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## Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?

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**If allegations of sexual abuse of a child are made after parents separate, the challenges of resolving custody and visitation issues are greatly increased, with the abuse allegations overshadowing other considerations. These are high conflict cases, and settlement may be very difficult (or inappropriate) to arrange. The involvement of a number of agencies and professionals, with overlapping responsibilities and potentially conflicting opinions, may complicate the resolution of these cases. A significant proportion of allegations of child abuse made in the context of parental separation are true, but this is a context with a relatively high rate of unfounded allegations. While some cases of untrue allegations are due to fabrication, more commonly unfounded allegations are made in good faith. Preexisting distrust or hostility may result in misunderstandings and unfounded allegations, especially in cases where the children involved are young and the allegations are reported through a parent. Some cases of unfounded allegations may be the product of the emotional disturbance of the accusing parent. This paper discusses how parental separation affects the making of child sexual abuse allegations, with particular emphasis on how separation may contribute to unfounded allegations. Recent research is reviewed, and national data from Canada on allegations of abuse and neglect when parents have separated is presented. Legal issues that arise in these cases are discussed in the context of American and Canadian case law. The authors discuss factors that can help distinguish founded from unfounded cases. The paper concludes by offering some practical advice about the handling of this type of case by mental health professional, judges, and lawyers.**

*Key Words: Evaluation of Child Sexual Abuse Allegations;  
Sexual Abuse Allegations After Parental Separation*

### The Context

Parental custody and visitation disputes are emotionally charged and difficult for parents, children, and professionals.<sup>1</sup> If there are allegations of child sexual abuse, the emotional

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<sup>1</sup> This paper uses the terms *custody* and *visitation*, which are commonly used in North America. In Australia and England, other terminology is used to legally define postseparation parenting arrangements. The custodial parent has

tension, bitterness, and complexity of a case are inevitably heightened. These cases are very distressing for parents and children, and challenging for the professionals involved: lawyers, judges, child protection workers, police, physicians, and mental health professionals. While there is no doubt that abuse is harmful to children, the making of an unfounded allegation can also be damaging, resulting in an intrusive investigation, and ultimately affecting the child's relationship with the wrongly accused parent. Not infrequently in an unfounded allegation case, the child may come to believe that abuse occurred, exacerbating the negative effects of the relationship breakdown.

A significant proportion of allegations of child abuse made in the context of parental separation are unfounded. In some cases the accusing parent may be deliberately fabricating the allegation; however, it is more common for accusers to honestly believe what they are alleging, even if the allegation is unfounded. Preexisting distrust or hostility may result in misunderstandings and unfounded allegations, and in some cases unfounded allegations may reflect a mental disturbance on the part of the accusing parent. It must also be emphasised that many abuse allegations made in this situation are true. While there are legitimate concerns about the possibility that accusing parents or children may be lying or mistaken, those who have abused children usually falsely deny or minimise their abuse.

In most cases there is no clear forensic evidence that can prove or disprove the allegation, and there may be a welter of conflicting claims. Investigations of abuse allegations in the context of parental separation are especially difficult because the alleged perpetrator will often have legitimate reasons for touching the child. The determination of whether touching was "sexual" may require an assessment of intent and circumstances; it may be very difficult for an investigator or judge to make that assessment based on the evidence available. There is usually no conclusive physical evidence, nor is there a valid psychological test or profile that can conclusively determine whether an accuser, an accused, or a child is telling the truth about an allegation.

Once the issue of abuse is raised, a number of agencies with differing mandates may become involved in the case, such as police, child protection, and evaluation clinics. There may be a number of different mental health professionals and social workers involved, with differing roles and levels of expertise, and with conflicting opinions. While some of the professionals and investigators who work in this area are highly skilled, there are also cases in which the professionals involved lack expertise and objectivity, contributing to the making of unfounded allegations. There may also be advocacy organisations involved, supporting the claims of one or both of the litigants. These advocates are usually well-intentioned and can bring expertise as well as support, but are often lacking in objectivity and their involvement can complicate a case by entrenching parents in their positions.<sup>2</sup>

It is possible for a criminal prosecution, child-protection application, and parental custody dispute, all involving one abuse allegation, to be proceeding at the same time in different courts, adding to the complexity and expense of the case. In practice, however,

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legal guardianship of the child, and the child generally has his or her principal residence with that parent; most children also spend specified "visitation" or "access" time with the other parent.

<sup>2</sup> The first advocacy groups of this kind supported women who claimed that their children were at risk of abuse. Such feminist groups are still active in this area. More recently, groups have been established to support those who believe they have been wrongly accused of abusing their children, usually men. See for example, "American Coalition for Fathers and Children", online: <<http://www.acfc.org/site/PageServer>>.

cases involving clear evidence of serious abuse are most likely to trigger criminal or child-protection proceedings, making it less likely that a parental family law dispute would reach the trial stage. On the other hand, cases where there is more uncertainty surrounding whether abuse occurred are generally resolved in family law proceedings.

This paper begins with a consideration of how parental separation affects the making of child sexual abuse allegations, with particular emphasis on how separation may contribute to unfounded allegations, including a discussion of recent Canadian data on the incidence and nature of these cases. It goes on to discuss some of the legal issues that may arise in these cases in the context of North American family law proceedings, and concludes by offering some practical advice about the handling of this type of case by family law judges, lawyers, and social service professionals.

### **Founded<sup>3</sup> Allegations of Sexual Abuse After Parents Separate**

Many of the allegations of child sexual abuse made after parents separate are founded. In some situations, the abuse commenced while the family was intact, but the child may have felt too intimidated by the presence of the abuser to disclose until after separation. Where there has been spousal abuse, the non-offending parent may have felt unable to take protective steps while living with their partner. In some cases, the child's disclosure of abuse may have been the precipitating factor in separation.

It is also common, particularly in instances of sexual abuse, for abuse to commence after separation, with an emotionally needy and lonely parent starting to exploit the child.<sup>4</sup> Although some parents who sexually abuse their children are paedophiles (i.e., have a sexual preference for children) abuse in this context is more likely to be situational (Friedrich, 2005). In some cases, abuse may be perpetrated by a parent's new partner, and only begin once the new partner has begun to reside with the parent and has regular access to the child.

### **False and Unproven Allegations of Abuse After Parents Separate**

A significant proportion of allegations of abuse made following parental separation are not proven in court. In some of these cases the allegations are in fact true, but the accuser, who bears the onus of proof, is unable to satisfy the court that the abuse occurred. This failure to prove abuse is often understandable, since there is frequently no physical evidence of abuse, and children, especially young children, may have great difficulty in communicating a coherent and consistent story, particularly if they feel pressure or guilt to retract allegations.

There are, however, also a significant number of cases in which the allegations of abuse are not true. While in some cases of unfounded allegations there may be a deliberate effort to deceive, more commonly the parent who brings forward the

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<sup>3</sup> The "founded" allegation is distinguished from the "uncertain" and the clearly "false" allegation. The term "founded" is often treated as synonymous with "substantiated," and is similar to "true." In this article, the term "substantiated" refers to an allegation that is either "substantiated," regarded as "founded" by an investigator or researcher, or that is "proven" in a court proceeding. An allegation that is "founded" may be considered to be "true," though it is possible that the investigator, researcher, or court was wrong in the conclusion reached.

<sup>4</sup> See *e.g.*, Faller (1991); Haralambie (1999); Penfold (1995).

unfounded allegation of abuse following separation has an honest belief in the claim. As explained by Leonoff and Montague (1996):

[Unfounded] accusations are most often multi-causal and are rarely simply the conniving manipulation of a competitive parent who wishes to win at all cost. There is a gradient between the parent who consciously deceives and the one who is deluded in belief and whose accusations are built of several elements: personal history projected onto the present relationship; shock and betrayal turned into malevolent mistrust of the other; aggression and hatred; fears based on regressed violent behaviour at the termination of the marriage; comments made in emotional turmoil; suggestibility enhanced by outsiders who are keen to find sexual abuse in men; wishes to denigrate, humiliate and punish the ex-spouse; distortion in thought processes in mentally vulnerable parents who view their overreactions as protectiveness; and finally, a fervent desire to win a custody case and be rid of that person forever. (p. 357)

Children can often provide accurate and detailed accounts of abuse that they have experienced. However, a child who has been repeatedly questioned by a parent with preconceptions or biases may be quite suggestible. Repeated questioning by a trusted adult can alter the memory of a child, especially a young child, to resemble the beliefs of the accusing parent. As a result of leading questions or suggestions from a parent, a child may come to believe that he or she was abused and create descriptions of events that did not occur (Ceci & Bruck, 1998; Goodman, Emery, & Haugaard, 1998; Saywitz & Camparo, 1998).

Another complicating factor arises in cases where a child has in fact been abused, but the offender has been misidentified.<sup>5</sup> Misidentification may, for example, result in a father with visitation rights being identified as the perpetrator when it is actually the mother's new partner abusing the child. The mother may correctly believe that her child is being sexually abused, but because of her hostility toward the father, assume that he and not her new partner is responsible. The child may misidentify the perpetrator because of the mother's unconscious influence or because the actual perpetrator has a more powerful position in the child's life. This may be an especially challenging situation to assess, since the child may exhibit genuine symptoms of abuse, but the alleged perpetrator is innocent.<sup>6</sup>

### **Studies on the Incidence of Founded and False Allegations**

When considering the research on false allegations of abuse in the context of parental separation, it is necessary to distinguish allegations that are clearly unsubstantiated (or false), from those that are uncertain (or suspected). In the clearly unsubstantiated category, it is important to distinguish between those cases that are a result of conscious fabrication (i.e., lying), either to seek revenge or to manipulate the legal system, and those that are a result of misunderstanding or miscommunication. If there is a deliberate

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<sup>5</sup> See e.g., *In the Matter of R.A.* (2006), where a previous court had determined that the child had been sexually abused, but could not specify by whom.

<sup>6</sup> See e.g., K.C. Faller, "Possible Explanations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991). This was what apparently occurred in *D.B. v. C.A.S. of Durham Region*, [1994] O.J. 643, varied (1996) 136 D.L.R. (4th) 297.

lie or manipulation, one must also distinguish cases where it is a parent who is fabricating and coaching a child, from cases where the child is fabricating.

Some of the research on the incidence of founded and false allegations in these types of cases is problematic. A number of early studies had small or biased samples.<sup>7</sup> Further, the nature of different studies is important, and may explain some of the apparent discrepancies in the research. Studies that consider all reports of abuse in a particular jurisdiction tend to have lower rates of intentionally false cases. Studies that report on clinical samples of high conflict parental separation cases involving allegations of sexual abuse that are going through the courts and are studied in the assessment process generally have higher rates of uncertain and deliberately false outcomes than jurisdiction-wide studies.

