They do not intend or want to change.
2. Some parents persistently deny abusive behavior in the face of clear evidence to the contrary.
3. Some families cannot change in spite of a will to do so. There may be a subgroup here of families who are willing to change but resources to help them are not available.
4. Some parents can change, but not "in time" for their child's developmental needs. For example, a 6-month-old baby's abusive parent, who after two years becomes less impulsive and dangerous, but in the meantime whose baby has developed a strong attachment to a surrogate parent.
5. Similarly, other parents may change in time for their next child but not for the index one.
6. Finally there is the category of untreatable parents who fail to respond to one treatment approach but who may be amenable to another agency or approach.

Jones, supra, at 410.
studies completed at the time of his review, one researcher concluded that about two-thirds of families with proven child sexual abuse were “treatable.”

The incidence of re-abuse may indicate whether families are treatable. One study found that re-abuse occurred in sixteen percent of families treated, with another fifteen percent being classified as families of “concern.” In another study, re-abuse occurred in fifty percent of the treated families, while still another study reported that no re-abuse occurred. The proportion of the sample of families treated which was unchanged or worse in the three studies ranged from sixteen to thirty-eight percent.

Because of the wide range of statistics reported, the details of these studies are important to fully appreciate their implications for termination. Although the authors of most of the studies have not explained the variance in their results, some basis for the differences can be detected. For example, in the study which reported a sixteen percent re-abuse rate, sixty-five percent of the families treated experienced “structural change[s]” in which the perpetrators left the families. Another five percent experienced other marital, parental, and parent-child relationship changes considered “structural,” and nineteen percent of the families experienced no change, leaving children at risk for more sexual abuse. Thus, in a study which reported a low sixteen percent recidivism rate, the equivalent of termination of parental rights occurred in at least sixty-five percent of the families. This study implied that termination was accomplished through non-judicial

60. Jones, supra note 59, at 412.
61. BENTOVIM ET AL., supra note 51, at 252-68.
62. “Concern” means that sexual abuse could neither be confirmed nor ruled out.
64. J.A. Kroth, Family Therapy Impact on Intrafamilial Child Sexual Abuse, 3 CHILD ABUSE & NEGLECT 297, 300 (1979) (reporting that no incidents of sexual contact with the victim were reported by perpetrators under treatment in a sample that included perpetrators who were at the midterm of their treatment programs and those that were near the termination point of their treatment programs).
65. Id.
67. There could be numerous explanations for the differences in these statistics. For example, re-abuse is difficult to detect, especially because perpetrators strongly deny re-abuse to prevent further criminal prosecution. BENTOVIM ET AL., supra note 51, at 263.
68. Id. at 266.
69. Id.
methods. The study which reported no recurrence of abuse, if accurate, may be based on a population which does not need judicial termination because termination occurs in that population through non-judicial methods.

D. Factors Bearing on Treatment Failure

One commentator summarized the factors which he believed constituted a “warning” of great difficulty in treatment. These factors do not necessarily predict failure, but they signal a need for caution in assuring a child’s safety:

1. Parental Factors Associated with Untreatability. Parental factors associated with untreatability include a parental history of severe childhood abuse, a persistent denial of abusive behavior, severe personality disorder (sociopathy or grossly inadequate personality), and mental handicap when associated with personality disorder. Psychotic parents whose delusions involve their child and those persistently addicted to drugs or alcohol often prove untreatable. Less evidence supports the notion that parents for whom child abuse is their only obvious problem and fanatics frequently prove untreatable. In the field of child sexual abuse, those parents who harbor persistent violent sexual fantasies are hard to treat.

2. Parenting Quality Associated with Poor Outcome. The parenting quality which most authors and clinicians find to be associated with poor outcome is a lack of empathic feeling for the child, either when victimized or in the present. Such parents fail to see their child’s needs as separate or different from their own. In child sexual abuse this basic fault may have a sexualized component, too, i.e., the child is seen as having sexual needs and desires of identical nature to those of the parent.

3. Aspects of Abuse Associated with Untreatable Outcome. Aspects of the abuse itself appear to be associated with an untreatable outcome, e.g., severe types of abuse such as fractures, burns and scalds. Cases where there is a long history of abuse prior to discovery prove harder to treat, as may be abuse which has involved premeditated torture or infliction of severe pain. Munchausen by proxy, nonaccidental poisoning, and severe failure to thrive are especially resistant to change. In the field of child sexual abuse, in addition to the factors above,

70. Kroth, supra note 64, at 301.
71. Jones, supra note 59, at 417.
cases involving vaginal intercourse or sexual sadism appear to be more difficult to treat.

4. Dangerousness to Child. With respect to dangerousness, cases where the parent has perpetrated previous violent acts are more likely to prove untreatable. The greater the number of such acts the greater the risk of repetition.

