

76-5-406.5 Circumstances required for probation or suspension of sentence for certain sex offenses against a child.

- (1) In a case involving a conviction for a violation of Section 76-5-402.1, rape of a child; Section 76-5-402.3, object rape of a child; Section 76-5-403.1, sodomy on a child; or any attempt to commit a felony under those sections or a conviction for a violation of Subsections 76-5-404.1(4) and (5), aggravated sexual abuse of a child, the court may suspend execution of sentence and consider probation to a residential sexual abuse treatment center only if all of the following circumstances are found by the court to be present and the court in its discretion, considering the circumstances of the offense, including the nature, frequency, and duration of the conduct, and considering the best interests of the public and the child victim, finds probation to a residential sexual abuse treatment center to be proper:
- (a) the defendant did not use a weapon, force, violence, substantial duress or menace, or threat of harm, in committing the offense or before or after committing the offense, in an attempt to frighten the child victim or keep the child victim from reporting the offense;
 - (b) the defendant did not cause bodily injury to the child victim during or as a result of the offense and did not cause the child victim severe psychological harm;
 - (c) the defendant, prior to the offense, had not been convicted of any public offense in Utah or elsewhere involving sexual misconduct in the commission of the offense;
 - (d) the defendant did not commit an offense described in this Part 4, Sexual Offenses, against more than one child victim or victim, at the same time, or during the same course of conduct, or previous to or subsequent to the instant offense;
 - (e) the defendant did not use, show, or display pornography or create sexually-related photographs or tape recordings in the course of the offense;
 - (f) the defendant did not act in concert with another offender during the offense or knowingly commit the offense in the presence of a person other than the victim or with lewd intent to reveal the offense to another;
 - (g) the defendant did not encourage, aid, allow, or benefit from any act of prostitution or sexual act by the child victim with any other person or sexual performance by the child victim before any other person;
 - (h) the defendant admits the offense of which he has been convicted and has been accepted for mental health treatment in a residential sexual abuse treatment center that has been approved by the Department of Corrections under Subsection (3);
 - (i) rehabilitation of the defendant through treatment is probable, based upon evidence provided by a treatment professional who has been approved by the Department of Corrections under Subsection (3) and who has accepted the defendant for treatment;
 - (j) prior to being sentenced, the defendant has undergone a complete psychological evaluation conducted by a professional approved by the Department of Corrections and:
 - (i) the professional's opinion is that the defendant is not an exclusive pedophile and does not present an immediate and present danger to the community if released on probation and placed in a residential sexual abuse treatment center; and
 - (ii) the court accepts the opinion of the professional;
 - (k) if the offense is committed by a parent, stepparent, adoptive parent, or legal guardian of the child victim, the defendant shall, in addition to establishing all other conditions of this section, establish it is in the child victim's best interest that the defendant not be imprisoned, by presenting evidence provided by a treatment professional who:
 - (i) is treating the child victim and understands he will be treating the family as a whole; or
 - (ii) has assessed the child victim for purposes of treatment as ordered by the court based on a showing of good cause; and

- (l) if probation is imposed, the defendant, as a condition of probation, may not reside in a home where children younger than 18 years of age reside for at least one year beginning with the commencement of treatment, and may not again take up residency in a home where children younger than 18 years of age reside during the period of probation until allowed to do so by order of the court.
- (2) A term of incarceration of at least 90 days is to be served prior to treatment and continue until the time when bed space is available at a residential sexual abuse treatment center as provided under Subsection (3) and probation is to be imposed for up to a maximum of 10 years.
- (3)
 - (a) The Department of Corrections shall develop qualification criteria for the approval of the sexual abuse treatment programs and professionals under this section. The criteria shall include the screening criteria employed by the department for sexual offenders.
 - (b) The sexual abuse treatment program shall be at least one year in duration, shall be residential, and shall specifically address the sexual conduct for which the defendant was convicted.
- (4) Establishment by the defendant of all the criteria of this section does not mandate the granting under this section of probation or modification of the sentence that would otherwise be imposed by Section 76-3-406 regarding sexual offenses against children. The court has discretion to deny the request based upon its consideration of the circumstances of the offense, including:
 - (a) the nature, frequency, and duration of the conduct;
 - (b) the effects of the conduct on any child victim involved;
 - (c) the best interest of the public and any child victim; and
 - (d) the characteristics of the defendant, including any risk the defendant presents to the public and specifically to children.
- (5) The defendant has the burden to establish by a preponderance of evidence eligibility under all of the criteria of this section.
- (6) If the court finds a defendant granted probation under this section fails to cooperate or succeed in treatment or violates probation to any substantial degree, the sentence previously imposed for the offense shall be immediately executed.
- (7) The court shall enter written findings of fact regarding the conditions established by the defendant that justify the granting of probation under this section.
- (8) In cases involving conviction of any sexual offense against a child other than those offenses provided in Subsection (1), the court shall consider the circumstances described in Subsection (1) as advisory in determining whether or not execution of sentence should be suspended and probation granted. The defendant is not required to satisfy all of those circumstances for eligibility pursuant to this Subsection (8).

Amended by Chapter 213, 2004 General Session