### *Canadian Incidence Study*

We present here data from the 2003 *Canadian Incidence Study*<sup>8</sup>, the only country that has national data on false allegations of child abuse. In two cycles of data collection, spaced 5 years apart, information was collected on reports of child abuse and neglect in a nationally representative sample of child protection agencies. Over a 3-month sampling period, the Canadian Incidence Study of Reported Child Abuse and Neglect (C.I.S.) collected reports from child-welfare workers about the characteristics of children and families investigated by their agencies. The nature of the reports and the CPS workers' assessments of the validity of those reports were recorded. A study of allegations of sexual abuse based on data from 1998 was previously published.<sup>9</sup> Of all reports of child abuse and neglect made to child protection agencies ( $N=11,562$ ), 49% were regarded as substantiated by the worker undertaking the investigation, 13% were suspected, 27% were unsubstantiated but made in good faith, and 4% were considered to be intentionally false.<sup>10</sup>

Of the reports that child-protection workers considered to be intentionally false ( $N=512$ ), only 9% were made by custodial parents; 15% were made by noncustodial parents, and 33% were made by neighbours and relatives. That is, noncustodial parents (usually fathers) were more likely to make intentionally false allegations than were custodial parents (usually mothers), but the unfounded allegations of noncustodial parents were most often about neglect, while the unfounded allegations of custodial parents were usually about sexual or physical abuse.

Of all children for whom sexual abuse was alleged as the primary form of maltreatment investigated ( $N=655$ ), 26% were substantiated, 15% were suspected, and 54% were considered unsubstantiated but made in good faith. About 5% of all sexual abuse allegations were considered to be intentionally false, with the rate of intentionally

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<sup>7</sup> See note 11, *infra*.

<sup>8</sup> The data presented here is based on an analysis of the Canadian Incidence Study [C.I.S.] survey results undertaken by the authors. The data in the present analysis are unweighted and are therefore not annual national estimates. This data has not previously been published, but a significant amount of data from the C.I.S., including a description of the methodology of the C.I.S., can be found in Trocmé et al. (2005).

<sup>9</sup> Data from the 1998 C.I.S. was analyzed in Trocmé and Bala (2005).

<sup>10</sup> Almost 7% of investigations were unsubstantiated with unknown intent ( $N=762$ ). These cases and 44 cases with missing information are excluded from subsequent analyses, yielding a total sample size of 10,756.

false allegations for neglect cases actually higher, at 7%. Of the intentionally false allegations of child sexual abuse ( $N=28$ ), slightly more were made by custodial parents (14%) than noncustodial parents (11%). Children (usually adolescents), made 4% of the intentionally false allegations of sexual abuse, and 32% came from anonymous sources.

As noted, intentionally false allegations were made in about 4% of all cases. However, if there was an ongoing custody or access dispute at the time the report was made ( $n=1,136$ ), the rate of intentionally false allegations was significantly higher: 14%. Of those intentionally false allegations of abuse or neglect made during a custody or access dispute ( $n=155$ ), only 27% were made by custodial parents (largely mothers), while 34% were made by noncustodial parents (largely fathers). The balance was made by persons like relatives or neighbours.

Of the allegations of sexual abuse made while there was an ongoing custody or access dispute ( $n=69$ ), 44% were reported by custodial parents, 10% were made by noncustodial parents (usually fathers against mother's new partner), and 29% were made by professionals. Of child sexual abuse allegations made in the context of parental separation, only 11% were considered substantiated, 34% were suspected, 36% were unsubstantiated but made in good faith, and 18% were considered to have been intentionally false.

The police were involved in 16% of all cases of child abuse and neglect reported to the child-protection agencies, and criminal charges were laid in 3% of these cases. For sexual abuse cases, the rate of police involvement was much higher, with police involvement in 45% of these cases, and charges in 12%. Among those cases of most interest for this paper, where there was an ongoing custody or access dispute and an allegation of child sexual abuse ( $n=69$ ), the police were involved in 46% of cases, but charges were laid in only 3% of such cases, a very low rate of charging, reflecting the large number of unfounded cases and difficulties in obtaining convincing evidence of abuse.

### *Canadian Family Law Judgments*

In a previously published study, Bala and Schuman (1999) identified reported Canadian family law judgments over a 10-year period that dealt with sexual and physical abuse allegations in the context of parental separation. In 46 of the 196 cases considered (23% of all cases), there was a judicial finding on the balance of probabilities (the civil standard of proof) that abuse had occurred. In 89 cases, the judge made a finding that the allegation was unfounded, while in 61 cases there was evidence of abuse but no finding that abuse had occurred. In 45 of the 150 cases where abuse was not proven (30% of cases), the judge considered the allegation to be intentionally false.

Allegations of abuse came from mothers in 71% of cases (64% custodial and 6% noncustodial), while fathers made allegations in 17% of cases (6% custodial and 11% non-custodial), and grandparents and foster parents made the allegations in 2% of cases. In approximately 9% of the cases, the child was the primary instigator of allegations. Fathers were most likely to be accused of abuse (74%), followed by mothers (13%), mother's boyfriend or the child's stepfather (7%), grandparents (3%) and other relatives, including siblings (3%). Because perpetrators are not likely to contest the issue of abuse in family law proceedings where there is strong evidence that abuse occurred, this study may not be representative of all cases where abuse allegations have been made following

parental separation. It may, however, provide some indication of the types of cases likely to be litigated in family courts.

### *Clinical Samples (USA)*

A number of studies from the United States involving cases where sexual abuse allegations have been made in the context of postseparation litigation have reported rates of unfounded allegations (both intentional and good faith errors), as determined by custody evaluators or child-protection workers, ranging from 36% to 79%.<sup>11</sup> The most recently published study on this subject is by American psychologist Janet Johnson and her colleagues (Johnston, Lee, Olesen, & Walters, 2005). They reported on 120 high conflict custody and visitation cases sent for evaluation, and found that allegations of some form of maltreatment or spousal abuse were made in 77% of these cases. Allegations of sexual abuse were made against mothers in 6% of the cases and against fathers in 23% of the cases, while domestic violence allegations were made against mothers in 30% of the cases and against fathers in 55% of the cases. The clinicians concluded that 26% of the sexual abuse allegations made against fathers were substantiated. They also found that only 34% of the allegations of child abuse or neglect were substantiated, while 67% of the domestic abuse allegations were proven. Interestingly, in this study the rate of substantiation of all types of allegations by mothers against fathers (51%) was virtually identical to the rate of substantiation of allegations made by fathers against mothers (52%). This study suggests that in high conflict cases fathers and mothers are comparably (un)reliable in their reports about the other parent. However, adults are significantly more reliable about reporting their own maltreatment at the hands of a former partner than in reporting about a former partner's maltreatment of their children.

### *Conclusions on the Incidence Research*

The outcome of each individual case must be assessed on its particular facts and not on the basis of statistics about cases in general. Nevertheless, it is useful for practitioners to have some sense of "typical outcomes".

While there is understandably some variation in the results of studies that have different methodologies and are studying different populations, there is also significant consistency in the North American research. Among the high conflict cases that go to trial in family court, a relatively large number are likely to involve some type of allegation of abuse. Although the rate of unfounded allegations of child sexual abuse in the context of parental separation is relatively high, with less than half being substantiated, a substantial proportion of these allegations are founded, and such

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<sup>11</sup> Faller and DeVoe (1995) ( $N=215$ ) found a substantiation rate of 72% based on clinical assessments, though of the "substantiated" (by clinical standards) cases in the study that went to domestic relations court, only 45% were also considered by the court to be cases where there was a civil finding that sexual abuse occurred; Benedek and Sctky (1985) reported on 18 cases of which 10 [55%] were considered false; Green (1986): 11 cases [36%] were considered false; Yates and Musty (1987): 19 cases [79%] could not be substantiated; and one multisite American study carried out in the 1980s reported that on average only 2% of custody and access court files raised child sexual abuse issues, though at some specific sites the rate was as high as 10%. The rates of substantiation by child-protection and court workers for these cases ( $n=165$ ) was 49% for allegations made by mothers against fathers, and 42% for allegations made by fathers: Thoennes and Tjaden (1990).

allegations must never be dismissed without careful investigation. It is also wrong to conclude that mothers are less reliable or more malicious than fathers, as separated fathers and mothers seem equally likely to make unfounded allegations of child abuse. Further, even where the allegation is considered unfounded, the incidence of deliberate fabrication or lying is relatively low, in the range of 3% to 30% of unfounded allegations. Most unfounded allegations are a product of miscommunication or misunderstanding, which may be exacerbated by hostility surrounding parental separation.

### **Child Protection Agency Involvement**

When a parent believes that their child has been abused, a child-protection agency is likely to become involved in the case. Sometimes the accusing parent contacts the agency directly. In other situations the parent may first contact a doctor or mental health professional, who may then be obliged under child abuse reporting laws to report a *suspected* case of abuse. When a child protection agency begins an investigation of suspected abuse, the agency will take steps to ensure the immediate safety of the child. If, for example, the allegation is against a noncustodial parent, the agency may go to court under child-protection legislation to suspend visitation by the parent suspected of child abuse, but more typically the agency will request a voluntary suspension or supervision of visits, with the threat of going to court if there is no agreement. The suspected abuser will be well-advised to appear cooperative with the agency, and may be informed by a lawyer that a court is also likely to err on the side of caution at this initial stage, and hence will feel pressured to agree to restrictions on visitation.

Child-protection agencies face resource constraints. This means that investigations regarding children who are not in immediate danger tend to be given a low priority. Because children who have been allegedly abused by a noncustodial parent may be protected if there is suspension or supervision of visits, investigations involving noncustodial parents tend to receive a relatively low agency priority. Further, this type of case is often complex, which results in an investigation that may take months to complete. If the agency concludes that abuse perpetrated by a parent has occurred, the agency generally has legal authority to seek a court order to protect the child. However, if the parents have already commenced family law proceedings, the agency often decides not to bring a child-protection application to court even if the agency believes the allegation is founded, but rather will rely on the accusing parent to seek a judicial determination to protect the child. Indeed in some cases, the agency may encourage the accusing parent to bring a family law application, and may even threaten that if the accusing parent fails to bring a family law application to suspend access and thereby protect the child, the agency will bring a protection application that may result in the child being removed from the care of the accusing parent and placed in agency care.<sup>12</sup> If

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<sup>12</sup> See *e.g.*, *In re Alyssa W.* (2005), in which the Department of Health and Human Resources removed the children as a result of the mother not believing the one child's allegations of sexual abuse against her step-father; but see *Morris v. Arbanis* (2002), where Child Protective Services initiated a proceeding against the accusing mother *after* she attempted to have the accused father's visitation reduced or supervised. While the court found the abuse claim to be unsubstantiated, CPS nonetheless alleged that the mother had failed to protect her son from sexual abuse. The agency was ultimately unsuccessful.

the agency does not make a court application, the agency workers may still testify in the family law case,<sup>13</sup> or may be asked to supervise visits by the alleged abuser.<sup>14</sup>

There are also cases in which the agency decides to commence child-protection proceedings, such as when the accusing parent does not pursue family law proceedings, for example, for financial reasons.<sup>15</sup> Alternatively if the evidence of abuse is relatively weak, or if the allegations of abuse are less serious, the agency may decide that no further action on its part is warranted; in this situation the accusing parent may still proceed with the family law case. If the agency has investigated but has not commenced a child-protection application, protection workers are still likely to be called upon to testify in family law proceedings.