5. Type of Professional Response. Lastly, there is a trend which links successful treatment outcome with the establishment of a helping relationship combined with an outreach component. Where this does not occur outcome seems less good.\footnote{72}

Based upon the foregoing information, at least six factors raise the possibility of terminating the parent-child legal relationship based on child sexual abuse. These factors include a criminal conviction of the child’s caretaker for sexually abusing the child,\footnote{73} prolonged abuse,\footnote{74} severe abuse,\footnote{75} a failure to protect,\footnote{76} other maltreatment,\footnote{77} and failure to keep siblings from sexually abusing each other or other children.\footnote{78}

In fact, appellate courts consider these very factors when making termination decisions. With these factors in mind, this Essay will next review reported court decisions on termination to clarify the general applicability of termination proceeding trends and their exceptions.

\footnote{72}{Id.}
\footnote{73}{Such a situation indicates that there was evidence beyond a reasonable doubt that the parent perpetrated a sexual offense against the child. Furthermore, because constitutional restrictions on criminal laws require strict scienter requirements, the implication is of a mind-set which is not conducive to therapy. Individual fact patterns, however, will undoubtedly shift this immediate presumption in certain cases. For example, some truly remorseful individuals may indeed confess rather than subject their child to prolonged court litigation.}
\footnote{74}{Prolonged abuse implies a greater likelihood that the child’s psychological or other developmental growth has been damaged and that the perpetrator is less treatable.}
\footnote{75}{Severe abuse also increases the likelihood of long-term harm, and implies greater difficulty in treating the perpetrator.}
\footnote{76}{Failure to protect a child from sexual misuse may itself create major problems for the child. On the other hand, it may be that the abuse occurred in such a way that the non-abuser remains a viable and important support to the recovering child.}
\footnote{77}{In addition to sexual abuse, there may be a number of other problems in the safety or care of a child which are severe and untreatable enough to require termination. Each harm may be considered individually or collectively when making the decision to terminate parental rights.}
\footnote{78}{While related to failure to protect, this consideration assures that sexually abusive children receive treatment and, in some instances, may justify termination.}
V. COURT DECISIONS INVOLVING TERMINATION

In researching published court cases, the author located only six pre-1975 termination decisions. Of those six cases, four courts allowed termination and two refused termination. Since 1978, there have been seventy-seven reported decisions pertaining to termination proceedings. Of those seventy-seven cases, only seven courts refused to uphold termination decisions. Taken together, these cases document a trend in which reviewing courts appear to be increasingly willing to uphold lower court decisions terminating the parent-child legal relationship. Although the rationale behind this possible judicial shift is not clear, it is at least clear that reviewing courts usually uphold lower court orders terminating the parent-child legal relationship.

This Essay will next discuss the factors which courts consider when refusing to terminate the parent-child legal relationship. It will then discuss the factors which courts consider when upholding a trial court’s order terminating the parent-child legal relationship.

A. Factors Which May Cause a Court to Refuse a Termination Order

In the first pre-1975 decision in which a court refused to terminate the parent-child legal relationship, the Pennsylvania Supreme Court vacated the trial court’s decision to terminate parental rights, even though the mother pled guilty to being an accessory to the rape of her fourteen-year-old daughter. Despite the mother’s guilty plea, the state high court found this single act insufficient to “meet the statutory standard of continued abuse necessary to support involuntary termin-

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80. See supra note 79.
81. The author located no appellate court termination decisions from 1975-1978.
83. See infra note 90 for the citations to these seven cases.
84. Sixty-six percent of the decisions involving sexual abuse located prior to 1975 upheld a termination decision on appeal. Ninety percent of the post-1978 decisions upheld a termination decision.
85. In re Involuntary Termination of Parental Rights, 297 A.2d at 118, 121-22.
and found other evidence untrustworthy. In the second pre-1975 case refusing termination, an Oregon appellate court upheld the trial court’s refusal to change custody of the child from the father to the mother. Although the court did find that one incident of incest had occurred, seven years prior to the time of the hearing at issue, between the father and a daughter no longer living at home, the court found that this one incident was insufficient to support terminating the father’s parental rights to his other children.

After 1978, seven cases were reported in which reviewing courts overturned terminations or upheld trial court refusals to terminate. Two of the post-1978 decisions, like the pre-1975 cases, also emphasized inadequate evidence. These two decisions, however, provided clearer justification for their conclusions than the older case. In the first case, In re Pieper, the State offered no evidence to prove that the mother was involved in or knew of the father’s sexual abuse of two of their three female children aged six, four, and three.

