

Sexual Abuse Allegations in Custody Visitation Cases: Difficult Decisions in Divisive Divorces

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INVESTIGATION

Of the many cases handled by Child protective services, police, medical, and clinical professionals, no allegation is more difficult to investigate than sexual abuse arising in the context of marital discord. These cases cause more frustrations for investigators than any other because of lack of evidence, possible biases, and the acrimony between the parties. How does the investigator¹ discern a true, valid allegation from one that may be caused by a party's misguided, but honest, belief that a child was abused or from a truly malicious complaint made solely to gain advantage in another court forum?²

A major concern of today's investigative agencies, in which the watchwords are "do more with less," is how to properly address an allegation of sexual abuse in the context of impending, pending, or concurrent family law litigation. Investigations of this type should be given the same detailed attention and priority as any child abuse case. They should not be handled differently just because they happen in the context of a divorce or custody case. Competent investigation of these matters is the only way the questions posed in this article will be adequately answered.

One of the main problems is competent investigation of these allegations takes an inordinate amount of time. Shrinking budgets and changing priorities have reduced staffing levels in investigative agencies, and with fewer people to handle investigations, time is in short supply. This is compounded when the child involved is too young to be able to articulate what has happened in just one or two sittings. Police and social workers assigned to child abuse investigations are already inundated with hard-to-prove cases involving a child accusing an adult. When credibility questions surface in custody/divorce cases, the cases become even more likely to be unsubstantiated³ or unfounded.⁴ In these cases, particular attention must be paid to the following questions:

1. To whom did the child first disclose?
2. What triggered the disclosure?
3. When did the first disclosure occur?
4. How the original disclosure surface?
5. Why is the child telling now?
6. How many people have talked to the child? Who are they?
7. What exactly did the child say to each of these persons?
8. What exactly did each of these persons say in response to the child's disclosure?
9. How, if at all, are these conversations affecting what the child is now saying?

10. What evidence is available to confirm or refute the allegation?
11. What evidence is available to confirm what the child is saying?
12. Are there any alternative explanations for the child's behaviors and disclosure?

These allegations often surface in high stakes circumstances that impugn the veracity of the disclosure. For example, an existing or pending custody/visitation order may in place, there may be a custody hearing or visitation issue to be settled, or the divorce may soon be or have just been filed. Each of these situations is ripe for someone making up an allegation to get an upper hand in the litigation. In all of these cases, the stakes are high — an improper allegation may ruin the reputation of an unjustly accused person, while an unrecognized valid allegation may subject the child to continued abuse.

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There are sound reasons why a child would choose to disclose actual abuse during a highly volatile and divisive custody or visitation litigation (MacFarlane, 1986). On one hand, a child who is separated from an offending parent and is faced with reuniting with that parent may finally feel

frightened enough about returning to the abusive situation to trigger disclosure. On the other hand, a child who is finally removed from an abusive situation may feel safe enough to disclose. A child may also become angry enough at the abuser during the turbulent throes of divorce to tell what has been happening

¹For the purposes of this article, we will assume that the roles of law enforcement and social services are different, yet they join in a unified objective. Law enforcement is the agency responsible for evaluating and developing evidence for a criminal prosecution. Social services, on the other hand, is responsible for the ongoing protection of the child. Evidence-gathering must be done under the direction and supervision of law enforcement who are responsible for knowing the laws of admissibility, investigative technique, search warrant preparation, and interview and interrogation techniques. Both disciplines are responsible and must collaborate to consider the objective of acting in the child's best interests.

²The most comprehensive resource now available on this issue is Schafran, 1996.

³"Unsubstantiated" as used herein refers to the inability to prove whether a crime did or did not occur.

⁴"Unfounded" as used herein refers to a completed investigation in which it is proven that no crime has occurred, or that it is highly improbable that a crime occurred, based on the evidence developed in the completed investigation.

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False allegations have been made in the circumstances of divorce or custody disputes, although the statistical probability of a false report is much less than is commonly believed. Thoennes (1988) reviewed the incidence of child abuse allegations arising in marital relations courts and found that as few as two and as many as 10 percent of litigated cases involve claims of abuse. That same study (as cited in Bulkley, 1989, p 17) also found deliberately false allegations in 14% of the 169 cases reviewed. A subsequent study, involving 9,000 families, yielded a similar result, finding a range of 1-8 percent of cases involved sexual abuse allegations (Theonnes, 1990)

In an investigation of cases involving allegations of abuse, the California Judicial Council (CJC) concurred with other researchers who found legitimate reasons for an allegation to be made, although it was later found to be unsubstantiated (California Judicial Council, 1990) That same CJC report found that false allegations are not common, "although they sometimes occur."(CJC, 1990, p 43)

Types of Cases

There are basically three types of cases:

1. Those in which there is a sincere, legitimate and valid report made which is true because the abuse actually occurred.
2. Those in which there is a sincere, legitimate, and valid report made which is:
 - a) a misinterpretation; or,
 - b) a direct and correct report of some behavior or statements made by the child, but there was no abuse.
3. Those where there is a deliberately malicious false allegation made.