### **Criminal Prosecution of the Alleged Abuser**

In some cases, the accusing parent may contact the police directly to report an abuse allegation; however, it is more common for the police to be contacted by child-protection workers who have become involved in the case. If child-protection workers believe that there is a serious abuse allegation, they will usually inform the police and a joint investigation may be conducted. In some cases, there may be considerable delay between the initial disclosure of abuse and the police being informed, complicating the police investigation. Given the nature of the criminal law, it is only when there is strong evidence of abuse that criminal charges will be laid. It is relatively uncommon for criminal and civil proceedings to be conducted simultaneously in these types of cases, though this does occur.

It is much more difficult to prove abuse in a criminal proceeding than in the civil context. For a criminal conviction, there must be proof beyond a reasonable doubt, while a civil case only requires proof on the balance of probabilities (or preponderance of evidence). Further, criminal rules of evidence or constitutional requirements may result in the exclusion of evidence in a criminal proceeding that would be admissible in civil child protection or family law proceedings. There is, for example, much more scope in a civil case for the admission of hearsay evidence about a child's out-of-court disclosures of abuse, as well as greater possibility to call expert evidence to help establish whether or not abuse occurred. It is not uncommon for a judge in the criminal trial to acquit the accused, but indicate that this is being done because of the high criminal standard of proof and to express concerns that the child may well have been abused by the parent.

If criminal charges are laid, they will tend to "dominate" any family law proceedings, at least until the criminal charges are resolved. A usual condition of the release of the accused in the community pending a criminal trial is the denial of contact with the alleged victim. In some cases, the criminal court judge will release the accused on bail with a condition that there is to be no contact with the child unless that contact is permitted by an order of the family law judge.

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<sup>13</sup> See *e.g.*, *Keisling v. Keisling* (2005), where a child protection investigator testified on behalf of an accused father.

<sup>14</sup> See *e.g.*, *D.C.O. v. J.A.O.* (2006).

<sup>15</sup> In some areas, court jurisdiction and rules of court permit one judge to deal with the family law proceeding and a child-protection application at the same time, reducing the expense for all involved. However, the accused parent may consider it unfair to have to litigate against both the other parent and a state agency in the same proceeding.

If there are simultaneous criminal and family law proceedings, the accused parent will often have separate lawyers for each proceeding, though it is highly desirable for these two lawyers to communicate and coordinate their efforts.<sup>16</sup> Defence counsel in the criminal case will generally be very reluctant to allow a person charged with a criminal offence to testify in a civil case that deals with the same issues, and will typically want any civil proceedings adjourned until the criminal case is resolved. If the accused files an affidavit or testifies in the civil case, the prosecution may use any inconsistencies between that affidavit and testimony in a later criminal trial to impeach the credibility of the accused. Similarly, if the accusing parent testifies in the criminal trial, any inconsistencies between that testimony and evidence in a later family law trial may be used to impeach the credibility of that person in the civil case.

While a criminal conviction for child abuse will often result in the termination of visitation, a judge in a family law case must still consider whether it is in the best interests of a child to continue or resume contact.<sup>17</sup> Children who have been sexually or physically abused by a parent will often feel an attachment to that parent, despite the abuse. As discussed more fully below, a family court may allow visitation by a convicted abuser if it is satisfied that this is in the child's best interests. The fact that an alleged abuser is not charged or is tried and acquitted in criminal court is not binding on a judge in a civil proceeding.<sup>18</sup>

If the prosecution withdraws the criminal charges or the alleged abuser is acquitted in criminal court, there may be a tendency for some accusing parents or others involved in the case to accept this criminal finding for civil purposes as well. The alleged abuser will often feel a psychological boost from the criminal acquittal or the prosecution's decision not to proceed with charges. Indeed in some family law cases the judge has granted visitation to an alleged abuser, taking account of the fact that the police decided not to lay charges.<sup>19</sup> It is, however, submitted that those involved in the family court proceedings should recognise that the issues and standard of proof are different in the two courts, and they should not be inappropriately influenced by a criminal court acquittal.

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<sup>16</sup> See *e.g.*, White (2006).

<sup>17</sup> See *e.g.*, TEX. FAM. CODE ANN. § 153.004(e) (Vernon Supp. 2004-05) which provides that "[i]t is a *rebuttable* presumption that it is within the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history of pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child" (emphasis added). But see Louisiana's *Post-Separation Family Violence Relief Act*, La. R.S. 9:364(D): "if any court finds, by clear and convincing evidence, that a parent has sexually abused his or her child or children, the court shall prohibit all visitation or contact between the abusive parent and the children, until such time, following a contradictory hearing, that the court finds, by a preponderance of evidence, that the abusive parent has successfully completed a treatment program designed for such sexual abusers, and that supervised visitation is in the children's best interest."

<sup>18</sup> However, it may be possible for a judge presiding over a child custody proceeding to take judicial notice of a related criminal conviction in order to deny visitation, see *e.g.*, *Royer v. Royer* (2006) at 3.

<sup>19</sup> See *e.g.*, *In the Matter of Guardianship and Conservatorship of A.L.T. & S.J.T.* (2006) at para. 44, where the court dismissed the appellant grandparents' argument that the father was sexually abusing the children on the basis that "at no time were criminal charges brought against him"; see also discussion of the trial judge quoted in *Miller v. Miller* (2004) at 2, in which he relies heavily on the opinion of the child protective agency: "I find it very telling that the Department of Human Services never did anything from contacting Mr. Miller, to starting some kind of case in juvenile court."

## Family Law Proceedings

Despite the absence of explicit legislative mention in most North American jurisdictions of child sexual abuse as a factor in making "best interests" decisions about children,<sup>20</sup> when such an allegation is made, this will generally become a central focus for parents and the judge in family court proceedings. Testimony from various mental health professionals, social workers and evaluators is often very important in these cases. However, their testimony is by no means determinative. In cases that are most likely to be fully litigated, professionals and experts may disagree about whether sexual abuse occurred.

### *Interim Visitation*

If there are reasonable grounds to believe that a noncustodial parent has been abusing a child during visits, a custodial parent has the right, and perhaps even the duty, to suspend visits until the allegation can be investigated or the matter brought to court for at least an *ex parte* interim hearing or *pendente lite* hearing. If a child protection agency is involved, the agency will usually advise the immediate suspension of visitation pending full investigation,<sup>21</sup> and may bring a protection application if this is not "voluntarily" agreed to or ordered in family law proceedings.<sup>22</sup>

It is apparent from the reported case law that when there is an allegation of abuse, especially sexual abuse, judges will tend to "err on the side of caution" after the allegation is made and pending a full investigation and hearing (Zarb, 1994).<sup>23</sup> Interim hearings are generally decided on the basis of affidavits from parents and any investigators or others who have been involved in the case. It is often difficult for an alleged abuser to challenge the validity of an accusation at this stage. However, there are also reported cases in which an investigation has been conducted, and the judge at an interim hearing decides that the evidence to support the allegation is so weak that visitation may continue.<sup>24</sup> Judges are most prepared to allow unsupervised visitation to occur if there has been an assessment by a competent independent evaluator, or an investigation by child-protection workers or the police, which clearly indicates that the allegations are unfounded.<sup>25</sup>

Often the alleged abuser will be advised by a lawyer to consent to supervision of visitation on an interim basis, even if the allegation is unfounded, so as to minimize the possibility of further allegations and to demonstrate appropriate concern for the child. While it is understandable that alleged abusers find restrictions frustrating, especially in cases where the allegation is ultimately not proven, it is also understandable that judges will not take a risk with the safety of a child unless satisfied that a child is not at risk of abuse.

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<sup>20</sup> Exceptions include TENN. CODE ANN. § 36-6-106(a)(8) (2001); and COLO. REV. STAT. § 14-10-124(1.5)(a)(IX) (2002).

<sup>21</sup> See *e.g.*, *Bather v. Bather* (2005); see also *King v. King* (2005) at para. 7, where a counsellor threatened to file a child in need of care petition if the mother continued to allow visitation by the father, who was suspected of sexually abusing the child.

<sup>22</sup> See *e.g.*, *In re Alyssa W.* (2005).

<sup>23</sup> See also *D.C.O. v. J.A.O.* (2006).

<sup>24</sup> See *e.g.*, *Flanigan v. Murphy* (1985); and *B.J.A.B. v. K.J.R.* (1996).

<sup>25</sup> See *e.g.*, *Ingles v. Watt* (2000); and *Huxtable v. Huxtable* (2001).

In one British Columbia case (*K.E.T. v. I.H.P.*, 1991), the judge at trial recognised the unfairness to the father that arose from the mother making unfounded allegations of sexual abuse, and the resulting limited supervised access that he had pending trial. Nevertheless, the judge felt that this had been the proper course of action under the circumstances (at ##):

It is unquestionably unfair to Mr. T. that he has been deprived of his children for the past year by circumstances beyond his control. It is also unfair that the very person whose actions placed him in this position is to be granted custody of the children. But, unlike other proceedings where the Court seeks to do justice between the parties, and in so doing attempts to be both just and fair, custody proceedings have a completely different focus, namely, the best interests of the children. It is not the parties' best interests which govern, but rather the interests of the children. Fairness to the parents is a secondary consideration. It is not that the Court is not sympathetic to the apparent injustice that arises to a parent such as Mr. T in these circumstances; it is simply that the Court cannot allow sympathy for the parent to interfere with the best interests of the children.

Reducing delay in investigations and expediting trials in these cases helps to reduce the unfairness to the wrongly accused parent, and also to ensure that children do not suffer from the inappropriate loss of a relationship with the wrongly accused parent. Counsel representing a person against whom an allegation is made should try to ensure that the trial is expedited, and that the most generous visitation possible is maintained pending trial, with whatever supervision that is required by the court.

### *The Standard of Proof*

Most of the judgments that deal with the issue of burden of proof indicate that the person making the allegation must prove to the court that it is more likely than not that the abuse occurred ó the civil standard of proof, a õpreponderance of evidenceö (or õbalance of probabilities.ö)<sup>26</sup> Some judges, however, are prepared to take account of allegations if there are õserious concernsö about possible abuse, even though the judge is unable to make a clear finding that abuse has occurred, based on a concern about the õbest interestsö of the child. Judges taking this approach may decide to terminate all contact if the child appears to fear the alleged abuser, even if it is not proven that there has been abuse.<sup>27</sup>

In contrast, some American courts have required õclear and convincing evidenceö of sexual abuse, a stricter evidentiary standard, to justify suspending the visitation rights of an accused parent.<sup>28</sup> In *Moore v. Moore* (2003) the Court of Appeals of North Carolina determined that without õclear, cogent, and convincing evidenceö of sexual abuse to

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<sup>26</sup> See e.g., *Miller v. Miller* (2004).

<sup>27</sup> See e.g., *J.A.M. v J.J.B.* (1995) where Auxier J. was unable to reach any õdefinite conclusionsö about the sexual abuse allegations, but felt that there was a õa substantial degree of risk that the child must be protected againstö, and terminated access.

<sup>28</sup> See e.g., *Buchanan v. Langston* (2002): õA trial court must find by clear and convincing evidence that the parent has sexually abused the child before a parent's visitation rights are suspended because of allegations of sexual abuse.ö

qualify the accused parent as unfit, the trial court could not terminate visitation without infringing the father's constitutionally protected rights.