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86. Id. at 119.
87. Id. at 121-22. The Pennsylvania Supreme Court explained that the balance of the evidence was two written reports that were admitted over counsel’s hearsay objections. Id. at 120. The court found one report “so permeated with hearsay that it could not justifi...g the…below,” and found the second report similarly defective. Id. at 121-22. As such, the court held these reports inadmissible. See id. at 120-21.
89. Id. The father had a non-forcible incestuous relationship with his oldest daughter seven years prior to the hearing at issue in the case. Id. at 493. The father promptly sought counseling, and there was no evidence of recurrence with that child or with any of his other six children. Id. at 492-93. Based on those facts, the court found no reason to remove the children from their father’s custody. Id. at 494.
92. 600 N.E.2d 317 (Ohio Ct. App. 1991), jurisdictional motion overruled, 607 N.E.2d 9 (Ohio 1993). In a subsequent proceeding, the appellate court affirmed the trial court’s finding that all three children were “dependent children” and awarded temporary custody to the state. In re Pieper Children, 619 N.E.2d 1059, 1061 (Ohio Ct. App. 1993).
93. In re Pieper, 600 N.E.2d at 322. Although the court found all three children neglected, it apparently did not find that six-year-old Laura, who suffered from cerebral palsy, was sexually abused. See id. at 318-19.
Although the trial court ordered the mother’s parental rights terminated, the appellate court determined that termination was unjustified.\textsuperscript{94} Similarly, in the second case, \textit{State ex rel. Department of Health and Human Resources v. E.B.},\textsuperscript{95} the mother neither participated in nor knew of the abuse of her daughters and thus the appellate court held that the trial court erred in terminating her parental rights.\textsuperscript{96}

In post-1978 cases, parents also successfully challenged the process used to obtain evidence which supported the termination decision. For example, a Pennsylvania appellate court held that a child’s testimony given in the judge’s chambers, without the parents or their counsel present, violated the father’s due process right to confront and cross-examine witnesses.\textsuperscript{97}

Other decisions which overturned termination orders appear to focus on statutory interpretations. For example, in \textit{In re Sonia G.},\textsuperscript{98} the father was found guilty in a criminal proceeding of numerous counts of child sexual abuse.\textsuperscript{99} While his appeal was pending, the State sought to terminate his parental rights.\textsuperscript{100} Because the statute for termination of parental rights required a “conviction,” the trial court refused to order termination.\textsuperscript{101} In upholding the trial court, the appellate court explained that the term “conviction” means final judgment, and because the father’s judgment was still on appeal, the statutory requirement of “conviction” had not been met.\textsuperscript{102}

Even though this Part discussed instances in which courts refused to terminate parent-child legal relationships, and analyzed the factors which courts used in reaching their decisions, these cases represent a minority of court decisions on the subject. As the next Part demonstrates, courts uphold termination orders in the majority of cases. Therefore, the factors courts cite in upholding termination of the parent-child legal relationship require a more in-depth analysis.

\textbf{B. Specific Factors Courts Use to Order Termination}

A clear judicial statement on a court’s rationale in terminating the legal relationship between a parent and child should include a finding

\begin{itemize}
  \item \textsuperscript{94} \textit{Id.} at 322-23.
  \item \textsuperscript{95} 504 So. 2d 162 (La. Ct. App. 1987).
  \item \textsuperscript{96} \textit{Id.} at 164-65.
  \item \textsuperscript{98} 204 Cal. Rptr. 498 (Cal. Ct. App. 1984).
  \item \textsuperscript{99} \textit{Id.} at 499.
  \item \textsuperscript{100} \textit{Id.} at 500.
  \item \textsuperscript{101} \textit{Id.}
  \item \textsuperscript{102} \textit{Id.} at 501-02.
\end{itemize}
that the abuse has occurred, that therapy or rehabilitation has been unsuccessful, and that there is no prospect for reducing endangerment of the children because of a parent’s treatment failures. Despite the importance of treatability to this formula, however, most courts simply gloss over this issue, and in so doing, risk due process challenges. Nevertheless, if a parent’s attorney fails to raise the due process issue, a court certainly cannot be faulted for not ruling on the issue.

The following sections address specific factors courts have cited in terminating parental rights. In all of the cases, a reviewing court terminated the parent-child legal relationship based upon child sexual abuse or a combination of child sexual abuse and other factors.

1. Denial of Abuse and Lack of Progress in Therapy as Factors Supporting Termination

In termination proceedings, courts clearly use evidence of a poor prognosis for treatability to support termination of the parent-child legal relationship. Many of the cases speak directly to the following factors of untreatability: inability to change, unwillingness to change, and persistent denial of “abusive behavior in the face of clear evidence to the contrary.” Specifically, these decisions comment on factors such as a refusal to participate in treatment, the failure to acknowledge responsibility or make progress in therapy, and the failure to take steps toward rehabilitation.
Even if a parent accepts therapy, courts recognize that the motivation may be dishonest. For example, in *In re Michael S.*,\(^{110}\) the court found that the father accepted treatment primarily because he wanted continuing sexual access to the children.\(^{111}\) Other courts have correctly recognized that attending therapy sessions is not equivalent to progress in therapy.\(^{112}\) Progress in therapy may be so slow or indefinite that termination becomes the only option.\(^{113}\) Moreover, years of treatment may simply not correct parental deficiencies.\(^{114}\) In these situations, the court should terminate parental rights.

In addition to outright refusal to participate in therapy, dishonest participation, and progress too slow to promise adequate and timely child care, some courts have held that a parent’s character makes him or her “untreatable” and that reuniting the family is simply impracticable. For example, a Nebraska court found that there was no reasonable prospect that the father could ever be cured of his pedophilia, and thus the court terminated his parental rights.\(^{115}\) In addition, termination may be justified if a parent admits that he or she will live with a perpetrator despite the risk of losing custody of the children.\(^{116}\)

Denial of abuse by a parent may play a key role for a court in termination decisions when the court finds that the denial indicates a failure to address the child’s needs.\(^{117}\) At the heart of child sexual


\(^{111}\) Id. In addition, the court found that the mother's unwillingness to recognize or respond to the father's abuse of Michael S.'s siblings, prior to Michael S.'s birth, supported removal from the home. Id. at 551-52. Although this case involved removal of the child from the home, a court might similarly look to this factor in a termination proceeding.


