

FETAL ALCOHOL, THE EXTERNAL BRAIN AND PROBATION ORDERS

This paper intends to make suggestions for parents, social workers, probation officers, lawyers and Judges about fetal alcohol and Probation Orders by referring to the concept of the External Brain.

The paper is divided into three parts, the basics, the criminal legal system, and the External Brain in Probation Orders.

THE BASICS

1. Fetal alcohol is a physical disability in the same way a person with an amputated limb has a physical disability. The alcohol in the womb acts as a solvent and kills individual brains cells. The baby is born missing brain cells, and later in life there are missing brain functions. Our brains operate differently when we are missing some brain functions. The damage is permanent, profound, and the disability is invisible.
2. We see the missing brain functions when we observe the behaviour of persons with fetal alcohol. Dr. Ann Streissguth has detailed these behaviours in her research and every parent or caregiver agrees because they see it everyday. As the criminal legal system is learning about these behaviours as more and more public education about fetal alcohol occurs, we are now ready to make some concrete suggestions on Probation Orders.
3. The research on fetal alcohol divides behaviours into primary and secondary behaviours.

4. Primary behaviours are “presenting “ behaviours including, but not limited to:

- * Suggestibility
- * Impulsivity
- * Failing to demonstrate remorse
- * Not understanding value, time, worth, and other abstract notions
- * Concrete language styles
- * Preseveration (“stuck in repetitive loops of behaviour”)
- * Missing social cues, not getting sarcasm,
- * Unable to understand the others point of view
- * Living in the moment, not understanding notions of the future
- * Failing to understand consequences
- * Distractibility
- * Dysmaturity
- * Slower processing pace
- * Memory problems
- * Difficulty predicting
- * Difficulty abstracting
- * Listening but seeming not to hear
- * Easily overwhelmed...and easily lead and other behaviours that ends up being described by criminal charges

5. Secondary behaviours include, and are not limited to:

- * Fatigue
- * Frustration
- * Anxiety
- * Feelings of failure
- * Depression
- * Shame
- * Grandiosity
- * Various mental health and illness issues

Many of these persons have learned early on in school to be “bad” rather than seem “stupid” to their peers, to teachers, and to themselves. They have learned to protect themselves “psychologically” with behaviours we call negative because the other option is to feel continually as if they do not make the grade. They may be class clowns, troublemakers, discipline problems, or annoying and difficult. They often do not comprehend and rather than risk being vulnerable by asking the same embarrassing questions over and over again, they take the easy road and act out their frustrations...and we see them as difficult. Shame may be the core difficulty. Shame and the associated grandiosity are secondary behaviours that are not going to go away with warm words and pleasant suggestions. This reality must be considered.

Diane Malbin advises: the greater the shame the greater the grandiosity. Grandiosity is a defensive protective response to failure and internalized shame. Shame then breeds defensive behaviours and we interpret the behaviour as difficult.

We fail to see non-comprehension, we fixate on what we interpret as non-compliance.

If you can accept that there is a physical limit to what we expect from these brains, Diane Malbin’s three cautions make sense:

- (a) Identify your personal assumptions;
- (b) Lower your expectations; and
- (c) Change their environment.

Malbin suggests you match the task you have set to the brain before you. She says, “Think younger.... MUCH YOUNGER.” The person may have had 18 birthdays, but may actually be only 9 years old neuro-cognitively (brain wise).

THE CRIMINAL LEGAL PROCESS

1. The concept of the External Brain is helpful to lawyers, Judges and probation officers because the External Brain intends to “make up” for the missing brain cells, for the missing brain functions. In legal language, by creating an External Brain, we are making an accommodation, in the same way we provide interpreters in court for deaf people. We create an External Brain for persons with fetal alcohol issues for the same reasons we give persons with their legs amputated electric wheelchairs to drive. We are trying to make them as successful as they can be given the disability. Probation Orders are a fine tool to create success, if we set out to create success.
2. The External Brain is the single most vital task a parent/caregiver can do if you anticipate there will be problems of criminal charges. The External Brain means gathering people, employers, friends, family and relatives and others that can help the probation officer supervise your child while on probation.
3. The External Brain is a team including, but not limited to:
 - * Judge
 - * Prosecutor
 - * Defence Counsel
 - * Probation Office
 - * Mental Health Advocates
 - * Poor Law Advocates
 - * Job Training Persons
 - * Teachers
 - * Coaches
 - * Church Members
 - * Employers
 - * Fellow Employees
 - * Police
 - * Sheriffs
 - * Local business people who operate establishments where the person frequents
 - * Corrections Staff
 - * Doctors

- * Psychologists
- * Any Health Care Provider
- * Neighbours
- * Friends
- * And any one who can contribute time and a positive non-judgmental caring energy because this is going to be hard work.