### *Founded Allegations*

While many allegations of sexual abuse made in the context of parental separation are not proven, a significant number result in a clear finding by the trial judge on the civil standard of proof that the child has been abused by the alleged perpetrator. In some cases the court will conclude that not all of the allegations of abuse were proven, but that sufficient abuse was proven to justify termination or curtailment of parental contact. For example, in *D.C.O. v. J.A.O.*, WL (2006) the Court of Appeals of Kentucky accepted the trial court's decision to order "very limited and supervised visitation" for a father accused of sexually and physically abusing his children, as opposed to terminating the father's visitation entirely, due in part to "the ambiguous nature of some of the allegations."

Though a finding by a judge that an allegation of abuse is founded will often result in termination of visitation, or closely supervised visits, in some cases a judge may allow unsupervised visits even after making a finding that abuse occurred.<sup>29</sup> Contact is more likely to be permitted if the child has a positive attitude towards the parent. If a child has fears or does not wish to see a parent who has abused the child, this will be very important evidence and may well justify suspension of access (*C.L.M. v D.G.W.*, 2004).

However, judges recognise that children who have been abused often want to have some contact with the parent, despite a history of abusive conduct towards the child. Unsupervised visitation has been allowed when the judge is satisfied that the child will not be at risk in the future. Unsupervised visits are most likely if the parent has recognised that he has been abusive and sought treatment, or if the child is older and is likely to report any inappropriate parental behaviour.<sup>30</sup> Judges are likely to exercise caution in awarding visitation privileges to parents (usually mothers), whose new partners have been accused or convicted of sexually abusing other children.<sup>31</sup> In some cases the abuser is a person who resided with a parent, like a mother's boyfriend or an older step-child, and the court may allow the parent to have access if satisfied that the perpetrator will not be in the house while the child visits (*C.H.M. v. K.W.*, 1983).

### *Unfounded Allegations: Misunderstanding, Fabrication, or Mental Disturbance?*

There is a range of circumstances that may lead a parent to make unfounded allegations of abuse in the context of parental separation. These include:

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<sup>29</sup> See *R.M.K. v L.W.H.* (2000), where a father who had sexually abused his daughter was allowed highly structured and supervised access.

<sup>30</sup> See e.g. *F.(E.) v S.(J.S.)* (1995), where Kerans J.A., affirmed a decision to allow a father to have unsupervised access despite having sexually abused other children some 6 years earlier. He had undergone therapy since then, and Kerans J.A. wrote that access in this case could only be denied if "one assumes that once a parent has committed an act of abuse they are forever afterwards an unreasonable risk" despite efforts at rehabilitation. That's not the approach our society has taken – our society encourages therapy and attempts to reconcile families after situations like this." See also Zarb (1994).

<sup>31</sup> See e.g., *Mowen v. Holland* (2003); compare *Murphy v. Murphy* (2004) [2003 on listing], where Justice Woodard determined that previous allegations directed at the child's grandfather were sufficient to order that his visitation with the child be supervised: "There is no requirement that the child sought to be protected must have already been harmed."

- allegations that are made in the honest but mistaken belief that abuse has occurred, often due to some misunderstanding or misinterpretation of events;
- allegations that are made knowingly with the intent to seek revenge or manipulate the course of litigation; or
- allegations that are made as the result of an emotional disturbance or mental illness of the accusing parent.

It may be difficult to determine which of these factors, or what combination of factors, resulted in the unfounded allegation being made. One must also remember that there are cases where the allegations are in fact true, but a judge has made a finding that the allegation was not proven.

In the majority of cases of unfounded allegations of abuse the accusing parent has an honest but erroneous belief that the child has suffered some form of abuse. For example, the allegation may arise from a custodial parent's misinterpretation of a young child's answers to questions made after an access visit concerning red genitalia. The child may, with limited vocabulary, describe innocent and appropriate touching, but it is misinterpreted as abusive. An unfounded allegation may also arise from a misunderstanding about innocent conduct, such as parental nudity or bathing with a young child. A young child, for example, commonly has considerable interest in the sexual organs of the opposite sex parent, and may try to touch them. In an intact family this type of touching is quickly and appropriately dealt with, but in a situation of mistrust a child's description of acts with one parent may be misunderstood by the other parent and result in a child protection investigation or litigation.

Parents who are questioning their children about what occurs during visits may also misinterpret children's behaviour and distress. In many divorce situations, children will be emotionally distressed, and may have such symptoms as bed wetting or nightmares. If there is high parental conflict, the change of care associated with access may be disturbing to the child. One parent may misinterpret generalised anxiety about visitation as fear of the other parent as opposed to distress at the level of conflict between the parents and about the associated changes in routine (Keuhnle & Kirkpatrick, 2005).

In the British Columbia case of *T. (K.E.) v. (P.) I.H.*, (1991)<sup>32</sup> the mother's concerns about possible sexual abuse began when the 3-year-old girl returned from a visit with her father "very upset." The child reported that she had showered with her father, though this did not appear to disturb the child. The mother, who was in the process of dealing with her own experiences as a victim of childhood abuse, began to question the young child about whether her father had ever given her a "bad touch" and the child apparently pointed to her vagina. The mother contacted the child-protection agency and the police, who began an investigation. The father's contact was immediately reduced from shared custody of the two children (the girl and her older half-brother) to very limited supervised visitation. The mother was genuinely concerned that the children had been sexually abused; the children clearly identified with the mother and began to tell investigators that they did not want to see the father (the stepfather to the boy). Various mental health professionals and physicians became involved. Most of them concluded that the children had not been sexually abused, although the older boy, then about 8,

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<sup>32</sup> See also *M.(P.A.) v. M.(A.P.)* (1991); *L.(C.M.) v. T.(R.)* (2000).

eventually made some vague disclosures that his stepfather may have touched his penis when he was 3 or 4.

By the time the case came to trial, the father had had almost no contact with the children for a year. Justice Prowse concluded that the mother's preoccupation with sexual abuse rubbed off on the children which explained the vague disclosures of abuse. The judge accepted that the mother had not consciously encouraged or coached the children to say that they had been abused. The mother honestly believed that her children had been sexually abused. Her actions, including moving from British Columbia to Ontario, were motivated by a desire to protect. The judge concluded that the father had not sexually abused either child, though by the conclusion of the trial his relationship with the children was troubled. The judge recommended counselling for the children and parents, and decided that the man should not have access to the older boy, who by this time was refusing to see him. The father was awarded access to his daughter, which out of an abundance of caution was to be supervised for the first three weekend visits.

In some cases the judge will conclude that the accusing parent was intentionally making a false allegation of sexual abuse against the other parent, as occurred in one Manitoba case, *Plesh v. Plesh* (1992), where the judge concluded (at 5):

It is patently obvious from the evidence and the manner in which it was given that the mother thereafter set out to punish the husband for the embarrassment that he had caused her. The only ways she knew of were to deprive him of property (she took all of the furniture) and their son. Her motivation was revenge, pure and simple ... I conclude that she never believed that her son had been abused, not when she reported the abuse and not now.

In the Tennessee case of *Keisling v. Keisling* (2005), a trial court made similar findings in regards to a mother engaged in obsessive efforts to have the children's father identified as a sexual abuser. In speaking to the use of such allegations in family law proceedings, the court noted (at 10):

False accusations of sexual abuse have become a reprehensible tool, of sorts, and treated as *de rigueur*, by some ex-spouses who are determined to vent their wrath upon a former mate. The practice is endemic following, doubtlessly, to its brutal effectiveness.

In theory, a parent who *knowingly* makes a sworn statement that contains a false allegation of abuse could be prosecuted for an offence such as perjury. If the accusing parent knowingly makes a false report to the police, there could be a charge of obstruction of justice.<sup>33</sup> However, such prosecutions are exceedingly rare. This is at least in part because the falsely accused parent is often so emotionally exhausted by the end of the family law process that police are rarely contacted about the possibility of laying

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<sup>33</sup> See also TENN. CODE ANN. § 37-1-413 (Supp. 1990), which states that: "Any person who either verbally or by written or printed communication knowingly or maliciously reports, or causes, encourages, aids, counsels or procures another to report, a false accusation of child sexual abuse commits a Class E felony." For a case in which this section was applied see *State v. Rackliff*, WL 430511 (Tenn. Crim. App. 2003).

charges. Further, even if the police are contacted, there is real difficulty in proving on the criminal standard of proof beyond a reasonable doubt that the accusing parent was *aware* that the allegation was false when it was made.

In extreme cases, a parent might recover damages for slander from a parent who made false allegations of sexual abuse.<sup>34</sup> It is also theoretically possible for a falsely accused parent to launch a civil suit for malicious prosecution against a person who knowingly made a false report to the police that resulted in a criminal prosecution. However, these claims are very difficult to establish.

Not infrequently a custodial parent who falsely accuses the access parent of abuse will interfere with visitation even after a judge concludes that the allegation is unfounded, which may result in contempt proceedings.<sup>35</sup> The use of civil contempt proceedings to enforce visitation can be a cumbersome and expensive process; judges usually only make a finding of contempt and impose a sanction like jail as a last resort.<sup>36</sup>

There are a number of cases in which it is apparent that the accusing parent is suffering from an emotional or mental disturbance which results in the making of an unfounded allegation. For example, in one Connecticut case (*Burr v. Burr*, 2005), the mother began accusing the father of sexual impropriety in relation to their son following separation. These accusations continued despite numerous professional opinions to the contrary. In awarding custody to the father, the trial judge remarked (at 6):

At the present time, [the mother] does not possess the capacity to parent her child in a psychologically healthy manner. It is clearly in the child's best interest that mother continue to receive mental health treatment so she can become a fully functioning parent and take on a larger role in her child's life.

In some cases the accusing parent's mental state may affect his or her perception of reality, so that it is not clear whether an unfounded allegation is being made honestly, manipulatively, or as a result of mental disturbance. For example, in *Keisling v. Keisling* (2005), the venomous post-divorce struggle over child custody in Tennessee, protracted litigation centred on allegations of sexual abuse against the father continued for 5 years. Although the children had allegedly made disclosures of abuse, the conduct of the mother and maternal grandparents, namely, questioning the daughters at length upon returning from visits with their father and using a magnifying glass to examine the children's genitalia for signs of sexual abuse, raised concerns about the independence and credibility of these statements. In fact when questioned at the initial proceeding to modify the father's visitation, the children admitted fabricating portions of their statements, causing the trial court judge to remark: "That's how serious this case is. These children are telling these lies." Although the trial court entered an order finding that the father "did not sexually molest any of the parties' minor children," the mother and her parents continued to make allegations, and caused numerous physical exams of the children to be conducted. None of these examinations indicated sexual abuse. At a subsequent hearing on the father's petition to change custody, the trial court noted the fact that the sexual abuse allegations had not been substantiated and remarked that (at 10):

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<sup>34</sup> See *R.G.H. v. Christison* (1996).

<sup>35</sup> See e.g., *B.M.M. v. P.R.M.* (2004).

<sup>36</sup> See e.g., *L.K. v. T.G.* (2006).