\(^{113}\) See *M.C. v. D.C.*, 762 S.W.2d 476, 478 (Mo. Ct. App. 1988) (holding termination of father's parental rights in the best interest of his children where there was uncertainty as to when daughters could be returned to father's custody, thus requiring long-term foster care during adolescence); *In re David C.*, 557 N.Y.S.2d 200 (N.Y. App. Div. 1990) (determining that termination was warranted based on mother's expulsion from, and lack of progress in, numerous counseling programs); *see also In re A.B.*, 460 N.W.2d 114, 117 (Neb. 1990) (finding termination of mother's parental rights in best interest of the children where mother was "unwilling to rehabilitate herself within any reasonable period of time.").

\(^{114}\) *In re M.J.D.*, 731 P.2d 937, 940 (Mont. 1987).

\(^{115}\) *In re C.*, 341 N.W.2d 605, 606 (Neb. 1983).

\(^{116}\) See *In re K.B.*, 419 A.2d 508, 514 (Pa. Super. Ct. 1980). The mother explicitly stated that she would resume living with her husband, a man incarcerated for sexually abusing her daughter, upon his release from jail. Id. In remanding the case to the trial court, the appellate court explained that the court "should not permit the return of the daughter to the household where she was abused without satisfactory proof that the abuse will not be repeated." Id. at 516.

\(^{117}\) *See In re C.R.*, 581 N.E.2d 1202, 1206-08 (III. App. Ct. 1991) (holding that
abuse is a parent’s failure to respect the needs of a child to develop and master his or her own sexuality and feelings. Applied to possible termination situations, some parents may be incapable of understanding or adequately empathizing with the child’s perception that he or she has been sexually abused.

For example, in In re I.O., a father was convicted of “second degree sexual assault, aggravated incest, sexual assault on a child, and child abuse.” Later, the parents refused to acknowledge the abuse during treatment ordered by the juvenile court incident to a civil protection adjudication. The court explained that, from the child’s perspective, acknowledgment of the abuse was crucial to the success of a treatment plan. While this case involved “denial” or “refusal” of abuse, it also involved a “capacity” issue. When a parent, safe from further prosecution from previous offenses, cannot demonstrate empathy for his or her child’s basic needs for security and protection, a court should terminate parental rights.

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118. Although this type of rationale is not usually articulated by the court, it appears to underlie the cases discussed. See infra notes 119-34 and accompanying text.

119. For example, if a child believes that she is not safe sexually, especially from the perdition of a parent who should protect her from misuse, and the parent is unable to understand and respond to the child’s plight, then the child is placed in an excruciating dilemma. She either overrides or disregards her own feelings, or disobeys the persons who are most important to the formation of her world. If the parent forces the view that the child’s perceptions are invalid, then the developmentally immature child must cope on behalf of the adult who is not able to find a way to help the child reconcile her fears. This can be a form of “role reversal” and is at least arguably evidence of inappropriate parental boundaries or premature sexualization. See In re I.O., 713 P.2d 396 (Colo. Ct. App. 1985) (adopting the aforementioned type of reasoning).

120. Id.
121. Id. at 396-97.
122. Id. at 397.
123. Id. Specifically, the Colorado Court of Appeals stated:
   The appropriateness of a [treatment] plan can only be measured by examining the likelihood of its success in accomplishing its purpose of reuniting the parents with their child. Here, several therapists indicated that admission by both parents of the occurrence of the sexual abuse was a necessary initial step not only to resolving the parents’ difficulties, but also to providing the daughter with security that the situation was not her fault and that she would not be sexually abused again.

Id. (citation omitted).
124. This is one of the important considerations for untreatability. See Jones, supra note 59, at 410; see also In re N.W., 472 N.W.2d 887, 891-93 (Neb. 1981) (holding that parental rights were properly terminated where the father, who pled guilty to sexually abusing his daughter, refused to admit to such abuse in therapy).
2. Variations in the Failure to Acknowledge Evidence of Sexual Abuse as a Factor in Termination: Lack of Protection

Courts frequently base termination decisions on a parent’s failure to protect children from sexual abuse. In almost all of the cases, the court has heard overwhelming evidence that the non-perpetrator, usually the mother, knew that her children were sexually abused over a prolonged period.\(^\text{125}\) Thus, even when all evidence indicates that the mother did not participate directly in the abuse,\(^\text{126}\) courts still terminate the mother’s rights based on the mother’s failure to protect her children.\(^\text{127}\)