4. I am assuming here that the person charged with a criminal offence has been or will likely be found guilty of some criminal offence and that probation is likely to be a part of the sentence imposed by a properly instructed and educated judge.
5. Parents need to start preparing for the moment the first phone call comes in from the police, or when a complaint of criminal behaviour is made. The conviction rate in B.C. is about 80%, which is not surprising since the system is made of hard working professionals. So assume a guilty plea or finding of guilt follows arrest.
6. After you have secured your child a talented defence counsel, begin the process of educating the legal system about fetal alcohol, starting with your lawyer.
7. After you have begun the daunting task of educating the legal system, start assembling an External Brain. Perhaps someone needs to make sure all appointments are kept. This would be your first External Brain cell. Perhaps someone needs to make sure job attendance is perfect. Perhaps someone needs to monitor/encourage sports...the list maybe long.... the longer the more likely there will be fewer future offences.
8. Remember you are creating an External Brain using people you know and trust, and each member knows all about your son/daughter's physical disability called fetal alcohol. It necessarily follows if you have a written diagnosis...share it with all members of the External Brain.

9. Audrey Salahub of the Asante Centre suggests each parent might create a three ring binder of info containing:
 - (a) a typed chronology...one or two pages... a brief history of your child, and a recent photograph
 - (b) Catalogue: adoption details, medical issues, the behavioural difficulties, list progress in school
 - (c) List any contacts you may have such as teachers, doctors, employers, police, probation, lawyers, and any expert or professional who has seen this person
 - (d) Mention if ever arrested, what sentences were imposed, the result, list any psychological tests done, or formal diagnoses made, for example oppositional defiant disorder, attention deficit disorder or other opinions from the DSM IV
 - (e) Assemble all court papers from all previous cases, including file numbers and previous lawyers or social workers involved
 - (f) Attach any letters of reprimand from schools, list positive skills.... musical, loves dogs, artistic, or some significant achievement that gives an idea of interests and positive abilities
10. A wise parent will have a few copies of such a binder and keep up dating it so you can be prepared to act fast when bad things happen.

CREATING ORDERS THAT USE AN EXTERNAL BRAIN

1. Probation Orders have a special place in the criminal system, not just because they are often used instead of putting people in jail, but because probation officers are police officers disguised as a good parent. The probation officer in many ways is a court appointed parent, who can if required have you jailed if you do not comply with the Order of the judge. For the most part the probation officer is the most human link in the criminal system. They have enormous

discretion. They can choose between jail and conversation to secure compliance. A wise parent will work hard to have a good relationship with probation.

2. After the guilty plea or finding of guilt has happened, NOT BEFORE, (because the parents will be following the advice of their competent criminal defence lawyer), make sure there is time to talk to the prosecutors before sentencing. You may need a week, a month or more. Insist on the time to do the job properly. This means you must alert the Crown, your defence lawyer, and possibly the trial scheduling person. Everyone needs to know that even for minor matters as a caregiver/parent you need time to present your information to Crown.... because you will be asking Crown to do something unusual.
3. This delay is vital. Here you want your lawyer to go to the Crown Prosecutor with your binder and lay out for the Crown some suggestions for a probation Order. You will now have to educate the Crown and Judge about Fetal Alcohol. You must be prepared to give your lawyers enough material about the person and about Fetal Alcohol so that your lawyer can do this job quickly and completely. As a parent/caregiver you will have material in a binder to educate your lawyer and your binder of collected info on your son will be useful to all concerned.
4. Most parents can tell the Crown and Judge about Doctors Ann Streissguth, Julianne Conry, K. Asante, Sterling Clarren and the several other stars in the field. You will also want to mention Diane Malbin and her book TRYING DIFFERNTLY NOT HARDER. Most parents have access to the best websites:

www.asantecentre.org

www.fasdconnections.ca

www.fasstar.com

Go to these sites download what is required. Photocopy and give the material to the lawyers, to probation, and tell your lawyer to make sure the Judge reads the material.