Notwithstanding, Mother, in concert with her parents, continued their obsessive efforts to fasten such disgraceful behaviour upon Father í Mother's expressed hatred of Father, fuelled by her parents, seemingly is endless í Mother, perhaps like (the child), cannot distinguish between truth and untruth, or does not care to do so.

Custody was ultimately changed to the father, and the mother subsequently appealed. The Court of Appeals of Tennessee affirmed the trial court's decision.

In most child-related litigation judges do not follow the ordinary rule of civil litigation of ordering the unsuccessful party to pay at least a portion of the legal costs of the successful party. However, in cases where a judge believes that a parent has deliberately made a groundless allegation for the purpose of gaining a tactical advantage in family litigation, the judge may sometimes order the accusing parent to pay at least a portion of the legal costs of the parent who was unfairly accused of abuse. In some jurisdictions, such as North Dakota, the awarding of costs against the accusing parent may be mandated by statute.<sup>37</sup>

### **Making an Unfounded Allegation - Effect on Family Law Decisions**

Some lawyers and advocates for women worry that the courts may punish accusers if an allegation of abuse is made which the judge does not accept (Neustein & Leshner, 2005). A particular concern is that a custodial mother may lose custody if she makes an allegation of abuse in good faith against an access father which is not proven in court. There are some reported cases where judges have suggested that a custodial parent who makes an unfounded allegation is by that very act harming the child and should therefore lose custody. For example, in one Tennessee case (*Neves v. Neves*, 2004) the judge commented (at 5):

I find that these allegations are as abusive to this child almost as what (the father has) alleged to have happened. I think that his actions in this regard and his actions in refusing to allow the child to visit her mother and refusing to talk to the mother about matters relating to the child í constitutes a sufficient change of circumstances to modify the previous order of the Court.

There is an understandable concern that this type of judicial response may discourage parents from bringing forward valid concerns of abuse for fear that they might not be able to prove them and that parents who make true allegations which are not proven in court may be unfairly punished for bringing these allegations to the attention of the authorities. While these are legitimate concerns, it would appear that most judges take a sensitive and contextual approach to cases where there are abuse allegations that are not proven. Where an allegation of abuse is rejected by a judge, the most common response is to then proceed to a "best interests" assessment. That assessment considers the accuser's motive in making the allegation, the reaction of the children to that allegation,

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<sup>37</sup> See *e.g.*, N.D. CENT. CODE § 14-09-06.5 (1993): "If the court finds that an allegation of harm to a child by one parent against the other is false and not made in good faith, the court shall order the parent making the false allegation to pay court costs and reasonable attorney's fees incurred by the other parent in responding to the allegation."

and whether the accuser can maintain a positive relationship with the child and the other parent.<sup>38</sup>

In most reported cases where a judge finds an abuse allegation by a custodial parent to be unfounded, the accusing parent continues to have custody, though in some decisions the judge warns the accuser that if he or she persists in making unfounded allegations of abuse, custody might be varied. Indeed, even in a case like *Plesh v. Plesh* (1992) where the trial judge concluded that the mother's motive in making a false allegation of child sexual abuse against the father was "revenge pure and simple", and that the child was the "real loser", the court did not vary custody but simply restored the father's access which had been suspended during the investigation.

Custody is generally not varied if the judge concludes that an unfounded allegation was made in good faith. Judges who do vary custody in these cases usually emphasize that the change in custody is not motivated by a desire to "punish" the accusing parent for alleging abuse.<sup>39</sup> In one case from California (*In re the Marriage of Colin and Emily Scott*, 2005) where the accusing father was appealing the decision of the trial court to award sole legal and physical custody of the parties' son to the mother, the appellate judge explained (at 9):

We do not perceive that the modification order punished [the father] for a conscientious effort to report sexual abuse of his son. The modification instead resulted from the adverse impact upon the child of [the father's] enduring, relentless hostility, threats and anger directed at the [mother], all in the face of universal opinions given to him that no abuse had occurred. The evaluators and therapists agreed that [the father's] obsessive and excessively antagonistic conduct endangered the welfare of the child. The trial court's finding that a change of custody and suspension of visitation was in the child's best interests is supported by substantial evidence.

Those cases in which a judge is likely to reverse custody (or terminate visitation if the allegation was made by an access parent) are ones where the accuser appears to be suffering from an emotional disturbance that contributes to the making of the allegation, or appears to be so hostile towards the wrongfully accused parent that the children would suffer if the accusing parent continued to have custody.

An example of a case where the accusing parent lost custody is the New York decision of *In the Matter of Amanda B. v. Anthony B.* (2004). Shortly after entering into a consensual custody arrangement that placed the parties' young daughter in the care of her mother, the mother began making sexual abuse allegations against the father, and petitioned to restrict his visitation. Seven reports were investigated and subsequently deemed unfounded by child protection authorities. In upholding the trial court's decision to transfer custody to the accused father, the appellate court concluded that the mother was "an unfit parent for [the daughter] because of her repeated allegations of sexual abuse against father that were unfounded and detrimental to the child and her relationship with father". The mother was nevertheless granted visitation.

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<sup>38</sup> See e.g., *Lessnau v. Lessnau*, WL 2290480 (Mich. Ct. App. 2004).

<sup>39</sup> See e.g., *In re the Marriage of McCord* (2003), Sackett, C.J.: "We will not hold the fact that a parent makes a report of alleged child abuse to the Department of Human Services based on some credible evidence against the reporting parent, even if it is returned as unfounded."

In general, judges do not appear to be reducing the parental rights of those who make honest mistakes that result in allegations that are ultimately not proven in court, provided their continued involvement does not pose a risk to the welfare of the child. On the other hand, the court will consider whether the accusing parent appears to be mentally unstable or deliberately undermining the relationship of the child to the other parent.

#### *Dealing with the Uncertain Outcome*

No matter how careful the investigation and evaluation, there will be cases in which judges, professionals, and parents will have to accept that there are *reasonable suspicions of abuse, but not sufficient proof to convince a court* that abuse has occurred. Learning to live with uncertainty may be a very challenging dimension of some of these cases.<sup>40</sup> It is often possible to take steps to protect the child against the *possibility* of further abuse without completely terminating contact with a *suspected* abuser. This may be done, at least for a time, through supervision of visitation, first in a neutral setting and perhaps eventually in the home, provided that the supervisor is a person committed to the welfare of the child (Bross, 1992; Fahn, 1991).

A long-term plan to ensure the safety of the child may also include therapy by a skilled neutral professional, who can both provide support for the child after the stresses of litigation and monitor for possible abuse.<sup>41</sup> In some cases, educating the child about inappropriate touching and the need to report is useful, though it must be recognised that in some cases the children may be too young or otherwise unable to protect themselves.

There are also cases in which the judge determines that the allegation of abuse is unfounded and the accusing parent, who is unwilling to accept that finding, goes underground rather than expose the child to the prospect of further abuse. Occasionally, the abducting parent may be correct and the judge was indeed wrong to have concluded that abuse did not occur.<sup>42</sup> However, in most cases the abducting parent is the one who is wrong.<sup>43</sup> The abducting parent may be suffering from some form of emotional or mental disturbance, perhaps a consequence of her own history of abuse.

#### *Child Takes a Leading Role in Making a False Allegation*

In most cases where there is an unfounded allegation of abuse arising in a situation where parents have separated, it is a parent who first discovers that the child has been abused. In many cases the only reported disclosure of abuse is through the accusing parent. The child never makes a disclosure to any investigator or evaluator; or the child may make statements to investigators that appear to be the result of parental suggestion or manipulation. Most cases of false allegations arise out of the misinterpretation, distortion,

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<sup>40</sup> For further discussion see Hewitt (2005).

<sup>41</sup> See *e.g.*, *N.(D.) v. K.(B.)* (1999).

<sup>42</sup> See *e.g.*, *D.R. v. A.A.K.* (2006), where a Canadian court accepted that the mother was justified in taking her child from France to Canada because of the failure of the French justice system to protect the child from sexual abuse by the father. In one infamous American case the mother, Elizabeth Morgan, was jailed for contempt of court for refusing to allow an abusive father to visit her daughter. Only later was it established that the judge was wrong to conclude that the father was not sexually abusing his daughter during access visits. An informal network of American feminists, sometimes called the "Underground Railroad," may help women and children to disappear.

<sup>43</sup> See *e.g.*, *B.M.M. v. P.R.M.* (2004).

suggestion, or even manipulation of a child's statements by the accusing parent, or even outright fabrication by the parent.

There are, however, some cases of false allegations in the context of parental separation where the child is taking the lead in making the allegation. In these cases the child repeats the statements to investigators or even in court, but the judge ultimately concludes that the allegations have been fabricated by the child. These relatively rare cases may involve older children, often preadolescent or adolescent girls, who may be manipulative or emotionally scarred by their parents' separation. In some cases the child may be subtly encouraged by a parent to make a false allegation. In other cases the false allegation may arise out of a child's desire for revenge against a father who has left the home,<sup>44</sup> or from a desire to remove a person, such as a stepfather, from the child's life (Green, 1991).

In the British Columbia case of *G.E.C. v. M.B.A.C.* (1995) the parents separated when their two daughters were very young. After an initial trial in which the mother made allegations of sexual abuse that were not proven, the mother had custody of the two girls and the father had generous access. The separation and litigation had been very stressful, resulting in the girls seeing various counsellors. The older girl, in particular, became upset when the father began to live with a new partner and announced plans to marry her. About 2 years after the first trial, when she was about 8 years of age, the older girl reported to her mother that during an access visit the father had slid his hand down the back of her trousers into her "bum hole." The disclosure was reported to police and social services, and a psychiatrist who had been working with the children carried out an evaluation. The investigators and psychiatrist concluded that the allegation was unfounded, with the psychiatrist noting that the child reported the allegation without emotional affect and could give no context or details. The child's psychiatrist concluded that the girl was the "central player" who was attempting to manipulate her father, although the mother was "only too willing to accept what [the child] says at face value." At trial, the judge concluded that the girl's allegation was unfounded and awarded custody to the father. She awarded the mother limited supervised access and made a recommendation for counselling for the children. The change in custody was not on the basis of the "fault" of either party, but rather because of the mother's lack of parenting skills and hostility, and the "psychological damage" suffered by the girls while in their mother's custody.

Of course, great care must be taken to not improperly dismiss allegations in cases where the child is making the allegation, as the child may be telling the truth. Even a recantation by the child does not mean that the allegation was false. Instead, it may reflect "accommodation" by the child to the pressure of the accused or other family members, or feelings of guilt or shame.

#### *The Role of Therapists and Investigators in the Making False Allegations*

In some cases a therapist, counsellor, or other professional has had a critical role in the making of a false allegation of child abuse, for example, where the professional has led the accusing parent to misinterpret statements or behaviours of the child. Typically these professionals will be acting outside their area of expertise.

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<sup>44</sup> See e.g., *G.S. v. T.S.* (2004), where a daughter made allegations of sexual abuse against her father out of anger for being punished by him for talking to an older boy and taking the family car without permission.