An adoptive mother’s failure to protect her three children was crucial in a Georgia case.\(^\text{128}\) In that case, the adoptive father subjected three adopted children to various types of sexual abuse, including forced sodomy, virtually from the time of the children’s adoptions.\(^\text{129}\) Although the adoptive mother was aware of the abuse, and even witnessed several incidents, she took no action other than once requesting that the adoptive father stop the abuse.\(^\text{130}\) Furthermore, despite the fact that no rehabilitation was attempted prior to the trial court’s termination of the parental rights, the appellate court refused to “reinstate appellants’ parental rights and turn the hapless children over to an, at best, indifferent and ineffectual mother and perhaps ultimately, in a worse case scenario, to a perverted and criminally abusive father.”\(^\text{131}\) Nevertheless, a trial court which seems to base termination on a

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126. In *Lakes v. Texas Dep’t of Human Servs.*, 791 S.W.2d 214, 216 (Tex. Ct. App. 1990), the physical evidence, a confession by the perpetrator, and clear statements by the child victim, all indicated that the mother was not involved in the abuse. This same evidence, however, clearly indicated that the man her mother was living with was the perpetrator. *Id.* As such, the appellate court upheld the trial court’s removal order, explaining that “[k]nowingly placing or leaving children with persons known to have sexually abused them is sufficient evidence to justify termination.” *Id.*

127. *Id.*


129. *Id.* at 111.

130. *Id.* Moreover, the adoptive mother told individuals outside the family that the children’s reports were lies. *Id.*

131. *Id.* at 112.
"irrebuttable presumption" of untreatability may provide a basis for parents to challenge the termination on review if the court inadequately addressed the issue of treatability.132

Another form of failure to protect involves siblings being abused by siblings. This situation occurs when parents are, or should be, aware of sexually abusing siblings, and they fail to prevent the abuse or to seek treatment. Some courts recognize this type of behavior as an incapacity which supports terminating the parental rights. For example, in a case in which both parents failed to stop or seek treatment for their oldest son who abused younger children, the court terminated parental rights based on the parents' failure to protect.133 Similarly, in a widely publicized Colorado case, the court terminated the legal relationship between the parents and seven children on grounds of chronic neglect, failure to respond to treatment, and failure to acknowledge that problems of sexual abuse existed among the siblings.134

3. Severity of Abuse as a Factor in Terminations

In cases where the abuse was so severe that it led to criminal convictions, reviewing courts will often uphold termination decisions despite the lack of evidence of untreatability. Because criminal convictions usually reflect child sexual abuse which is particularly prolonged or severe,135 in civil proceedings, courts hold that the same facts speak to untreatability, and thus, support termination decisions.136

132. See KEMPE & KEMPE, supra note 1, at 103-05.
133. In re B.M., 383 N.W.2d 704, 708 (Minn. Ct. App. 1986). The mother's general incapacity and the father's mental illness were apparently contributing factors supporting termination. Id. at 706.
134. Interview with Peggy Jessel, Guardian Ad Litem (October 31, 1994) (unpublished opinion).

After the termination order was entered and upheld on appeal, several of the children testified against their parents in criminal proceedings. The parents were ultimately convicted and sentenced for sexual assault of a child and selling their children for sexual purposes to their adult friends. Sally McGrath, Jury Finds Dunann Guilty, DAILY CAMERA (Boulder, Colorado), Jan. 29, 1993, at B1, B3. In retrospect, it appears that the guardian ad litem was wise to not pursue suspicions of parental sexual abuse at the time of termination, but rather to pursue termination on the already strong grounds of neglect, including failure to stop sibling abuse.

135. The length of time abuse has occurred and the severity of the abuse were factors previously noted as signs of untreatability. See supra notes 59-72, 74-75 and accompanying text.
136. It is of course very different to emphasize the underlying facts speaking to severe abuse as a justification for termination, and to wait on or rely on a criminal conviction as the basis for proceeding in the civil matter. See supra note 40 and accompanying text.
In many cases, courts have noted the associated criminal convictions of parents scrutiny to uphold termination of the parent-child legal relationships. In a Louisiana case, for example, the State proved beyond a reasonable doubt and by clear and convincing evidence that a father abused his two adopted stepdaughters and his natural son. The father had been convicted of forcible rape of each stepdaughter, and had exposed his infant son to his sexual activities with his stepdaughters. Accordingly, the court properly terminated the stepfather’s parental rights with respect to all three children. A court terminated another father’s parental rights after the father was convicted of sexually assaulting five of his six children. Notably, the father had previously completed counseling in another state. In another instance, the Massachusetts high court affirmed a trial court’s termination order where both the mother and father pled guilty to numerous counts of child sexual abuse.

While criminal convictions are noted, and are perhaps influential in certain termination decisions, there are other factors which warn against an exclusive focus on the issue of criminal culpability. For example, in In re C.J.S., the court terminated both parents’ legal ties to their daughter, but not the mother’s legal relationship with her son. In refusing to terminate the mother’s legal rights to her child, the court found a sufficiently strong “‘bonding relationship’” between mother and son to maintain the legal relationship. The court held that this decision was in the best interests of the son.

