

**The Cost of Inaction:
Defining, Investigating, and Prosecuting
Neglect and Failure to Thrive Cases**

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**What Makes Neglect Cases
So Difficult**

- It’s *inaction*, not action that makes the behavior abusive
- Difficulty in differentiation between a crime and a “mistake”
- No easily understood motives
- Your victim’s family – who should be acting to protect the family – *includes* the offender
- These behaviors are hard for the public to understand

How do we deal with juror sympathy?

- Keep in mind these perceptions throughout your investigation
 - There is no such thing as “enough” evidence
- Use investigation to provide motives
 - Highlight stressors, vulnerability of the victim, and prior abuse
- Gather evidence / interview witnesses knowing that jurors may be looking for reasons to acquit!
 - I’d appreciate a little bit of sympathy for the VICTIM!

Delaware Criminal Neglect Endangering the Welfare

- Endangering the welfare of a child; class E or G felony – 11 Del. C. § 1102 (2010)

- (a) A person is guilty of endangering the welfare of a child when:
 - (1) Being a parent, guardian or any other person who has assumed responsibility for the care or supervision of a child less than 18 years old the person:
 - a. Knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of the child; or
 - b. Intentionally does or fails to do any act, with the result that the child becomes a neglected child;

Delaware Neglect Sentencing

- (b) Endangering the welfare of a child shall be punished as follows:

- (1) When the death of a child occurs while the child's welfare was endangered as defined in subsection (a) of this section, endangering the welfare of a child is a class E felony;
- (2) When serious physical injury to a child occurs while the child's welfare was endangered as defined in subsection (a) of this section, endangering the welfare of a child is a class G felony;
- (3) When a child becomes the victim of a sexual offense as defined in § 761(g) of this title while the child's welfare was endangered as defined in subsection (a) of this section, endangering the welfare of a child is a class G felony;
- (4) In all other cases, endangering the welfare of a child is a class A misdemeanor.

11 Del. C. § 1102 (2010)

Murder by Abuse or Neglect

11 Del. C. § 634 Murder by abuse or neglect in the first degree; class A felony

- (a) A person is guilty of murder by abuse or neglect in the first degree when the person recklessly causes the death of a child:
 - (1) Through an act of abuse and/or neglect of such child; or
 - (2) When the person has engaged in a *previous pattern* of abuse and/or neglect of such child.
- (2) "Child" shall refer to any person who has not yet reached that person's 14th birthday.
- (3) "Previous pattern" of abuse and/or neglect shall mean 2 or more incidents of conduct:
 - a. That constitute an act of abuse and/or neglect; and
 - b. Are not so closely related to each other or connected in point of time and place that they constitute a single event.

Assault by Abuse or Neglect

11 Del. C. § 615. Assault by abuse or neglect; class B felony - Class B felony

(a) A person is guilty of assault by abuse or neglect when the person recklessly causes serious physical injury to a child:

- (1) Through an act of abuse and/or neglect of such child; or
- (2) When the person has engaged in a previous pattern of abuse and/or neglect of such child.

Neglect Examples in DE Case Law

- *STEPHANIE WALLS v. STATE OF DELAWARE, 834 A.2d 827;*
– SUPREME COURT OF DELAWARE – 2003
- *STATE OF DELAWARE v. E. J., 2005 Del. Fam. Ct. LEXIS 119*
– FAMILY COURT OF DELAWARE, NEW CASTLE – 2005
- *MARIE ANDRE v. STATE OF DELAWARE, 840 A.2d 641*
– SUPREME COURT OF DELAWARE - 2003

Definitional Section

TYPES OF CHILD NEGLECT

Types of Child Neglect

- Physical Neglect: It includes failure to protect from harm or danger and provide for the child's basic physical needs, including adequate shelter, food, or clothing.
- ERICKSON, p. 7.

Types of Child Neglect

- Emotional Neglect: "passive or passive / aggressive inattention to the child's emotional needs, nurturing, or emotional well-being" (*Citing to American Humane Association definition*).
- *Id.* p. 7.