Create a binder called a Fetal Alcohol Education Primer. Include photocopies of relevant material so the Judge and Crown can be brought up to speed in a hurry. They are quick students. Expect this education process will take a lifetime: recall how long it took you to figure it out! It took many many many years to make domestic violence a crime in Canada. The system moves slowly and wants hard facts in hand before it changes its institutional ways. These websites contain the best info available. If you google “fadu” you will get to the site of Dr. Ann Streissguth of the University of Washington (Seattle). For extra help speak to Kay Kelly the co – director, who was for 30 years a probation officer in Hollywood and for the last six (6) years has worked with Dr. Streissguth as her legal liaison.

As Probation Orders are typed into a document, you need to address the language skills of the person before the court. Again as Malbin suggests: “ Consider the brain and match the task you set to the brain before you.” As a parent you know failures outnumber successes: explain this to the lawyers, explain the reasons he does the list of difficult behaviours, explain about missing brain functions. Give the lawyers, probation, and Judge the written diagnosis. Give them evidence of his neuro - cognitive delays and specific evidence of his secondary behaviours and list the accommodations you know work. Explain how standard interventions do not work. Malbin has several pages that summarize these points in her materials, in her books, and on her site at: www.fascets.org. Photocopy; give to the court.

First, the language of the Probation Order must be “fridge proof”.... that is in the same language you would use if you were to leave your son a message at home on the fridge. The parents know what language works and what language does not work. No one, not even my mother, knows what KEEP THE PEACE AND BE OF GOOD BEHAVIOUR means in specific daily instances!

As Judge Michael Jeffrey’s of the Alaska Court says:

“Do not assume he understands your Probation Order, just because he stands there nodding to each of your sentences”.

His language skills may not be as developed as yours, but his social skills have taught him long ago to nod when spoken to in any disciplinary setting.

Second, you need to stretch your definition of success. This is clearly a huge problem in a world ruled by “beyond a reasonable doubt.” Explain there will be breaches of the Probation Order. Explain that you have people to help with creating compliance with the Order. Give the Crown the names and contact info of your External Brain: explain the function of the External Brain. Use the example of an amputee and the idea of fetal alcohol as an invisible physical disability. Design into the Orders the fact of failure. Understand and explain Jan Lukte’s distinction between non-compliance and non-comprehension.

Malbin and many other experts have repeatedly stressed cognitive competence and how we fail to see these people as cognitively impaired. We jump to non-compliance. As you well know people with fetal alcohol have trouble:

Remembering. Memory problems: may recall a concept one day and forget the next, get the Order of event confused

Predicting.... problems using what was learned Tuesday in the classroom and applying it to the playground on Thursday

Abstract notions like elapsed time, value, worth and the gravity of situations may not be well understood

Do not connect cause and effect

Cannot stand in the shoes of the other

Cannot see his responsibility for crimes committed

Cannot translate hearing into doing, thinking into saying, reading into speaking and feelings into words

Bearing these cautions in mind you can see using concrete language is not enough. Someone has to be the missing brain cells – the External Brain.

The main difference between people charged with criminal offences and those who are never charged is that we (the never charged) have a brain function that says: do not do that! Or in other circumstances we have friends who say: do not do that! Persons with fetal alcohol often have no friends and certainly do not have the little brain voice you and I have. The External Brain is that voice. And it has to work hard to override missing brain functions. And the External Brain requires many voices because it is hard work saying the same messages everyday for as long as the person lives.

A famous basketball coach at Terry Fox Secondary School in Port Coquitlam has a “special” class of grade 11 modified social studies students; many in the class are fetal alcohol. The Coach/Teacher, Don Van Os, interrupts his teaching every few minutes by proclaiming: “eye contact, “eye contact”. He brings the class back to task repeatedly and without communicating any ill will. Again and again he goes over basic topics, explaining each time as if it is the first time. He is teaching children who will not go to college, or get apprenticeships, or even graduate like you and I did. He has learned to match the task of his lessons to the brain before him in his class and he knows to not expect these students to be like his “normal” grade 11 socials class. Otherwise he invites failure and more shame.

The External Brain is like Don VanOs saying: “eye contact” “eye contact” with no ill will and eternal optimism.

Third, acknowledging that there will be some failure, suggest concrete specific terms the Crown will find helpful to stop further offences. This will most likely involve curfews, “no go” areas, and “no contact” certain people who may lead the person effected with fetal alcohol into committing new crimes.