139. Id. at 1196-97.
140. Id. at 1199.
142. Id. at 773-74.
143. In re Martha, 553 N.E.2d 902, 904-05 (Mass. 1990). Both the mother and father pled guilty to indecent assault and battery on both daughters. Id. In addition, the father pled guilty to unlawful sexual intercourse or unnatural sexual intercourse with, and abuse of, both daughters. Id. These charges were based on the fact that the father had sexual relations with his seven-year-old and five-year-old daughters weekly for approximately one and one-half years. Id. at 903. The mother engaged in sexual acts with her daughters, and the parents required their daughters to perform sexual acts on each other. Id. The parents took pictures of all of these acts. Id. at 903-04. Another severe case resulting in imprisonment of both the mother and her boyfriend is In re J.D.B., 813 S.W.2d 341, 342 (Mo. Ct. App. 1991).
145. Id. at 36. Both the mother and the father served prison sentences for the molestation of their daughter. Id.
146. Id. at 38.
147. Id. Such cases caution those representing children’s interests to always be clear
A related issue in cases where criminal charges are filed is whether the failure to convict on criminal grounds prevents a civil termination proceeding. The better view is that the standard of proof and purposes of criminal and civil proceedings are quite distinct, and that criminal acquittal is not dispositive in civil protection proceedings. For example, in *In re J.N.*" 148 despite the fact that the jury acquitted the father on all sixteen counts of sexual misconduct with his adoptive children, the civil court found by clear and convincing evidence that the father’s conduct warranted temporary foster home placement of the children. 149

After six months of “treatment,” and continual denial by the parents of any sexual abuse, the trial court issued an order terminating parental rights. 150 In upholding the trial court’s order, the appellate court found that the parents’ “problems were not going to be solved so as to make it safe for the children to return to the home.” 151

4. Termination Based on Child Sexual Abuse “Plus” Other Factors

Many cases reveal fact patterns in which sexual abuse was only one of many factors establishing dysfunction and parental incapacity. For example, decisions reflect sexual abuse combined with maltreatment and factors indicating untreatability. Some case scenarios include: a seventeen-year period of physical, sexual, and emotional abuse at the hands of a mother and her boyfriends, significant emotional and behavioral disturbances in the children, and many failed attempts to
engage the mother in counseling;\textsuperscript{152} long-term foster care resulting from a stepfather’s sexual abuse of a child and a mother’s denial that abuse occurred, coupled with no reasonable expectation of returning the children to the parental home in the near future;\textsuperscript{153} failure to provide adequate food and shelter combined with repeated sexual abuse of children by two of a mother’s three successive husbands;\textsuperscript{154} intentional burns from a hot furnace grate with the possibility of prior incidents of sexual abuse;\textsuperscript{155} sexual and physical abuse combined with exposure to drugs;\textsuperscript{156} sexual abuse along with severe neglect;\textsuperscript{157} and physical abuse with likely sexual abuse.\textsuperscript{158} In a Michigan case, the court terminated parental rights based upon a documented lack of food, failure to provide medical attention, chronic emotional deprivation, intense parental conflict, observation of the sexual activities of the parents, and sexual abuse by the father.\textsuperscript{159}

In particular, a parent’s mental incapacity, when coupled with sexual abuse, should be considered an important factor.\textsuperscript{160} The more

\begin{itemize}
\item \textsuperscript{153} In re C.M.M., 757 S.W.2d 601, 603-07 (Mo. Ct. App. 1988).
\item \textsuperscript{154} In re L.P., 370 N.W.2d 839, 840 (Iowa Ct. App. 1985); see also In re Sprite, 400 N.W.2d 320, 323 (Mich. Ct. App. 1986) (upholding the trial court’s termination of the mother’s parental rights based on the mother’s failure to protect her children from the father’s sexual assault, the mother’s relationship with a new boyfriend who himself had a history of child neglect, and the mother’s own neglect of her children).
\item \textsuperscript{155} In re S.M.Q., 796 P.2d 543, 545-46 (Kan. 1990).
\item \textsuperscript{156} In re C.V.M., 478 N.W.2d 874, 876 (Iowa Ct. App. 1991); In re C.K.G., 827 S.W.2d 760, 764 (Mo. Ct. App. 1992). In the latter case, the appellate court upheld the trial court’s termination order, based on a finding that the mother’s excuse—her “drug and alcohol haze”—for her failure to protect her children was unpersuasive. Id. at 765. Notably, one of the mother’s live-in boyfriends was incarcerated at the time of the proceeding after pleading guilty to second-degree murder of one of the mother’s children. Id. at 763. That child died from intracranial bleeding resulting from head trauma, and also exhibited signs of rectal trauma. Id.
\item \textsuperscript{157} In re M.T., 607 A.2d 271, 282-83 (Pa. Super. Ct. 1992); see also In re Pieper Children, 600 N.E.2d 317, 322-23 (Ohio Ct. App. 1991) (finding the children neglected and sexually abused by the father but not the mother).
\item \textsuperscript{158} In re Rinesmith, 376 N.W.2d 139, 143 (Mich. Ct. App. 1985). In Rinesmith, the court accepted a doctor’s testimony that the “pattern of bruises substantiated the allegations of sexual abuse,” Id. at 140. In a New York case, In re Chianti FF, 558 N.Y.S.2d 707 (N.Y. App. Div. 1990), appeal dismissed, 576 N.Y.S.2d 213 (N.Y. 1991), the court found the child’s statements to a social worker to be sufficient corroboration of the child’s out-of-court statements regarding sexual abuse. Id. at 708-09.
\item \textsuperscript{159} Sprite, 400 N.W.2d at 323-24. Multiple factors are also found in Baxter v. Texas Dep’t of Human Resources, 678 S.W.2d 265, 267 (Tex. Ct. App. 1984).
\item \textsuperscript{160} See Polk v. State Dep’ t of Human Resources, 542 So. 2d 279, 280-81 (Ala. Civ. App. 1988); In re B.M., 383 N.W.2d 704, 707-08 (Minn. Ct. App. 1986). Such cases point to the important distinction between the “culpability” or “blameworthiness” of parental behavior and the much more important question, from the child’s perspective,
problems a parent has which reflect negatively upon his or her ability
to be a parent, the greater the complexity, and hence, the more difficult
the treatment. For example, in an Alabama case, the trial court ordered
termination of the mother’s parental rights based on findings that the
mother was mentally unstable, the mother had previously lost custody
of her two older children, the child remaining in the mother’s custody
had extensive knowledge of sexual behavior and language, and the
child’s social behavior in kindergarten was consistent with having
participated in sexual activity. 161