Emotional Neglect

- "Emotional or psychological abuse is *the most elusive and difficult to define of all types of child abuse* [39-41]. It has been defined by the National Center of Child Abuse and Neglect as child abuse that results in impaired psychological growth and development [42]."
- Endom at 8. Citing to the following:
- 39. Hamarman, S, Bernet, W. Evaluating and reporting emotional abuse in children: parent based, action-based focus aids in clinical decision-making. 3 Am Acad. Child Adolesc. Psychiatry 2000; 39:928.
- 40. Neims, BC. Emotional abuse: helping prevent the problem. 3 *Pediatr. Health Care* 2001; 15:103.
- 41. Kent, A., Waller, G. Childhood emotional abuse and eating psychopathology. *Clin. Psych. Rev* 2000; 20:887.
- 42. National Center of Child Abuse and Neglect. National Center of Child Abuse and Neglect. Washington, DC 1997.

Emotional Abuse

- “Emotional abuse is the most common form of child abuse since it occurs independently and is a component of all other forms of child abuse [2,39,44]. “

Endom at 8, citing to [2] Ludwig, S. Child abuse. In: Textbook of Pediatric Emergency Medicine, 5th ed, Fleisher, GR, Ludwig, S, Henretig, FM (Eds), Lippincott Williams and Wilkins, Philadelphia 2006, p.1761, [39] Hamarman, S, Bernet, W. Evaluating and reporting emotional abuse in children: parent based, action-based focus aids in clinical decision-making. 3 Am Acad Child Adolesc Psychiatry 2000; 39:928. and [44] Kaplan, 53, Pelcovitz, D, Labruna, V. Child and adolescent abuse and neglect research: a review of the past 10 years. Part I: physical and emotional abuse and neglect. 3 Am Acad Child Adolesc Psychiatry 1999; 38:1214.

Types of Child Neglect

- **Medical Neglect:** “caregivers’ failure to provide prescribed medical treatment for their children, including required immunizations, prescribed medication, recommended surgery, or other intervention in cases of serious disease or injury.”
- ERICKSON, p. 7-8

Types of Child Neglect

- **Medical Neglect:**
 - In addition to refusal to seek or delay in seeking medical care, medical neglect also includes lack of adherence to health care recommendations.

– Endom, p. 3

Types of Child Neglect

- Mental Health Neglect: “caregivers' refusal to comply with recommended corrective or therapeutic procedures in cases in which a child is found to have a serious emotional or behavioral disorder.”

– ERICKSON, p. 8.

Types of Child Neglect

- Educational Neglect: “caregivers' failure to comply with state requirements for school attendance.”

– ERICKSON, p. 8.

Definitional Section

FAILURE TO THRIVE

What is Failure to Thrive?

- Failure to Thrive (FTT) as a medical diagnosis:
 - Inadequate weight gain or deviation from growth standards for age and sex, based on standardized National Centers for Health Statistics (NCHS) growth charts
 - Haney Presentation

What Is Failure to Thrive?

- Is FTT always criminal?
 - NO! A diagnosis of FTT does not mean that there is *any* wrongdoing on the part of the caregiver!
 - Need to determine the cause of the FTT
 - Organic
 - Non-organic
 - “Most FTT is of mixed etiology”
 - Haney Presentation

What Is Failure to Thrive?

- How is FTT diagnosed?
 - “Complete history and physical examination of child
 - Detailed dietary and psychosocial history
 - Prolonged observation / intervention”
 - Haney Presentation

Types of Neglect Cases Typically Seen

- Failure to Supervise
 - Kids in Car
 - Kids in Water
- Inadequate Medical Care
 - Deliberate withholding of care
 - Withholding based on other facts
- Starvation / Failure to Thrive
 - Failure to insure nutritional needs
 - Deliberate withholding of nutritional needs
- Exposing a child to danger
 - Including a failure to protect from known risks
 - Messy house cases

Uncovering the Truth

Investigating Child Neglect Cases

Neglect Investigations

- Identify the child's situation
- Identify the caregivers
- Prove the inaction (or lack thereof)
- Pinpoint the motivation
- Work with prosecutor and child protection to determine course of action

Neglect Investigations

- Identify the child's situation
 - What is the behavior in question?
- It is very possible that in many homes, you will find multiple neglectful behaviors / inactions that affect the children on a variety of levels. Some neglectful behaviors may not appear to affect the child at all.