The problematic role of a parent's therapist is most obvious when that professional comes to court and testifies about the child's condition (Martindale, 2005). Less obvious, but also problematic, are cases in which a parent's therapist is inappropriately encouraging the parent to make an unfounded allegation, but not appearing in court. In some custody cases involving abuse allegations the courts have ordered the accusing parent's therapist to disclose records related to the therapy in order to help establish possible motivation for making the allegation.<sup>45</sup>

In the Ontario case of *M.K. v. P.M.*, (1996), the mother alleged that the father had sexually abused their 6-year old daughter. Child protection, police, and experienced medical investigators all concluded that the allegations were unfounded. They felt that the child's disclosures were a result of the mother's manipulation and suggestions to the child. However, two mental health professionals testified to support the mother's allegations. Both had been involved in a therapeutic relationship with the mother. One had been the mother's therapist for over 2 years. Neither therapist had interviewed the child or the father. They nevertheless came to court to critique the work of the independent evaluators and investigators, and to express their "professional opinion" that the mother did not "consciously or unconsciously" suggest anything to the child. In rejecting their evidence, the judge commented **(at ##):**

Therapeutic counselling and providing objective expert opinion are two very different professional functions ... therapeutic contact [with a parent] may make it very difficult for an expert to provide a neutral balanced assessment of a situation. Unless the expert evidence relates to the course of counselling itself, it ... may not be very useful.

In some cases, it is the child's therapist who has become inappropriately allied with one parent in supporting or even inducing unfounded allegations of abuse. In one Washington case (*Webb v. Neuroscience Inc.*, 2004), the divorced father sued his son's therapist for negligence, claiming that she breached the professional standard of care by helping to induce his son to have false memories of sexual abuse. After the therapist reported disclosures of abuse by the child to the child-protective agency, both parents sought a variation to the previous parenting plan. A guardian *ad litem* (GAL) was appointed by the court for the child with instructions to prepare a report, and she requested the appointment of a psychologist with expertise in repressed memory to review the record of the child's therapist. The report of the GAL opined that the child's "alleged recovered memories of abuse were implanted through the suggestions of [the mother] and reinforced through counselling with [the child's therapist]." The report described how the mother would be present during the child's therapy sessions, and that the mother and the therapist had prepared notes for the child to use during interviews with child protection investigators. An appellate court allowed the father's negligence action to proceed, ruling that the therapist had a legal obligation to the father to use appropriate care in treating the son.

Most professionals who work with abuse cases are sensitive and aware of the complexity of such cases. There are cases where professionals may have a legitimate difference of opinion about whether abuse occurred. Further, depending on their professional role, some professionals have the role of providing support or even advocacy

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<sup>45</sup> *Smith v. Smith* (1997).

for an accusing parent or child. There are, however, some professionals who have their own psychological or political agendas, and become inappropriately enmeshed in their clients' lives. These misguided professionals may play a significant role in the making of a false allegation.

#### *Admission of Children's Hearsay Evidence in Family Law Cases*

While children frequently testify in criminal cases involving abuse allegations, it is rare for children to testify in family law cases in North America. Judges recognize the emotional stress that will inevitably arise if a child is forced to testify in court, and openly take sides with one parent against the other. Where children's disclosures are admitted into evidence, it is most often in the form of out-of-court statements made to individuals such as parents or professionals like social workers and police officers.

Many family law judgments admit a child's hearsay statements without discussion of the basis for their admissibility. The Canadian decisions that consider the issue usually cite the Supreme Court of Canada decision in *R. v. Khan* (1990), for the general principle of admission of hearsay if it is "reliable" and "necessary." A child's statement to an investigator or evaluator, especially if recorded, will invariably be regarded as "reliable" for the purposes of a family law case. "Necessity" arises from the desire to prevent the emotional harm that might arise if the child were required to testify "against a parent" (*J.A.G. v. R.J.R.*, 1998).

Similarly, many American jurisdictions have statutes or family law rules that explicitly permit hearsay evidence of child-abuse victims, so long as there are sufficient indicia of reliability (Haralambie, 1999). Such indicia may come in the form of corroborating evidence,<sup>46</sup> for example expert testimony or the statements of siblings.<sup>47</sup> Even in states without such specific exceptions to the rule against hearsay, out-of-court statements of children may still be admissible pursuant to generally recognized hearsay exceptions, such as an "excited-utterance" by a child about a recent startling event (Haralambie, 1999). The "excited-utterance" exception to the hearsay rule is premised on the likelihood that a statement made by a child who is disclosing abuse immediately after it occurred would be so overcome by the excitement of the event that the child would not likely have had the time to fabricate a report (Gregoire, 2002; Tapie, 2004).

#### *The Role of Evaluators and Experts*

Custody evaluators, mental health professionals, police, and child-welfare investigators play a very important role in the resolution of family law cases where abuse allegations are made. Few of these cases proceed without some type of "expert" involvement. Indeed in most family law cases where allegations of abuse are made, there are likely to be a number of professional investigators and evaluators involved.

One of the difficulties in this area is that some of the evaluators, investigators, and other "experts" who are involved in these cases lack the objectivity, experience, skills, and knowledge to deal effectively with this particular type of child abuse case (Behnke & Connell, 2005). Many of the behavioural patterns that may be consistent with a child having been abused by a parent may also be consistent with a child suffering from the

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<sup>46</sup> See e.g., *In re the Marriage of Gilbert* (2004).

<sup>47</sup> See e.g., *Matter of Elizabeth G.* (1998).

effects of a high conflict parental separation. There is research which suggests that mental health professionals have considerable difficulty in reliably assessing whether young children have been sexually abused based solely on observing an interview of a child's disclosure.<sup>48</sup>

In practice, once the investigators and other experts have assessed the merits of an allegation, many cases are resolved without a family law trial. An accusing parent who is not emotionally disturbed is unlikely to pursue a matter to trial if all of the expert evidence supports the position of the other party. In cases where the initial allegation is a result of an honest mistake, the accusing parent may be relieved that investigators or evaluators have all determined that the allegation is unfounded and the child has not been harmed;<sup>49</sup> such cases are less likely to be pursued in court.

Cases seem most likely to proceed for a family law trial if there is a division of opinion among the various mental health professionals and investigators, if one parent seems especially hostile, or if the parent is emotionally unbalanced and is disregarding the expert opinions. There are, however, also some cases in which counsel is able to establish that the opinion of the experts (or professional investigators) is wrong.

There is an understandable judicial preference for the testimony of professionals who are appointed by the court or with the consent of both parties, or who are perceived as independent. While an expert evaluator retained by one party may provide valuable testimony, there is a concern that such an expert typically lacks access to all of the parties and hence can only provide an incomplete evaluation. (Behnke & Connell, 2005). Although the fact that the expert is retained and paid by only one party should not lead to an automatic discounting of the testimony of that expert, a judge may take a more cautious view of this type of evidence, since there may be a concern that the expert was selected because of known predispositions.

In some cases, there are divergent expert opinions about whether abuse occurred and the judge must decide which expert opinion to follow. In some cases, it may be relatively easy for one party to demonstrate that the opinion of one expert should be discounted. For example, an opinion may be of little value if the evaluator or investigator lacks expertise concerning the special issues that arise with child sexual abuse allegations in the context of parental separation. Another reason to discount an opinion (especially in this type of case) is if the professional has been involved in a therapeutic relationship with one parent, and hence is not in a position to present an unbiased position about whether or not the child has been abused.<sup>50</sup>

In some cases an officially independent investigator, such as a child protection worker, may become allied with one parent (often the accusing parent who is usually the first person to get in contact with an investigator). A biased investigator may, for example, behave in an unfair or unprofessional manner with the other parent (often the

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<sup>48</sup> See e.g., Herman (2005); Horner & Guyer (1991-92); Horner, Guyer & Kalter (1993). See also Penfold (1997).

<sup>49</sup> In fact, where an accusing parent does not express relief at discovering her allegations are unfounded, this may influence a trial court's decision in regards to custody. See *Lessnau v. Lessnau* (2004).

<sup>50</sup> See e.g., *M.K. v. P.M.* (1996).

accused parent).<sup>51</sup> In this situation, the evidence of an investigator is likely to be discounted.

In some cases the judge must assess the methodology of experts with conflicting opinions. For example in the Ontario case of *K.M.W. v. D.D.W.* (1993), the judge rejected a mother's allegations of inappropriate sexual conduct by the father, and permitted the father of a four-year old child to have unsupervised access. The court severely criticized an evaluation conducted by a psychologist, which was characterized as a "blitzkrieg assessment," because it was conducted in 6 hours on one day. The psychologist, who had initially been selected with the consent of both parties, asked the child leading questions about the disclosure and relied on his interpretation of the child's play with anatomically correct dolls to come to his conclusion that abuse had occurred. The psychologist ignored the fact that the child also reported that the mother had kissed the child's genital area. The judge preferred the opinion of a child protection worker, who rejected the abuse allegation. While the protection worker was not accepted as an "expert witness," the judge gave "her testimony great weight," noting that she had 14 years experience. Her interview with the child, following an accepted investigative protocol, avoided asking leading questions, and included questions challenging the child's story. The protection worker concluded that the child was "highly suggestible" and exposed to "inappropriate sexual material" on television at her mother's home. The child's original "disclosure" to her mother, that her father "touched her peepee" may have been related to the child's diaper rash at the time.

In some cases a parent retains an expert to critique incompetent work by a court appointed evaluator<sup>52</sup> or by child welfare investigators in order to persuade the court to reject their opinions. In the Ontario case of *M.T. v J.T.*, (1993) parents were involved in a custody litigation in which the mother alleged that the child had been sexually abused by the father. A child psychiatrist was appointed by the court to conduct an evaluation, but he was not an expert in child sexual abuse. The evaluator saw the child only once, when the child said that her father had done "something bad" to her, but the evaluator did not pursue this with the child. Instead, he concluded that the child had not been sexually abused because she seemed to play happily with her father during an observation session and spoke positively about her father. After this evaluation the child welfare agency conducted its own assessment and two psychologists with expertise in child sexual abuse investigations were retained to critique the first evaluation. It became clear that the child was afraid of being alone with her father. In the family law trial the judge was persuaded that the first evaluation was inadequate, and concluded that the father had indeed inappropriately touched the child in a sexual manner. The father was only permitted limited, professionally supervised access.

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<sup>51</sup> See e.g., *L.T.K. v. M.J.K.* (1991), where Pickett Prov. J. rejected the opinion of the staff at a hospital child abuse clinic that a 2.5-year-old child had been sexually abused by her father during an access visit. A physical examination by the physicians did not produce evidence of abuse (though that is not unusual even if the child has been abused), and the only source of the "disclosure" was through the mother. The assessors never interviewed the father and the judge characterized the staff as "anything but fair and open-minded." They "grossly over-interpreted innocent behaviour" such as how the child played with anatomically correct dolls.

<sup>52</sup> It is not, however, uncommon for the judge to conclude that the original court appointed assessor, who had access to all the parties, provided a more sound opinion than the expert retained by one party to provide a critique; see *In the Matter of W.J.* (2005).