When other signs of maltreatment are present as the “plus” factors, a
court may use them to indirectly support termination based upon
sexual abuse. For example, a court did not use evidence of physical
beatings with fists and two-by-fours by a mother and her boyfriends
as separate grounds for termination, but rather to buttress the facts
with respect to child sexual abuse. 162 A Kentucky case further exem-
plifies the importance of looking at factors other than sexual abuse in
certain termination situations. 163 In that instance, the court found the
oldest daughter’s report of sexual abuse by her father, and the father’s
guilty plea to that charge, insufficient to terminate the father’s parental
rights as to his younger two daughters. 164 Nevertheless, based upon
these facts, in conjunction with the mother’s testimony that she could
not stand up and protect the children when the father became violently
angry, the appellate court upheld the trial court’s termination order
with respect to both parents because of the parents’ incapacity to care
for their children. 165

In some instances, state statutes affirmatively require a finding of
more than one instance of abuse to support the termination of parental
rights. For example, an Oklahoma statute pertaining to termination

of the basic capacity of a parent to provide essential child care and protection. A parent
who is not at all “blameworthy,” indeed a victim in his or her own right, should not
mislead the decision-maker into ignoring the lack of potential for safe child care. The
explanation that a parent has had a tragic life should not be allowed as an excuse for
abuse, although such information may be useful in arriving at a prognosis of

161. Polk, 542 So. 2d at 280-81.
162. In re M.H., 367 N.W.2d 275, 278-79 (Iowa Ct. App. 1985). The court also
noted that the mother’s boyfriend used the children as b.b. gun targets. Id. at 279.
1986).
164. Id.
165. Id. The use of different words, such as “skills” or “capacity,” can be very
important in understanding and expressing the issues of adequacy in parenting. “Skills”
have a cognitive meaning as used herein; whereas, “capacity” is meant to refer to
emotional, social, and cognitive factors in parenting.
requires a "finding that a parent has physically abused a child subsequent to having been found guilty of child beating or child abuse . . . ."166 Despite this express statutory requirement, one court ordered termination, even though neither parent had a prior conviction for child abuse, based on the following evidence: the three-year-old child’s gonorrhea; photographs of the child and parents nude; and conversations overhead in which the parents talked about sexual contact with their child.167 This court’s decision exemplifies the fact that although it is generally preferable for a court to base a termination order on more than one factor, a court may sometimes decide that a particular set of circumstances, or just one factor, warrants termination of the parent-child legal relationship.

5. Termination Based on a Substantial Risk of Sexual Abuse Evidenced by Harm to Other Children

Another important issue in child protection proceedings is whether a court can terminate a parent’s legal rights to unborn children or to children in the parent’s custody but not directly involved in the abuse. There are many cases in which courts have upheld termination orders based on physical abuse to other children,168 and increasingly more cases find sexual abuse to one child to be relevant in assessing the safety of other children in the same person’s care.169 For example, a California appellate court ruled that the juvenile court properly assumed jurisdiction over a child whose siblings had been declared dependent children pursuant to petitions alleging acts of sexual abuse by the father, even though the child in question had not been born at the time of the alleged events.170

In an Illinois case, the father sexually abused two older girls at a residence while his youngest daughter was there.171 In upholding the termination decision as to both parents, the court cited the father’s

167. Id. at 1372-74.
168. See, e.g., People ex rel. C.R., 557 P.2d 1225, 1227 (Colo. Ct. App. 1976) (finding the mother’s failure to protect her three youngest children from physical abuse was sufficient to terminate her parental rights to her fourth oldest child).
170. In re Michael S., 179 Cal. Rptr. 546, 551-52 (Cal. Ct. App. 1981). The court refused to ignore the father’s return from a state hospital and resumption of residence in the mother’s home because his motive might be to continue a sexual relationship with the children. Id. at 550.
refusal to seek treatment, the mother’s inability to provide protection, the daughter’s resultant developmental delays, and the psychologist’s report that returning the child to her mother could result in future risk to the child. In another instance, both the trial and appellate courts in Florida agreed that anticipatory termination was required where the father was a diagnosed pedophile, had been convicted for sexual battery on a child, had not completed the ordered sexual offender program, and had no prospects for successful treatment. The courts had every reason to believe that the father would abuse his children, so termination was proper.

