

When Children Who Have FASD are Arrested: What Parents Need to Know

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Part One: Introduction

I want to talk about something difficult: the giving and receiving of advice.

Generally speaking, there are two ways of being with people:

1. You can give people advice, you can tell people what to do, you can teach, instruct, and lead people, or
2. You can just be there with them when they are in trouble.

It is one or the other, and it is black and white, left and right, apples and oranges.

My main assumption here is the following personal statement I have come to believe is true for me. Warning: this statement may not work for you.

I believe that all people want is to be seen and heard in their lives, in their struggle. This doubly applies to people under great stress, and especially to people who have children with FASD. Most people believe that if they are heard and seen as they experience themselves and their circumstances, then the correct outcome will occur.

So, when you are with people under great stress, you can give advice... or be with people without judging them, just be there for them, sit with them and just hold their hands without words. It is a choice point, a decision, a question of choosing the role you act out.

A personal example

My partner has colon cancer, and after surgery last November, she started chemotherapy. I would not wish chemotherapy on anyone. Constant nausea, back pain, tired all the time, forgetting stuff, losing her hair, and the nagging fact that at age 52 she may die all too soon.

I am a lawyer who fixes things for a living. I give advice: do this, do that, do not do this, do not do that. I can tell you from personal experience no advice from a lawyer helps when you have colon cancer. My partner wants me just to listen and just be there. She takes her advice from the oncologist: take chemotherapy, he says, and maybe this cancer will not go to the liver. I am learning that there are times when advice is not helpful. Advice is all about creating a specific outcome. She does not need to hear about

meditation, special diets, and alternative medicines from me. Being there, just being with her, is all about having no outcome in mind. The oncologist gives advice. I am learning to listen, and get tea and agree to buy the shrubs on sale that will go well beside the plum tree.

What does this have to do with parents of children with FASD? Everything!

Please, I urge you not to confuse the advice of oncologists and lawyers with the desperately required human need to be heard and seen in your struggle with FASD. People hate lawyers because you come in to my office with great personal difficulties, and after pleasantries I ask for the documents, or where you were on a certain date, or do you have a written diagnosis? Inside you are screaming: “What an insensitive asshole!”

I am not excusing bad manners or nasty behaviour. Time is money. And both lawyers and oncologists, in my opinion, need to work on their personal skills. Few people accuse lawyers of being overly sensitive to the pain of their client’s circumstances. But my partner wants the chemo, the blood work done, and hopes the oncologist can stop the cancer from spreading to the liver. She wants his advice because she believes it will help her live—that is her desired outcome. The supportive role of being there with her, the human need to be heard and seen as a woman fearful of dying, is given to the wonderful psychiatric social worker that works for the Surrey Cancer Clinic.

Do you understand the distinction?

When a lawyer gives advice, he is only interested in a specific outcome; he is not trained to be supportive like a psychiatric social worker. I have learned that most of what I do in my office is disguised as social work. The difference is that I can go to court and raise hell and create a specific outcome for my clients, and a kind and sensitive social worker cannot. And I have to improve on being more sensitive to the pain my clients are experiencing. I always tell folks to see their family doctor, a therapist, or someone for emotional support—not because I cannot be the “nice guy”. No. I tell people to get support; to get the humans needs met by someone else because you pay the lawyer for dispassionate professional analysis and to guide you to a specific outcome.

Just like the oncologist, lawyers have a different role to play than psychiatric social workers. When roles are confused, disaster follows. I would not ask my cognitive psychologist friend for tax advice.

I have created a distinction for you:

- *lawyer vs. *psychiatric social worker,
- *advice and a specific outcome vs. * the person who listens, holds your hand, gets tea.

If you can remember this distinction, what I have to say will make sense. If you confuse and smooch the two together, you will create heartache.

I have another assumption: Parents of children with FASD do not need more heartache. There are ways to reduce heartache. Lawyers need to hear the parent's experience in all its colour and sound because to the parents their story is unique and separates them from their "normal" neighbours. To each parent, each FASD story is different because the facts and people are different. To lawyers it is a B&E, a theft, and a "take auto without consent": a number in the Criminal Code of Canada.

This is the great divide of giving and receiving advice. The parents often cannot articulate the legal facts and the professional lawyer often does not listen to the details of their pain and in his not listening may miss important facts.