Neglect Investigations

- Identify all forms of neglect not only to ensure that all of the child's needs are being met but also for the purpose of building a strong case if needed
- Example:
 - Mother and father being prosecuted for failing to enforce attendance laws
 - Discovery: child being physically and sexually abused by a foster brother and parents hide this by keeping her out of school

Investigating Child Neglect

DEFINING THE CRIME SCENE

Where is Your Crime Scene?

- Explore the child's living environment, including the specific areas of concern.
- Recognize that because of co-occurrence of neglect with other forms of abuse, you may have multiple scenes.

Scene Investigation

- **Investigate thoroughly, even if you're not sure it's a crime**
 - You can't go back later and re-create what has been destroyed
- **Think about what can be changed in a house in a matter of minutes**
 - There's no gun to hide
 - No drugs to stash
 - *Everything needed to harm / fail to protect a child is right in front of your eyes*

Scene Investigation

- Photograph Everything!!!
- Presence of luxury items
- Absence of child's necessities
- **Collect and preserve physical evidence**
 - Blankets and bedding
 - Open formula, baby food
 - Prescription medications
 - Baby furniture
 - Laundry
 - Garbage

Initial Witness Interviews

- Record / document all interviews in file
 - Who did the interview
 - Manner in which it was recorded
 - Any witnesses to the interview
 - Follow-up interviews needed
 - Attempt to verify information provided
- Interview *all* relevant parties
 - Information may later prove helpful

Initial Witness Interviews

- Talk to the children using a trained forensic interviewer
 - Get to the child before offender / accomplice does
 - In interviewing other witnesses:
 - Did the children say anything?
 - Where were the children when independent witnesses arrived?
 - What opportunities did other kids have to observe?

Child's History

- Was this child wanted?
- How did this child impact parent's life?
- Who has cared for child throughout life?
 - Interview these people where long-term abuse is an issue!
- Has child lived in different places?
 - Frequent moves without clear need / reasons
 - Moves to accommodate partner (s) of biological parent
- Did anyone interviewed ever consider calling CPS?
 - “What would you have reported, if you had it to do over?”

Investigating Child Neglect
EXTRINSIC EVIDENCE

Extrinsic Evidence

- Cell phone records
 - Including *anything* in the phone
- Internet records
 - Was the Defendant on the internet at the time the incident happened?
- 911 calls
 - Who can be heard in the background?
- Prior CPS reports
 - What efforts have been made to support this family?
- Social worker notes from schools
 - Include IEP's

Investigating Emotional Neglect

- **“Substantiation** — The substantiation of emotional abuse may be difficult and requires repeated observations of family interactions. The observations should be documented as objectively as possible (i.e. direct quotations of witnessed interactions). Collateral reports from schools, other professionals, child care workers, and others involved with the family can also be helpful [43]. The involvement of a mental health provider can be helpful in uncertain cases. “

Endom at 7, citing to Ludwig, S. Child abuse. In: Textbook of Pediatric Emergency Medicine, 5th ed. Fleisher, GR, Ludwig, S, Henretig, FM (Eds), Lippincott Williams and Wilkins, Philadelphia 2006, p.1761, and [43] Kanyo, SW, Johnson, CF. The psychological maltreatment of children—technical report. Pediatrics 2002; 109:e68.

Investigating Child Neglect
MEDICAL EVIDENCE

Medical Investigation

- Autopsy / pediatric examination
 - Not just cause of final injury / injuries, but also means of prevention
- Toxicology
 - Not just illegal drugs, but anything in system
 - Evidence of dehydration
- Evidence of chronic conditions that were assigned benign explanation

Medical Investigation

- Records:
 - Go back to birth
 - Verify developmental progress of the child
 - Verify medical advice given to caregivers
 - Strongest evidence may be *lack* of documented treatment
 - Did the child ever have well-child visits?
 - Other Records
 - “Free clinic” / Emergency Care center records
 - Dental records
 - Insure that you have notes from nurses and social workers

Medical Investigation

- Meeting with Pathologist / Treating Physician
 - What explanations exist for this child's condition?
 - Are there interventions which could have prevented the child from getting to this stage?
 - What warning signs would have existed to show that this child needed care?
- Can you say, to a *reasonable degree of medical certainty*, that *but for* the inaction in question, this child would be alive / healthy / not endangered?