Similarly, a Louisiana court terminated parental rights to all three of a father’s children, despite the court’s finding that two of the children may not have been abused. In so holding, the court found that “the great preponderance of the evidence showing that other abusive conditions existed, whether inflicted by either or both the mother and the father towards one or more of the children” justified the termination decision.

Finally, a combination of physical and sexual abuse of one child may be used to support termination of parental rights to another child. For example, in one case, the judge took judicial notice of the fact that the mother’s parental rights to the subject child’s older sibling had been terminated due to severe acts of physical and sexual abuse by the younger child’s father and by the mother’s uncle. The court took into consideration the fact that the mother knew of the abuse and that it occurred while the child was in the mother’s custody. Because the conditions that led to the abuse of the older sibling had not been remedied by the mother, and because the mother emotionally neglected the younger child, the court terminated parental rights without a specific incident of sexual abuse to that child. In effect, sexual abuse of

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172. Id. at 1202, 1205-06. The mother possessed the mental age of a five to six-year-old, and although she had made progress over a two-year period, the court found her progress inadequate to demonstrate that she would in “the reasonable future, be able to discharge her parental responsibilities.” Id.


175. Id. The State alleged that the fourteen-year-old daughter had borne a child from a sexual union with her father outside Louisiana. Id.


177. Id. at 332-33. The statute in question allowed termination of parental rights when a “severe act or recurrent acts of physical, emotional or sexual abuse [is directed] toward the child or any child in the family by the parent . . . .” Id. at 333 (quoting Mo. REV. STAT. § 211.447.2(2)(c) (1986)).

178. Id. at 334-35. The court found that the child’s emotional ties to the mother
an older child, along with the emotional harm to the subject child, created a record of both actual and potential harm sufficient to justify termination as to the younger child.

At least one court, however, has held that the abuse of one child could not be a basis for finding other children "neglected." In that instance, the court held that although the oldest child, who had been sexually abused by the father, was both "dependent" and "neglected," the other two children were only "dependent" within the meaning of the state statute. Therefore, under the state statute at issue in the case, if only one child in a family is abused, a court is not permitted to find that other children are thereby abused or neglected. A court could, however, terminate parental rights based on the parents' general lack of parenting skills.

VI. CONCLUSION

Child sexual abuse occurs at an alarming rate. Together with the documented effects of such abuse, it is clear that society cannot allow this abuse to continue. Although there are several legal proceedings in which sexual abuse can be addressed, termination of the parent-child relationship may be the most effective proceeding from the viewpoint of the child who is abused. Of course some abusers can be effectively treated, but unfortunately there are instances when no treatment will sufficiently protect the child. Therefore, it is important to examine court decisions which overturn and uphold trial court termination decisions to determine when and if termination should be sought in a particular case, and how to prove when and if termination is the only option.

The factors tending to decrease the likelihood that termination will be upheld include doubts about the underlying evidence of abuse, or technicalities in the termination proceeding, especially where a criminal decision is being relied upon. The factors tending to support a termin-

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179. In re V.R., 355 N.W.2d 426, 430 (Minn. Ct. App. 1984). Under the state statute a neglected child is one "[w]ho is without proper parental care because of the faults or habits of his parent . . . ." Id. (quoting MINN. STAT. § 260.015(10)(b) (1982)).

180. Id. at 431. In vacating the trial court's neglect adjudication as to the younger siblings, the appellate court explained that there was no evidence at trial, and no finding of sexual or physical abuse of the two younger children by their father. Id. Therefore, the children only fell under the dependency statute which includes a child who is "in need of special care and treatment required by his physical or mental condition and whose parent . . . is unable to provide it . . . ." Id. at 430 (quoting MINN. STAT. § 260.015(6)(b) (1982)).
ation decision include severe or prolonged sexual abuse, child sexual abuse "plus" other forms of maltreatment, a failure to protect the child from sexual abuse alone, or from sexual abuse in combination with other forms of maltreatment, and a failure to stop sibling abuse, through diagnosis and treatment for the victimizing and victim children. It is also important to note that abuse of other children by a parent can sometimes be used in termination decisions involving at-risk children who have not themselves been abused.

In the area of termination, courts appear to be consistent with the current treatment trends and research findings related to child sexual abuse. It is not clear, however, whether terminations of the parent-child legal relationship in cases of child sexual abuse are being sought by agencies and guardians ad litem as frequently as they should be, given the high percentage of termination decisions being upheld in the nation's court system.