Lawyers want special facts called material facts. These are relevant details. Parents believe each fact of their pain is important. Parents and lawyers sit on the opposite side of the Grand Canyon of facts. On one side are relevant facts; on the other side are family facts. To parents who live with the daily struggle of FASD all the facts of the struggle are relevant to them. The same facts, for the most part, are irrelevant to lawyers. The obvious solution is for lawyers to listen with an open heart: let the family tell the whole story. And, for parents to come to the law office prepared. This paper aims to prepare parents.

And here is my opinion. Remember that. This is my opinion, and only a legal opinion. Because you also need those other basic needs met of being seen and heard... and I do not do that... no lawyer does.

Part Two: Before Arrest

I have divided this paper into four sections. This second section deals with what to do before the arrest if you are a parent or caregiver of a person with FASD. The third section deals with preparing for trial, and the last section is about sentencing, about jail, and what parents can do when their child with FASD goes to jail—because as you know, your child is more likely than others to be found or plead guilty.

The research by Dr. Anne Streissguth tells us your child with FASD is likely to be arrested, be institutionalized, have trouble in school, or bang into some government system hard and bloody their nose. So let us get prepared.

I am assuming you have cruised through the following websites and followed the many links to other websites:

1. www.asantecentre.org (Dr. Asante)
2. [www.fasstar](http://www.fasstar.com) (Teresa Kellerman)
3. www.fasdconnections.ca (Jan Lutke)
4. www.cifasd.org (international information)
5. <http://depts.washington.edu/fadu/> Dr. Streissguth/Kay Kelly at the University of Washington, Seattle

I have written on this before. The articles are available on Dr. Asante's site. First, read the "Lawyer's Brief". Give it to the police, lawyers, judges and probation officers in your town.... NOW!

The first step is to get a written diagnosis for your child. This is next to impossible so I ask you to do it first.

Then I would recommend you take a copy of the diagnosis, attach it to a recent picture of your child and include your names, phone numbers, and more contact information such as the names and contact numbers of any and all professionals your child has seen. Have a package in three-ring binder form ready for the police or your lawyer.

If you live in a small town like Chase, or even Kamloops, and know "socially" a police person, give a copy to the police. In the binder include the specific behaviours your child has exhibited in your home. Tell the police in advance how your child may "seem" to lie or confabulate or deny simple facts everyone else sees as obvious.

Make sure you tell the police you want them to know your child is not giving up any CHARTER RIGHTS. Be specific: your child has not given up the right to silence. Do not let the police ask him questions without a lawyer's advice. Tell the police: **IF HE IS ARRESSTED OR DETAINED PLEASE CALL YOU OR ONE OF THE PROFESSIONALS YOU HAVE LISTED ON THE HANDOUT...before any questioning begins.**

I would also introduce the child to the police, arrange repeated visits to the police cells, and have the police explain the positive aspects of policing... keeping order and helping people in trouble.

As any teacher will tell you, no one can tell which lessons stick. And the point here is to hope the police can create a relationship with you and your child so as to prevent crime, or at least prevent the horrible things that parents who have children with FASD speak of when they get swooped up into the criminal system. Maybe, just maybe, regular visits to the police lockup will have some positive effect on your son, so that maybe, just maybe, when some fellows try to talk him into holding a gun for a few minutes he says no. He probably will say yes... and if the police know about FASD, they may choose to understand his role in the holdup differently. This is relationship-driven: if you can create a positive relationship with your local police you can begin to educate them about FASD.

My suggestion here is based on the assumption it is easier to educate the police about your son when he is not arrested and when you are explaining about his brain-based birth defect, than when trying to explain what the gun under his bed is all about.

Another simple, concrete item you can make for a few dollars is your own FASD identity card. Create a plasticized, credit card sized card with his picture, your contact information, and a statement that says something like: "David has Fetal Alcohol Spectrum Disorder. If arrested call this number. David needs to see a lawyer immediately

on arrest or detention. Call this number. David is exercising all of his charter rights and specifically is exercising his right to counsel and his right to silence. David does not agree to waive any of his Charter rights.”

Some have suggested this card should be on a colourful hockey skate lace and around his neck every time he leaves the house. I agree.