Child Abuse Experts

- Consider legal nurse consultants to gather and compile relevant data
 - Able to organize large volumes of data
 - Define medical terms
 - Identify “missing” history
- Use these witnesses to identify or rule out constellations of injury, evidence of medical neglect, treatment / diagnosis of FTT

Investigating Child Neglect

IDENTIFYING PERPETRATORS

Identifying Responsible Parties

- Identify the person /people who could have prevented the injury / endangerment
 - Who was with the child *when the child was dying / being injured?*
 - What signs and symptoms should have alerted those around the child that the child needed help?
- Identify those persons who put the child in a position of peril

Questioning Suspects

- **Admissions:**
 - Legally responsible
 - Aware of risks to child
- **Motivations:**
 - What stressors / circumstances led up to death?
 - Beware the creation of unnecessary sympathy
- **Know what you want them to admit and highlight stressors to gain admissions**

Questioning Suspects

- Awareness of risk to child
 - Knowing that child couldn't protect self
 - Knowing the child's needs
 - Acknowledgment of dangers

Questioning Suspects

- Example:
 - I knew that my daughter was only 9 months old
 - I knew that my daughter sometimes falls over when sitting up
 - I normally stay with my daughter when she's taking a bath
 - When I left my daughter in the tub to go read my emails, I knew that no one else was in the bathtub with her
 - While I could hear noise from the bathroom, I could not see what was happening in the tub while seated at my computer

Be Prepared for Follow-Up Interviewing

- Need to **corroborate or disprove** what suspect says
- **Consult with medical experts** about any explanations given for the child's condition
 - May require additional testing
- Compare suspect story to **forensic evidence, medical reports, and eyewitness accounts**

Things to Avoid

- "I know you didn't mean to . . ."
- Speaking poorly of others in investigation
- Getting confrontational with anyone before conduct is clearly neglectful

To Charge or Not to Charge?

Screening Determinations in Neglect Cases

Charging Considerations

- **“With neglect, the question is, given that neglect exists, could the parent have prevented the problem?** Thus, the unique feature of neglect is locus of responsibility. It is often unclear whether neglect is due to a parent's omissions or due to absence of social, economic, or psychological resources. Thus, a frequent response to neglect is to assess whether parents could have met their children's needs given their resources. Compared to abuse, much of neglect may occur because of factors truly beyond the parents' control”

Gelles, p. 279.

Charging Considerations

- **Challenges**
 1. The most important challenge to improving policy responses to neglect is to try to draw a clear line between **less than optimal but acceptable care** and **clearly inadequate care**.
 2. Closely tied to the first challenge is discriminating between parent behavior due **to factors beyond their control** and circumstances over which parents **reasonably do have control**.

Gelles, p. 295.

Charging Considerations

**Can an act be deemed neglectful,
regardless of its apparent impact on a child?**

- Example: Mother takes her children to a drug deal, knowing that she has stolen from the primary drug dealer and that the dealer wants a pay back. She knows that everyone in the transaction will be armed. She and her children leave the transaction unharmed.
- Example: Father brings his son to a drug deal, knowing that he has stolen \$20 from the dealer. He knows that the dealer is armed and the father is armed. The dealer shoots at the father but kills the child, who is sleeping in the car.

Important Distinction: Chronic Neglect vs. Single but Significant Episode

- Chronic:
 - Looking to demonstrate a pattern of behaviors
 - EXAMPLE: The “Fat Boy”
- Acute:
 - Single episode or act which has significant consequences
 - EXAMPLE: Bath time with some porn surfing
- Remember: the child may be raised in a neglectful environment without ever meeting a legal definition of neglect

Charging Considerations

- Use the elements to guide you
 - What evidence do you have that supports each of the elements of any crime charged?
- Create a checklist of questions about the situation
 - Was this situation reasonably avoidable?
- Use a single case screener to ensure consistency of decisions

Charging Considerations

- Ask yourself:
 - What policy interests am I advancing with my decision?
 - Is this charging decision consistent with other charges that have been accepted or declined?
 - For what exact behavior am I seeking accountability?
 - What were the parents' motives, within the context of their culture and beliefs?