Litigation involving allegations of abuse is often very expensive and many parents lack the resources to retain experts. If court appointed evaluators or state paid investigators lack knowledge or skill, or are biased, this may be seriously and perhaps irreversibly prejudicial to the parent and child whose case has been improperly assessed. The solution to this problem, however, is not to exclude expert evidence when it is available, but rather to allow such evidence to be challenged by cross-examination or by adducing other evidence, and then allowing the judge to make the best decision possible in light of the evidence presented.

### **Assessing the Validity of Sexual Abuse Allegations**

When child sexual abuse is alleged in the context of parental separation, there is rarely a single conclusive piece of evidence that abuse did, or did not, occur. The alleged incidents almost always occurred when the alleged abuser was alone with the child, and there will not be any independent evidence of the events in question.

There is usually no conclusive forensic evidence. Most sexual abuse allegations do not involve penetration and hence there is unlikely to be physical evidence. While a medical examination of the child is often appropriate in these cases, it is rarely conclusive. Physical symptoms like vaginal irritation and nonspecific vulvovaginitis, or rectal irritation or fissures, are common in young children. These conditions are sometimes misinterpreted by parents (or even by inexperienced physicians) as proof of abuse.<sup>53</sup>

Children's statements are significant, but not unproblematic. There are possibilities for misunderstanding by the child, as well as suggestion, manipulation or intimidation by parents affecting the reliability of a child's statement, especially if the child is young. An accused parent is likely to have had legitimate reasons for touching the child, and if the child is young, for touching the child's genitalia. Expecting a child to answer questions about whether the touching was abusive (or a "bad touch") may require the child to draw inferences about the parent's intent when touching the child; this may be impossible for a young child to do in a reliable fashion.

In the context of parental separation, the child may have been questioned by the accusing parent many times before a professional investigator is contacted. After these discussions any interview by investigators or evaluators suffers from potential problems of "tainting".<sup>54</sup>

A child's sexualised play, genital handling, masturbation, or unusual interest in adult genitalia may be evidence of sexual abuse (Friedrich, 2005; Friedrich et al, 2001). However, these are not uncommon behaviours in children and may be misinterpreted. They could also be the result of exposure to pornography or even abuse by a person other than the accused parent. Various nonspecific behavioural symptoms such as sleep disturbance, regressive behaviour, or even fear of or rejection of the suspected abuser may be evidence of abuse. However, these signs can also be attributable to the stresses of parental separation, or other factors.

Many of the founded sexual abuse allegations in this context do not arise out of paedophilia (i.e., a sexual preference for children). Rather the sexual abuse may be a

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<sup>53</sup> See e.g., *Panaro v. Grady* (2002). See also Green (1991).

<sup>54</sup> See e.g., *Keisling v. Keisling* (2005).

product of an emotionally needy, immature parent who has lost his sexual partner, and hence phallometric testing (sexual preference testing for males) may not be very useful as an exclusionary tool.

Usually investigators and evaluators, as well as judges and lawyers, must try to assess all of the evidence to make an often difficult determination. In the Ontario case of *J.A.G. v R.J.R.* (1998), Justice Cheryl Robertson offered a helpful summary of factors for assessing allegations of sexual abuse in the context of parental separation **(at ##)**:

While there is no formula to determine probability, the process must be more than intuitive. In evaluating the evidence ... the court must filter the circumstances, facts, expert opinion and assess the credibility of witnesses before reaching a conclusion. In weighing the evidence, I considered the following:

- 1) What were the circumstances of disclosure - to whom and where?
- 2) Did the disclosure or evidence of alleged abuse come from any disinterested witnesses?
- 3) Were the statements made by the child spontaneous?
- 4) Did the questions asked of the child suggest an answer?
- 5) Did the child's statement provide context such as a time frame or positioning of the parties?
- 6) Was there progression in the story about events?
- 7) How did the child behave before and after disclosure?
- 8) Is there physical evidence that would be available by medical examination? If so, and no medical report has been filed, is there a sufficient explanation for its lack?
- 9) Was there opportunity?
- 10) What investigative or court action was taken by the parent alleging abuse?
- 11) Who provided background information to the experts and investigators, and is it accurate, complete and consistent with both parties' recollections?
- 12) Was there other evidence supporting the allegations of sexual abuse?
- 13) Was the custodial parent cooperative regarding access, or was access resisted on other grounds prior to the allegations and after disclosure?
- 14) Was there harmony between the evidence of one witness and another, and between the evidence of the experts?
- 15) Was there consistency over time of the child's disclosure?
- 16) Did the child use wording in statements which appeared to be prompted, rehearsed or memorized?
- 17) Was the language used by the child consistent and commensurate with the child's language skills?
- 18) Was the information given by the child beyond age-appropriate knowledge?
- 19) What was the comfort level of the child to deal with the subject matter, in particular with respect to the offering of detail?
- 20) Did the child exhibit sexualized behaviour?
- 21) Was there evidence of pre-existing inappropriate sexual behaviour by the alleged perpetrator?
- 22) Was a treatment plan put forth by either parent?
- 23) Was the child coached or prompted?

- 24) Did the evidence of the expert witnesses, as accepted by a trial Judge, support the allegations of sexual abuse?

In determining the validity of allegations of child sexual abuse allegations when parents have separated, evaluators (and judges) must consider information about the child, the accusing parent, and the accused parent (Green, 1991; Leonoff & Montague, 1996).<sup>55</sup>

### *The Child*

A proper custody evaluation will normally include interviews with each parent alone, and with each parent together with the child, as well interviews with the child alone.<sup>56</sup> (Keuhnle & Kirkpatrick, 2005). In this type of case, the evaluator should have specific training in dealing with allegations of sexual abuse in the context of parental separation, and should ask the child open-ended, non-leading questions about the disclosure and the allegations of abuse. In cases where there are allegations of sexual abuse in the context of parental separation, investigative or assessment interviews with children should be videotaped, or at least audiotaped.

While observation of interaction between a child and each parent is normally a part of a custody evaluation, in this type of case there may be a concern about restimulating trauma in the child, and a joint interview should only be undertaken if the evaluator is satisfied that this will not harm the child; it would normally be appropriate for the evaluator to consult with the child's therapist prior to undertaking such a joint interview, though the ultimate decision about whether to conduct a joint interview must rest with the evaluator (Keuhnle & Kirkpatrick, 2005). Even if the allegations are not founded, the child may be traumatised by a meeting with the alleged perpetrator, especially if visitation has been suspended. A child should not be interviewed with the accused parent if the child is firmly opposed, even if the evaluator believes that the allegation may be unfounded.

The circumstances of the child's initial disclosure, the child's reaction to the parental separation, and any report to investigators should be carefully considered. In false allegation cases, the child may be more likely to make the allegations only in the presence of the accusing parent, and to "check in" with the parent. In the absence of the accusing parent, the child may appear disinterested or unaffected when describing the allegations, or may have an emotional tone that is inconsistent with the allegations. In some cases, the child may appear to have memorised the disclosure, but this is rare. More commonly, the child will be unable to provide the type of contextual or descriptive information about the setting or mental state of the perpetrator that one would expect of a child of that age. In false allegation cases, there can be a discrepancy between negative attitudes expressed by the child in the presence of the accusing parent and an affectionate and relaxed demeanour in the presence of the accused when the child is free from the accuser's influence. However, there is also a need to be alert to the possibility of "gentle fondling" of a young child who is unaware of its abusive nature. Some children maintain warm and positive relationships with an abusive parent, especially if the child is young

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<sup>55</sup> See also Goldstein (1999); Haralambie (1999); McGleughlin, Meyer, and Baker (1999).

<sup>56</sup> For a suggested protocol for assessment of sexual abuse allegations in the context of parental separation, see Bow, Quinell, Zaroff, and Assemany (2002). See also discussion in Faller (2005); and Ellis (2000).

and does not appreciate the exploitative nature of the conduct.

In unfounded cases the child may use age inappropriate language, such as when a 4-year-old child reports to an investigator that, "daddy sexually molested me." The use of this type of vocabulary indicates that the child has adopted the perspective of a prior adult questioner, likely the accusing parent, though it does not in itself establish that the allegation is false. The child who has actually been abused is more likely to express feelings of self-blame, and quite possibly affection towards the abuser.

The child whose unfounded allegation is a result of alienation by one parent is more likely to express only hostility towards the alleged abuser. In founded allegation cases, the child may have distress or deeply disturbed behaviour that will have been apparent before the child disclosed the abuse, as the abuse may have been going on for some time before disclosure. In unfounded cases, behavioural disturbances are more likely to begin only after the reported disclosure. Explicit sexual knowledge ("then milk came out of his peepee") is suggestive of sexual abuse, though it may come from exposure to pornography or abuse by a person other than the alleged perpetrator.

Parents (and others) who abuse children often start with some type of "grooming" behaviour, such as exposing the child to pornography and engaging exhibitionistic behaviour as a way to break down barriers to modesty and "normalize" sexual contact. Evaluators and investigators should ask the child about this type of parental behaviour. Although the child should be examined by a physician, even for children who have been victims of sexual penetration there is often no medical evidence, and much child sexual abuse does not involve penetration.

#### *The Accusing Parent*

A complete social and sexual history of the accusing parent should be taken, including an assessment of responses to the separation and to the allegations. In founded allegations, the accusing parent is more likely to have been initially disbelieving or shocked at the possibility of abuse.<sup>57</sup> There may be an initial degree of doubt and checking with the other parent about the suspected abuse. The parent who is fabricating an allegation is more likely to appear certain that the abuse occurred and to immediately contact the police or child welfare investigators. This parent is likely to be hostile towards professionals who express any doubt that the child has been harmed.

With unfounded allegations, the accusing parent is likely to present as vengeful and aggressive, or paranoid and hysterical. Parents making false allegations tend to have little awareness of the effects of parental demeanour on the child. The parent may also appear to be unconcerned about the effects of the investigative process on the child, focussing on establishing the guilt of the other parent. Parents who make unfounded allegations may have unresolved feelings about their own history of childhood abuse, or may be emotionally disturbed.

#### *The Accused Parent*

A complete social and sexual history of the accused parent should be taken. Individuals who were themselves sexually abused or who have a history of sexual deviance may be more likely to engage in sexual abuse of their children. A parent who sexually abuses his child is likely to have a childhood history of family dysfunction, often of abuse, neglect,

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<sup>57</sup> See e.g., *In re Alyssa W.* (2005).

or violence. Abusers often engage in drug or alcohol abuse. This person may have engaged in voyeurism or have a fixation with pornography, and may present as aggressive.

Parents who have sexually abused their children are often self-centered and not attentive to the needs of their children. They may have difficulty with boundary issues. Parents who have sexually abused their children are sometimes vague in describing incidents, or may report that they do not remember the incidents in question. Some parents who sexually abuse their children are paedophiles; however, others are situational abusers, whose abuse may be an inappropriate response to loneliness following separation. The type of screening tools that may be of some use in establishing pedophilia or paraphilia, like phallometric testing and the Abel Assessment of Sexual Interests, do not have any established validity for determining whether a man has sexually abused his own children (Sachsenmaier, 2005).

### **Representing the Accusing Parent**

When an allegation of abuse is made in a custody or visitation case, it usually becomes a central focus of investigation and litigation. The fact that an allegation has been made will invariably heighten tension between the parents. Counsel for the accusing parent should warn this client that the litigation is likely to be especially intense.<sup>58</sup> The actions and motivations of accusing parents are likely to come under close scrutiny. Their emotional health and personal history may also be closely examined.