The next assignment for you the parents is to collect as much information as you can from schools, doctors, and other professionals, put it in a binder, and makes copies. If there is a teacher or teacher’s aide who knows your son or daughter well, get a statement, or something from them that will assist your lawyer, the police, the judge, or probation. Again, this is easier to do *before* the arrest for stealing cars.

If there are positives, list them in great detail, for instance: sports or animal-related activities, musical or church involvement.

All of this information is used at sentencing and judges and probation officers need it. The information may be useful if your lawyer thinks there is an outside chance he can get charges reduced or if the lawyer thinks he can stop the police or crown counsel from proceeding in the beginning. Often the best work of a lawyer is in the first hours after arrest. Sometimes the next day is too late. Good information at the beginning has a tremendous effect; at sentencing you are doing merely damage control.

Part Three: Preparing for Trial

I assume you have followed the Conrad Black criminal trial in Chicago. Your child has the same legal rights as Conrad Black. And you can be as well prepared as he is.

Visit the courthouse several times, watch trials, and practice giving evidence. Cross-examination is the bedrock of our civilization. Through cross-examination the legal system decides the truth. Crown counsel will cross-examine your son rigorously if he is accused. Defence counsel will do the same if your son is a complainant or witness.

Remember that not all children with FASD are criminals, some are victims of crime and the advice is the same... pretend your son is Conrad Black and be as prepared as Black is. Harsh cross-examination is designed to test the truth of your direct evidence. So lawyers will try to confuse, upset, and challenge your son. It may be helpful for your lawyer to give the judge and Crown a copy of the diagnosis, or have an expert like Dr. Julianne Conry, the neuro-psychologist from the Asante Centre, give evidence about how best to interview your son, especially if he has language, memory, attention, or reasoning issues.

Dr. Conry has a mnemonic: ALARM. Learn it and tell others.

A is adaptive behaviours
L is learning

A is attention
R is reasoning
M is memory.

The ALARM trick is a quick and dirty way to learn about FASD. Dr. Conry uses it to teach police. Parents can use it to educate members of the criminal legal system.

NEWS FLASH: Choosing a lawyer is more important than buying a car. Test drive, do your research. Criminal lawyers are an odd lot. They are different from those who do real estate deals or wills. Ask a police officer who is the best. Go watch him or her work. There is a paper I have on this topic at the Asante Centre website called: “Honouring Our Past”. The paper gives more details on choosing lawyers and it was written for parents! Download and read.

Judge Maher from Alberta says to choose a problem solver, not someone who sees you as a path to paying his kids’ college tuition. Lawyers learn fast so it is easy to educate a lawyer about FASD.

It is not easy to find someone you respect, trust, and like. Those are the only criteria. If you cannot speak and believe you are heard: get another lawyer.

As a parent of a child with FASD, you must go to see several trials. You need to understand how the system works. If your child is a witness or complainant/victim, you need to do different things than if your child is an accused. If you watch 10 or 15 trials (note: some trials can last less than an hour), you will know enough to get a good lawyer! Short trials are best. Watching a few quickie theft or assault trials will give you a good feel of what you need to prepare your son for his trial. You could bet millions that Conrad Black has had hours of preparation time.

With your binder in your lawyer’s hands, much of the work is done. By this time you will have understood the prosecuting lawyer, called Crown Counsel, is neither evil personified, nor your lawyer. Crown is the lawyer for all of the people, the voice of the community. And you will understand it is not personal. Crown has a job to do and your son is only another case. In the above papers found at the Asante Centre website I urge parents to see the case from a prosecutor’s point of view. Concentrate on the legal issues, not the personal pain you have. This is most difficult because your son may elect to have a trial and you think he is guilty. The lawyer may see a legal defence. Or the lawyer may say, “We must plead guilty.”

Good advice is worth lots of money—learn this. And the price you pay for legal advice has no relationship to the value of the advice. So you are in a difficult bind. Get educated!

Trials are public so you need to prepare for possible media coverage and all the emotional discomfort that follows. Never EVER talk to the press. Let your lawyer do all that. You run the risk of being arrested for contempt of court.