Charging Considerations

- Are the child's needs being inadequately met?
- Is there evidence of actual or potential harm?
- Is there a pattern of neglect?
- Has Child Protection been involved?
- What factors are contributing to the neglect?
 - Is the parent aware of the problem?
 - Does poverty play a role?
 - Is there access to necessary services?

Charging Considerations

- What family strengths or resources are available?
- What interventions have been tried in the past?
 - What were the results?
- Is the family motivated to make necessary changes?
- Are the necessary resources available?
- How much help is the family willing to accept on behalf of their child?

Charging Considerations

- Medical Neglect:
 - Is the recommended treatment necessary and likely to have a significant benefit compared to alternative treatments being used (or no treatment)?
 - Is the child harmed or at risk of harm because of lack of care?
 - What are the possible barriers to care (e.g., transportation)?
 - Are there cultural or religious factors that are contributing to lack of care or adherence to the treatment plan?
 - If medical treatment was delayed, would a reasonable layperson have recognized the need for medical treatment?
 - Was the treatment plan clear? Were the recommendations in writing? Was the plan agreed upon?

Jenny, C. Recognizing and responding to medical neglect. Pediatrics 2007; 120:1385.

Charging Considerations

- Failure to Thrive: Reporting Considerations from Dr. Suzanne B. Haney (2010)
 - “Frank neglect or physical abuse
 - Severe malnutrition
 - Families resistant to recommendations
 - Persistent failure in management attempts”

Sensitive Questions

- Is this defendant being charged because he / she is poor?
- If the community didn't hate this suspect (based on what happened to the child), would we be charging?
- How will I feel about this decision after the outrage passes?

Jury Issues in Child Neglect Cases

- How would you respond to a juror who said “hasn’t she lost enough?”

Jury Issues in Child Neglect Cases

- Think twice about jurors who
 - Have strong feelings about “government interference” in the family
 - Who have any history with CPS
 - Who have friends / family members who lost a child
 - Who have been victims of DV / child abuse

Trial Time

ADDRESSING COMMON DEFENSES

Likely Defenses in Child Neglect Cases

- ***“I didn’t know there was a problem”***
 - Will assert that a lack of training or education caused the neglect.
- ***“It wasn’t me!”***
 - Will likely agree that there was neglect, but someone else was responsible for the child
 - May even suggest other perpetrator
- ***“This is merely accidental, not abuse”***
 - Just a tragic accident or an unavoidable result of circumstances

“I Didn’t Know it Was a Problem!”

- Starvation Cases:
 - It was my lack of parenting experience / education
- Sexual Abuse Cases:
 - I didn’t know he was a convicted sex offender
- Physical Abuse Cases:
 - How was I supposed to know she was hurting the kids?

“I Didn’t Know it Was a Problem!”

- It was my lack of parenting experience / education
 - Demonstrate that this isn’t about education. This risk was obvious.
- I didn’t know he was a convicted sex offender!
 - Reasonable precautions could have prevented this
- How was I supposed to know she was hurting the kids?
 - Argue that time and attention – not money or book smarts – would have spared this child

“It wasn’t me!”

The Identity Defense in Neglect Cases

- **Highlight Admissions by the Defendant**

- Agreement that it would be wrong to treat a child like this
- Acknowledgment that this behavior would be deadly / endangering
- Establish the suspect’s responsibility for the child
 - While someone else may have shared responsibility, the defendant was legally responsible for the child.

“It was an accident, not a crime!”

- **Show how this was *avoidable* but for the defendant’s neglect**

- Example: Kyle would never have been able to kill Ellen had he not been left with her for hours

- **Be prepared to demonstrate the evident risks**

- Example: Kyle’s mental and emotional limits and prior witnessed smothering

- **Demonstrate the options available to the defendant**

- Example: Ruth did not have to leave the motel to buy cocaine.

The Harm

In some cases,
neglect slowly and persistently
eats away at children's spirits
until they have little will
to connect with others
or explore the world.

- ERICKSON, M.F. p. 4.

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