In the first type of case abuse has occurred. In the second type of case, a report is made where no abuse occurred. Sorting out the circumstances behind this second type of case presents serious difficulties for investigators because there is a legitimate reason for the report of abuse. The child has done or said something that triggered the concern. The child's behavior or statement was either misinterpreted or there is simply no known reason or attributable explanation why the child did or said what was reported

Too often law enforcement and social services give short shrift to the distinguishing points between these three types of cases. When they encounter the difficulties these cases present, they either stop and investigate no further or incorrectly jump to the conclusion there was a malicious motive. Therefore, the cases break down because investigators fail to make the critical distinction of motive among the three types of cases. That motive establishes the difference between justified or innocent belief and a crime or risk

to the child.

The first and second type of case have legitimate motives, while the third does not. In the first type of case, the child has been victimized and may be at risk of re-abuse. The second type of case presents a different problem in deciding what to do because there is no culpable pathology on the part of the parent making the report. The third type of case, where the motive is malicious, may be prosecutable as a false report. More important, there may be a risk to the child. The child may be emotionally abused by the conflict that subsequently follows or may be unjustly harmed by the separation from the wrongly accused parent. This may be cause for the law enforcement agency or social services agency to move to protect the child.

The real problem in all three types of cases is that the manner in which the parent makes the report is very much alike in all of them. The dilemma then becomes how does the investigator determine which type of allegation has been made and whether abuse has or has not occurred?

Wouldn't it be wonderful if there was some sort of litmus test to provide a reliable screen for abuse? Unfortunately, there is no such test. There is only good investigative practice and procedures which can establish proof to either support or refute an allegation of sexual abuse.

When a complaint is made, the police must be notified immediately. Interviews with the reporting party (not always the estranged parent) must be conducted to identify the source of the disclosure and separate the source from the supporting parent, if possible. For example, in one case, a three-year-old child of divorced parents who were sharing custody of him was observed drawing at his preschool. He was obviously experiencing discomfort kneeling over the table and so a teacher suggested he sit down. He replied he couldn't because his "bottom" hurt. When asked why, after some shifting and clear reluctance to talk, the child told of his father sodomizing him. Here, the disclosure came from the child independent of the supportive parent and was not volunteered, but was triggered by the teacher's concern for the child. It is these characteristics, coupled with the emotion, fear, and hesitancy, that make the disclosure credible. More important, it was identifying these characteristics through investigation that helped to support the child's claim and refute the claim of fabrication made by the offending parent

Considering the posturing of the parties and influences exerted upon the child by witnesses, relatives, and others whom the courts will use to evaluate

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the facts, proper investigatory steps must be taken immediately upon the receipt of the disclosure of abuse or the value of any subsequent information gathered is likely to be questionable. Keeping all of the issues listed above in mind, four concerns must be addressed simultaneously at this juncture in the investigation:

1. Is it possible to prevent contamination by witnesses and involved parties talking to one another or is there a chance of alliances being drawn once the "secret" is out?
2. Is it possible to secure an admission or confession from the offender before he learns of the investigation and tries to intimidate the child or witnesses or begins to confabulate a story?
3. Is it possible to prevent the destruction of evidence by the offender or his supporters (often the non-offending parent) before he learns of the investigation?
4. Is there any medical evidence available?

The first is a time, space, and logistics problem. Are witnesses able to call or talk to one another? Is there a sufficient number of investigators available to quickly conduct interviews and nail down statements to prevent changes in accounts, perceptions or influences by involved parties?

The second is a matter of getting as much information about what happened and confronting the suspected offender as soon as possible. Denial is a common response investigators obtain when confronting the suspected offender. Therefore, the most successful technique an investigator can employ is one which will encourage the offender to tell the truth. This means the offender must not be threatened by the consequences of talking with the police or CPS worker. One of the most successful techniques to accomplish this is the pretext confrontation, conducted by the child victim or, if the child is too young or incapable, the non-offending parent or any party whom the offender may trust.

This technique involves a recorded call or personal confrontation which is "wired."⁷ The person telephones or meets the offender in person and confronts him/her with the specific allegations of abuse.⁸ The objective is to provide an opportunity for the offender to admit the crime and to try to explain it away or try to convince the person not to tell about it. A main concern with this technique is the personal safety and mental state of the person doing the confrontation.⁹ In one case, a child called her father and told him she thought she had venereal disease from the sexual intercourse they were having. His response was that it was impossible because she was the only one he had been having sex with. In another case, a mother confronted the father about the fact he was having

sex with his daughter by asking what she should tell the authorities who were now inquiring. The response she received was to "tell them it was a mistake, I shouldn't have done it."