If you have a defence you will most likely need evidence. Evidence is either paper, as in documents, fingerprints, photos, maps, and blood samples, or people speaking in court. Your son will need to practise giving his evidence. This means answering questions over and over as if in front of a judge.

You may need to gather witness statements. You may need to photograph the crime scene. The lawyer will tell you what the case looks like; she may not have time to do some of the grunt work such as finding documents and contacting witnesses...time is money. Parents can collect evidence or hire a private investigator.

Part Four: Sentencing

Over 80% of cases result in the accused pleading guilty or being found guilty. Be prepared. Here the binder becomes gold. And all those witnesses, they become excellent evidence for the judge on sentence. The path is:

- Jail/no jail?
- If jail then how long?
- If no jail then what community-based punishment is best?

Sadly, most FASD cases are guilty pleas for obvious reasons. Your binder must contain all his criminal record, and any comments you can gather from previous probation or corrections staff. You can ask the director of the correctional facility for copies of his record in the jail at the end of his sentence. This document will assist the judge in determining the length of sentence if jail is required. If the corrections people know about FASD and your son has been there before, the binder with all his information including his performance last time in jail may assist. The records from the last correctional facility may guide the judge as to appropriate punishment.

If you have a chance at no jail, here is where parents can play their biggest role. If as I suggest in the papers on the Asante Centre website you immediately took the “complained of behaviour” seriously and put in place controls—**the External Brain**—then your chance of no jail gets better.

The court has one overriding job: to protect the public. Your son’s lawyer will tell the judge that the best way to protect the public is to install an external brain. Make sure you have an external brain up and working. Expect to have to explain to everyone what an external brain is.

An external brain is a brilliant concept from Dr. Sterling Clarren. It is a team of people who volunteer, or who are paid, to act as replacements for the missing brain cells. Again go to the Asante website. I have some papers for you to read on the external brain and then distribute to probation officers.

Jail time may still be the outcome. Jail is not healthy for anyone. Rape and severe assaults are normal. Do not expect your son to be protected or safe while in jail. And yet some persons with FASD thrive on the structure of jail. The more information you can give the director of the facility the better. And if you have a good relationship with the probation officer, ask them to write to the director. Do not EVER ask for special treatment. Always frame your letters as educational, as information, as assisting the facility in achieving its goal of preventing future crime. Include any scientific or psychological books or articles: the materials by Diane Malbin and Anne Streissguth. Always include Jan Lutke's piece on differentiating between **non-compliance** and **non-competence**.

Do not expect a single letter or single visit to change a 20-year correctional officer's view about criminals. Relationship is key. See his job as important and find ways to help him. Most of the time, the sentencing is postponed so both Crown and Defence can prepare. Sometimes a probation officer is ordered by the judge to write a report called a pre-sentence report.

Here parents can have a huge impact... if they are skillful and prepared to educate the probation officer in a soft way. Trust me, blasting in there yelling and at the probation officer is not helpful. They are overloaded and underpaid. I am not suggesting bribery, I am suggesting you learn to explain your son's behaviour, not excuse it. Learn to give positive information: the external brain, trying differently rather than harder, and distinguishing between non-compliance and non-competence. Always assume the person you are talking to be competent and trying to do the right thing.

Final Hard Advice

It never helps Conrad Black to talk to the police without a lawyer, so never let your son speak or answer police questions without a lawyer's advice.

It never helps if Conrad Black if his wife or friends talk to the police, trying to explain what really happened, so never as a parent try to explain to the police what your son was doing. Let the lawyer talk to the police. Black has the best legal advice money can buy.

When in trouble, always be polite to police, or to the judge, or to the probation officer, and say "My son wants to speak to a lawyer before he says anything." Listen to the lawyer's advice. Make your decisions based on professional advice, not based what you would do listening to your heart and sense of what is right and proper. Many parents are so distracted by the difficult behaviour of their children with FASD that they welcome the intervention of the police. Often parents call the police because they cannot cope with the difficult behaviour: they want respite. Never call the police unless you are about to be wounded or hurt so badly you need to go to the hospital. You may not like this advice. But, remember there is a difference between two days in jail and two years, and your son is doing the time.

Lastly, buy yourself each year a Martin's Annotated Criminal Code of Canada—the best \$92.00 you will ever spend... and then read it as if it were the Bible.