Counsel should advise the accusing parent to leave the determination of whether abuse occurred to independent investigators and evaluators. Counsel should caution the client about the need to focus on the child rather than hostility towards the other spouse. The basis for concerns about abuse should be presented fairly and without overstatement to investigators. However, if the report of abuse by the accusing parent appears to be made in a biased fashion and there is a lack of independent support for the allegations, the court may view the accusing parent as acting inappropriately or as being mentally unbalanced.

An important role for counsel is to ensure that any professionals involved are competent in carrying out abuse investigations and evaluations in the context of parental separation. Some investigators, evaluators, social workers, or physicians who work with children may lack the training and experience to express a well-founded opinion about this complex type of case (Herman, 2005). If the case proceeds beyond the initial investigation stage, it will often be helpful to try to get independent legal representation for the child. A lawyer for the child may have an important role in helping parents to focus on their child's best interests.

It is important for counsel for an accusing parent to be aware of any investigations carried out by the police or child protection workers. However, there may be limits to the information that can be shared by these investigators with counsel for the accusing parent. If other proceedings have commenced, it will be important for counsel for the accusing parent to liaise with counsel, for the child-protection agency or prosecution to share information and to discuss scheduling issues. In some cases, the accusing parent may, with the advice of counsel, decide not to pursue family law proceedings if the child

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<sup>58</sup> See Wilson (1987); and Morris (1996).

protection agency is prepared to commence proceedings that will adequately protect the child. Counsel for the parent may even have a role in persuading the agency to do this. While the accusing parent will not have control of the protection proceeding, these proceedings have financial advantages for the accusing parent. In addition, the fact that the agency has carriage of the proceedings may reduce the possibility for the accused parent to argue that the allegations are the result of a *övendettaö* by the other parent.

The accusing parent is likely to find any proceedings that raise abuse allegations very stressful, and may need psychological counselling or support during the process. However, as noted above, if the parent discusses the child's disclosures of abuse with a therapist, the therapist may become a potential witness, and the records of the therapist may become the subject of disclosure (*M.K. v. P.M.*, 1996).

The accusing parent may ultimately have to be prepared to live with a situation where the court does not find that abuse is proven, but the parent believes that it happened, or at least has strong suspicions and understandable fears. The accusing parent is likely to find this situation highly stressful, and needs to be supported in coming to accept and respect any court order. However, that parent must also maintain vigilance for further evidence of abuse that may justify another court hearing.

In some cases, counsel for the accusing parent may believe that the evidence of abuse is very weak and is concerned that the allegations are not supported by independent investigators or evaluators. In these situations counsel may feel that the client may be overreacting to very weak evidence of possible abuse, or even fabricating the allegations or suffering from mental instability. Making a clearly unfounded allegation of abuse in court will not be helpful to either the parent or child. Counsel should be candid with the accusing parent about the possible consequences of putting abuse allegations before the court that appear to be completely unfounded, as well as pointing out how stressful court proceedings may be for the child and parent. If counsel for the child is involved and not supporting the allegations, this may help persuade a client that it is not in the child's best interests to pursue unfounded allegations.

Given the emotional and financial cost of this type of litigation and the fact that pursuing an unfounded allegation can permanently poison relationships, it is important to try to resolve the issue of whether to pursue this type of allegation as early as possible in the proceedings. At least in some cases, especially where the accusing parent is mentally unstable, the lawyer who confronts the client with concerns about the absence of credible evidence to support the allegations may be dismissed by the parent.

### **Representing the Alleged Abuser**

It is highly stressful to be accused of abusing one's child, and counsel for the accused parent will also have a challenging role. If the allegation is actually false, the client will understandably feel that he is being treated most unfairly, especially if some of the investigators or evaluators appear to be acting in a biased or unprofessional fashion. It is important for the accused parent to appreciate that investigators and evaluators are working to achieve what they perceive to be the child's best interests, and, especially initially, are likely to err on the side of caution. The accused parent should be encouraged to understand the role of these professionals and to maintain a cooperative attitude towards them. In some cases, it is appropriate to explore with the client whether some other person could have been abusing the child while the child was in the client's care.

When an abuse allegation is made, the accusing parent will usually want to immediately suspend that parent's contact with the child. This initial position may be supported by child protection workers or the courts. Counsel should try to ensure that the accused parent continues to have as much regular meaningful involvement as possible with the child during a period of investigation and evaluation, even though that may drag on for months. Depending on the strength and seriousness of the allegations, this may require supervision of visitation. Often it will be preferable to consent to supervision and put forward an interim plan that meets legitimate concerns about the *alleged* threat to the child's well being while maximising contact. If there are restrictions on visitation, as is often the case, there should be every effort made to have the trial expedited.

Counsel for a parent accused of abuse must try to ensure that any investigations or evaluations are carried out by competent professionals who are approaching the case in an unbiased fashion. If there is a concern that the initial investigation by police or child protection workers has been conducted in a biased or incompetent fashion, it may be necessary to obtain expert evidence to critique the original investigation.

If criminal proceedings have been commenced, it is important for the criminal defence lawyer and family law counsel to communicate and coordinate their efforts. Although these are distinct legal proceedings, they are in reality interrelated.<sup>59</sup> Often the criminal proceeding is resolved first, and its outcome can affect the family law case. Further, evidence that is used in one proceeding can often be used in the later proceeding. Criminal trial counsel should, for example, be kept informed about the plans of family law counsel for any affidavits that may be filed for interim visitation motions. Similarly, family law counsel will want to have access to information, and if possible transcripts, of key testimony from the criminal trial.

A parent who has in fact abused a child will often deny this, at least initially, for both psychological and tactical reasons. Counsel must advise the client of the evidence of abuse, and if there is strong evidence of abuse, explain to the client the likelihood that the courts will find that the child has been abused. If a parent has abused a child, it is likely that he has a history of having been abused in some way as a child (though not necessarily the same type of abuse as he perpetrated), and may well have alcohol or drug dependency problems. Acknowledging the problem and seeking appropriate help is likely to be the best strategy for maximising contact with the child over a period of time, as well as promoting the welfare of both the abuser and the child.

While the court will not view visitation as a "right" of the parent, and will have to be satisfied that contact will promote the welfare of the child,<sup>60</sup> the court may permit continued contact despite the fact that abuse has occurred. In some cases, a child will want to maintain a relationship despite the abuse and the court can be persuaded to allow access despite the history of abuse. Contact will only be permitted if the court is satisfied that the child will not be at risk, which may require supervision (especially at first), and

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<sup>59</sup> See, generally, discussion in this paper about "Criminal Prosecution of Alleged Abusers".

<sup>60</sup> See *e.g.*, *M.R.P. v. P.P.* (1989), where a new trial was ordered when the trial judge allowed unsupervised access to a father convicted of sexually abusing the children 5 years earlier. The trial judge was satisfied that the father had been rehabilitated and there was no risk to the safety of the children. The appeal court held that the trial judge should have not only considered the issue of risk of further abuse, but should have also required evidence that access was in the best interests of the children.

evidence of the abuser having undergone treatment that will reduce the likelihood of future abuse.

If a family lawyer believes that the client has abused the child, but the client continues to deny this, the lawyer may face some difficult ethical and tactical decisions. If a client wishes to pursue a course that the lawyer considers harmful to the child, the client may be advised that counsel will not advocate this position and will withdraw from the case rather than advocate a position that would harm the child.

### **Counsel for the Child**

Custody and visitations disputes involving allegations of abuse are especially contentious. It may be useful to have counsel appointed for the children involved, though this lawyer may have a challenging role. An important role of counsel for the child is to ensure that the best evidence is available for the court. In cases involving allegations of abuse, the evidence should include an evaluation of all of those involved by a professional experienced with this type of case. In some cases, counsel for the child will believe that the allegations of abuse are definitely unfounded, or conversely that they are clearly true; in these cases the position to advocate is relatively easy to determine. In these cases, counsel for the child may have a role in encouraging the parents to accept this position and avoid embittering litigation that may be harmful to the child and make it very difficult for the parents to both continue to be involved in their child's life.

In other cases, counsel for the child, and perhaps the judge, may be uncertain about the allegations, and faced with the cruel dilemma of either restricting or terminating access to a possibly suitable parent, or exposing the child to the risk of abuse. In these cases, there should be a long-term plan in place to provide support and protection for the child, perhaps involving a neutral experienced child therapist who can meet regularly with the child to deal with safety and other issues. It will usually be appropriate to have supervised visitation, at least initially. The visits could start in a neutral controlled setting and then move to the home of the alleged abuser, provided that the supervisor is someone who is committed to the welfare of the child. It may also be appropriate to have some type of counselling in place for one or both parents, especially if the issue seems to be inappropriate parental conduct rather than exploitative abuse.<sup>61</sup>

### **Conclusion**

Parental separation cases in which sexual abuse allegations are made are among the most challenging cases faced by professionals who work in the family justice system. Some of the strategies recommended in this paper for dealing with sexual abuse allegations are expensive, and many parents cannot afford to hire independent experts or even counsel. If cases are resolved without access to competent counsel and appropriate involvement of mental health professionals, the stress on those involved is increased, and it may be impossible for the justice system to be fair to the parents or to promote the welfare of children.

There should be more societal support for services that assist in dealing with these difficult cases, such as evaluation services, supervised access, and counsel for children.

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<sup>61</sup> Note that at least one appellate court has determined that it is inappropriate for a trial court to order a parent to undertake counselling in this situation. See *In re the Marriage of Carnohan* (2005).

There is also a need for better education and training for professionals who deal with these cases, as well as for more research to better understand the dynamics and characteristics of these cases,<sup>62</sup> and to allow professionals to more effectively distinguish between founded and unfounded allegations.

It is true that some professionals involved in cases involving allegations of sexual abuse display incompetence or bias. However, it is also true that some of the parents involved in these cases are emotionally unbalanced, either before the process starts or as they are dragged through the legal system. At the conclusion of court proceedings, rather than accepting that their positions were without merit, or at least lack credible supporting evidence, some parents will unjustifiably accuse the professionals involved of bias or incompetence. If such parents are not vindicated in court, they may be inclined to complain to professional discipline bodies about the lawyers, judges, assessors or other professionals involved.

Although sometimes the complaints to professional discipline bodies that arise out of cases involving allegations of sexual abuse after separation are valid, the least reasonable disappointed litigants are also the most likely to pursue their claims in this way.<sup>63</sup> This understandably makes some professionals wary of being involved in this type of case, and should make those professionals who are involved handle these cases with special care. However, professionals who approach these cases in fair and balanced fashion, armed with appropriate knowledge and training, have the potential to help parents arrive at a resolution that truly promotes the best interests of their children, and are less likely to face complaints to professional bodies.

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<sup>62</sup> For a discussion of some of the research and policy issues that arise in this area, see Bala et al. (2001).

<sup>63</sup> See e.g., *F.(J.) v C.(V.)* (2000) (father accused of sexual abuse claims gender bias on part of medical assessors and has surreptitious recordings of interviews).

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