The third investigative concern involves the securing and preservation of evidence. While they are considering using a recorded pretext interview with the accused, investigators should also consider obtaining a search warrant. Corroboration in the form

Corroboration in the form of concrete, tangible evidence or admissions of the offender must be sought in the earliest stages of an investigation.

of concrete, tangible evidence or admissions of the offender must be sought in the earliest stages of an investigation. Besides a confession or admission from the mouth of the accused, there is nothing that can be more convincing than physical evidence corroborating the child's allegations. The clearest example of this is when the offender takes pictures of the offense in progress (a frequently overlooked issue in incest

cases). The phrase "a picture is worth a thousand words" must have anticipated the doubt cast upon children who accuse their parents of sexual abuse. However, even the slightest corroboration, such as finding the lubricant or condom the child claims was used, in the hiding place described by the child, is very compelling.

Medical examinations should be conducted as soon as possible. The body often heals itself too quickly for injuries to be documented. Therefore, immediate medical examinations with colposcopic, photographic documentation are a must in every case. Forensic medical evaluations should be conducted by professionals who are identified as forensic medical examiners in the child sexual abuse field. The fact that a person is a licensed medical professional does not mean that the person is a qualified forensic examiner.

⁷The conversation, whether an in-person confrontation or a telephone conversation, should be recorded. The laws of each state vary, so review privacy and wiretapping statutes before employing this practice.

⁸For an excellent discussion of precisely how to conduct a pretext call and what to consider in doing so, see Gassaway and Rawlins, 1993.

⁹This technique is one which some think may be too much for a child as it involves the child directly in the investigative process that may ultimately convict the offender. Consideration of the child's well-being and psychological state-of-mind must be a priority and mental health counseling should be considered before and after employing such a technique. The ultimate decision to use and application of the method proposed must lie in the hands of law enforcement. This is not something that should be done by non-law enforcement or without their direction.

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Additional concerns arise in these matters. Background checks need to be done on the accused and all crucial witnesses. What connections do the witnesses have with the parties involved? What opportunities did the witnesses have to observe or interact with the child or the parties? What behaviors did the child exhibit before the disclosure? What were the circumstances of the disclosure? What exactly was said? Who was present? These questions (all basic areas of inquiry in any abuse case) and many more need to be answered to assure that any decision made by the courts is made after considering the most complete, reliable, credible evidence possible.

Of special concern in these matters is the fact that interviews must be conducted in person. Evaluations of risk conducted by phone are not only inappropriate, they are worthless. Nothing can substitute for a direct, visual, in-person examination of the facts. The inquiry should not stop until all avenues of investigation have been explored. These responsibilities must not be delegated to anyone other than unbiased, independent, trained professionals. In other words, if a mother reports that her child is displaying unusual behaviors, she should not be told to go back and further question the child. This is also true for third parties. If a teacher reports that a child has said something or is doing unusual things, the teacher shouldn't be told to go back and get more information. If either the teacher or mother questions the child improperly or misperceives what is said, unnecessary doubts may be cast upon the case and the child may be improperly discredited, or, in cases where no abuse has occurred, a false (though not malicious) allegation may be triggered.

Finally, people who conduct these investigations must be properly trained, and have access to updated and continual training. Delegation of tasks should be done carefully, and any professional who takes on such responsibilities must have the same training. For example, if a therapist is asked to help determine what happened to a child because the child is preverbal or won't talk about it, that therapist must be properly versed in the art of forensic interviewing. Nothing is more devastating to a case than to have the validity of the information obtained called into question because

someone may have inadvertently influenced what the child said.

The answers to all of these problems are not simple. Plans for addressing these problems should be prepared long before any case is ever handled. Resources should be identified and policies put in place long before the necessity arises. Only after a well planned and implemented investigation is completed may any competent and reliable conclusions be drawn about allegations arising in family law matters. In these matters, children depend upon child protection professionals to keep them safe. These professionals are often the only reliable sources of information a court may look to in making decisions about a particular case. A carefully planned response to an allegation arising in the context of family law litigation is the key to protecting the children involved. The payoff for planning is the confidence which will accompany the conclusions drawn and dispositions made as a result of evidence gathered through sound investigation techniques.

Every child identified as a possible abuse victim deserves a complete and competent investigation. The accused also deserves a complete and competent investigation. We should view our responsibilities as "truth seekers," and have pride in our successes, including cases in which the allegation is proven, and the child is protected, and those rare cases in which we prove that no abuse has occurred.

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