Here is where the External Brain can function well. No one person can supervise as intensely as the Courts or Crown might expect. But several people can and it is my assumption that for most offenders being strictly supervised beats being in jail.

Explain to the Crown/Defence lawyers that concrete language is best, that the person with fetal alcohol has these specific problems that you have experienced: tell the Crown in detail because as the parent you know the list of problems, and you know what works and what does not work. Frame Orders positively. This means simple and standard wording of “no go” and “no contact” Orders are unhelpful. Instead of a simple no go clause, try something different:

Try: “no go” to the 7/11 but you can go to the Quick Mart.

Try to make the Orders simple so that they can be put on a business card sized paper and carried in his wallet. An excellent example of a successful External Brain comes from South Dakota. This persistent offender now has only one term on his Order: YOU MUST BE HOME EACH NIGHT BY 7PM. and everyone knows. The places he frequents, the people he hangs out with, and the owners and staff, all know what to say to him at about 6:30 pm: TIME TO GO HOME. It works. The Probation Officer is proud to point out the re-offending has dropped by 50%.

Structure for success because it works. First, use repetition, familiar contexts, and secondly “think younger.... much younger!”, always looking for and concentrating on success, not focusing on failures.

Set up structures for success in the community as well as within the probation system. Mr. Justice David Vickers makes this point eloquently when he discusses the Victor Williams case. He convened a meeting in the Provincial jail where Victor was incarcerated. The Learned Judge made sure he had assembled an External Brain before Victor was released. Present were people from the Ministry of Health, from housing, from probation, from Forensic Psychiatry, addiction specialists, a John Howard worker, his “best friend” and others. The Judge wanted to know a plan was in place. There wasn’t one so the Judge used his Supreme Court powers of persuasion to create one. Over the course of the meeting, various people were scuttling about until a comprehensive plan was in place. Justice Vickers also insisted everyone know everything so there were no gaps. This same philosophy can be found in Vancouver Provincial Court’s new program called “Drug Court”.

While the assembled External Brain had a single function to help Victor live crime free, no one had any illusions. Everyone knew there were going to be more problems, the point was to expect some failure and have a structure in place so that the failures were few and the successes were many.

Research and experience indicates persons with fetal alcohol do well in structured situations. Use structure to your advantage. Use the same days, times and places for appointments. We also know a familiar and comfortable context/environment is helpful because familiar surroundings reduce the anxiety. Therefore, rely on family and friends for assistance. It may be best if the same someone always accompanies or reminds the person about probation appointments. The family's involvement is all too often overlooked by Crown and Probation. This is an error. The family knows much and wants to help. Crown would do well to invite the family into planning sessions about what the Probation Order might say. Again as parents or caregivers you need time to create an External Brain. Ask for the time and use it to educate the lawyers and Judge. You need Crown on your side as part of the External Brain.

I would encourage all Crown Counsel to use a good chunk of time between Plea and Sentencing, to make phone calls, to meet members of the External Brain. This is going to be difficult because of caseload and courtroom practice. Time spent doing this "legal" work, doing it differently, is much easier on the individual Crown in terms of stress and will eventually bring more success than the standard pitch for "more jail" than last time.

Remember the Malbin mantra: identify your assumptions about behaviour, lower your expectations, and change their environment!

Every courthouse in British Columbia has a Court Registry which contains a series of photocopied pages, which lists the standard probation terms. Get a copy. Using what you know about the neuro-cognitive aspects of Fetal Alcohol re - write the standard probation terms in "fridge proof" language so that your son can understand them. Give a copy to your lawyer. Tell your lawyer to give these new "fetal alcohol sensitive" probation terms to the Judge.

Every parent and caregiver knows what standard behavioural modification techniques or interventions do not work with your son. List them. Give the list to your lawyer. Explain the reasons and the examples why increasing consequences does not work.

Explain that keeping your son busy is best. Explain the reasons he seems to always choose the wrong friends and can be talked into doing crime so easily. Explain that threats of “next time” are hollow because he has forgotten the lecture/threat when the next time arrives. You need to build the lawyers and Judge a map of what works and insist you and your External Brain be involved.

The External Brain is a legal duty of care we owe to the person with fetal alcohol. Canadian criminal law requires we accommodate offenders who have disabilities. The main problem here is that fetal alcohol is an invisible physical disability. Education and creating an External Brain makes the disability visible and is the best accommodation available today because we are replacing missing brain cells with people who care.

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