

## Representing the Protective Parent in Sexual Abuse Custody Cases

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### The Problem

A parent, usually a mother, believes her child is being molested by the other parent. Maybe a father believes his child is being molested by the stepfather or mother's paramour. Surely this is a relevant, perhaps determinative, issue in a court's custody and visitation order. We want parents to be protective of their children. When they are not, Child Protective Services (CPS) intervenes even if the parent was not the active abuser. Why is it, then, that the would-be protective parent becomes the target of suspicion and even wrath, risking the loss of custody, merely for pursuing the allegations? More important, how can a parent protect the child without the court awarding custody to the abuser as punishment for having raised the allegations?

The title of John Myers's excellent book *A Mother's Nightmare-Incest* paints a dramatic but accurate picture (Myers, 1997a). The problem is not a nightmare only because intrafamilial child sexual abuse is a terrible thing in itself, but also because of what happens to the allegations in the legal system. Unless the sexual abuse was discovered by a credible, objective third party, and the protective parent did not immediately believe the allegation but was then convinced of its truth and persuaded to take legal action against the abuser, the protective parent often will be met with skepticism. Despite broad consensus among professionals with very different perspectives that sexual abuse can begin or be revealed for the first time during marital separation, divorce, or modification actions, which seek to increase the child's time with the abuser, and that fabricated allegations are a small minority (Pence & Wilson 1994, Faller 1990, Sirls & Lofberg 1990, Green & Schetky 1988, Gardner 1987, Corwin et al. 1987, MacFarlane 1986), the timing of such allegations is seen as highly suspect.

Domestic relations judges may be more skeptical about sexual abuse allegations than are juvenile or criminal court judges, who daily see individuals who have committed violence or other abusive acts. Domestic relations judges are used to hearing litigants exaggerate trivial events that were accepted during the marriage but that take on the characterization of grievous abuse during the divorce trial. In addition to exaggerations, some domestic relations litigants lie in order to gain an advantage or punish the other parent. It is within this context that many domestic relations judges view allegations of sexual abuse (Haralambie 1999). Further, a number of

people have spoken and written publicly about the "epidemic" of false allegations in custody cases and the "tactic" of alleging sexual abuse to gain an advantage in a custody or visitation case. (Gardner 1996, Nichols 1994, Wakefield & Underwager 1988). However, studies do not support the "common knowledge" that sexual abuse allegations are widespread in divorce cases (McIntosh & Prinz 1993, Thoennes & Tjaden 1990) or that there is a large proportion of fabricated allegations (Myers 1997b, Jones & McGraw 1986).

Judges and expert witnesses are not immune from the effects of this erroneous public perception. Even front-line investigators from CPS (McGraw & Smith 1992)

and law enforcement often regard allegations that arise within the context of domestic relations disputes to be highly suspect. However, what the media choose to report or exploit is not scientific evidence for the frequency of events, and it is important for everyone involved in actual cases to avoid the influence of extraneous issues in determining whether a particular child in a particular family was molested or needs protection (Myers 1994, Dziech & Schudson 1989, Hechler 1988). Part of the job of a lawyer for a protective parent is to

ensure that the investigators, evaluators, and judge all look at the specific factors involving the parties at hand. The task is made more difficult by the realities of dealing with a client who feels like the most cursed Cassandra of Greek mythology—destined to tell the truth but never to be believed.

### Assessing the Strength of the Position

First, the lawyer needs to assess the factual basis of the claim. The most dire results in these cases occur when an action is brought prematurely or argued beyond the available evidence. That error may haunt the case forever, notwithstanding later discovery of more compelling evidence. Once the evaluator and/or the judge determines that the "protective parent" is either vindictively fabricating the allegations or hysterically over-interpreting what was heard or seen, it may be impossible for him or her to objectively assess any other evidence in the case. Whereas it is entirely understandable for a parent to become distraught or enraged at the thought of her child being molested, the lawyer must not get drawn into these highly charged emotions. The client must always be focused back on the long-term best interests of the child, as well as the more immediate need for protection. Unfortunately, that will sometimes

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mean leaving a child in an unsafe place temporarily to avoid putting the child in a worse position (full time custody to the abuser).

It is extremely important in domestic cases involving allegations of abuse to make a good faith attempt to determine the truth. The lawyer should refer parents who believe their children are being molested to the most qualified experts available. Highly polarized expert witnesses who always find abuse should be avoided at all costs. Properly qualified experts can assist the parent and the court in devising safe visitation arrangements when the facts are not clear. They can also reassure parents who have interpreted certain behaviors as abuse-related when, in fact, the child is just having difficulty accepting the changes in his or her life.

The client's willingness to accept expert advice is essential and will benefit the client at every step of the process. This is one reason that selection of a well-qualified and experienced expert is particularly important. It is the lawyer's job to ensure that the client is confident that the expert will do a good evaluation and will do his or her best to act in the best interests of the child. The client's willingness to have an open mind and to discover the real truth is the best defense against charges of fabrication. The best reality for the child would be that he or she was not, in fact, molested. An evaluator or judge would find it strange that a parent would not be relieved to learn that his or her child had not been molested. A parent so convinced that the child was molested that she is unwilling to accept any contrary opinion, no matter how skilled the evaluator, will lose credibility.

An important step in the lawyer's investigation is to reconstruct as accurately as possible the process of how the allegations came to light, including to whom the child spoke, and who observed or heard things that might corroborate the allegations. The lawyer should get all of the records from any medical, mental health, or social science expert who has been involved in the case. The lawyer should then learn as much as possible about each of those persons' professional backgrounds to determine their actual experience and training in child sexual abuse. If the people already involved have appropriate expertise, there is no need to refer the client for duplicative evaluations, which might seem like expert-shopping. The lawyer should look for the weaknesses, as well as the strengths, of the available evidence.

If the allegations do not appear to be true, then the lawyer must determine whether they were deliberately fabricated or merely good faith misinterpretations. Expert assistance is essential. If the allegations arose from misinterpretations, the expert should explain to the parent why the indicators reveal another problem that needs to be dealt with. The accusing parent will need to be reassured that the child is safe. If the allegations constitute inappropriate conduct but not molestation, such as

sleeping or bathing with an older child (understanding that experts differ on the cut-off ages) or failing to give a developing child adequate privacy, the expert should suggest a strategy for educating or sensitizing the other parent.

## A Lawyer for the Child

It is often helpful to have a lawyer appointed to represent the child as early as possible in the proceedings. This strategy will also demonstrate that the client really is attempting to serve the child's best interests. The parent's lawyer should be careful to ask for appointment of a qualified lawyer to represent the child, one who has experience in *intrafamilial child sexual abuse cases* as well as in domestic relations cases. A poorly trained child's lawyer can be devastating to the case. The most likely pool of well-trained lawyers to represent children in these cases is found among the lawyers who are appointed by the juvenile court in child abuse cases filed by the state or county. The child's lawyer has no loyalty except to the child and is, therefore, at least theoretically free from the taint of having a personal agenda to be served in making or denying the allegations. If the child's lawyer is properly qualified and experienced, the parent's lawyer should consider deferring the lead in the case to that lawyer. This will make it easier for the court to look at the child's best interests without being biased by the presumed self-interested motivation of the parents.

## Inconclusive or Insufficient Evidence

When well-qualified experts have been brought in by the parent to determine whether there has been abuse and, although abuse has not been ruled out, there is not a preponderance of evidence to prove abuse, a strategic decision must be made. The expert should take the lead in determining how likely it is that further evaluation will reveal the existence of abuse and how much the child is in need of protection. There is a useful model of therapeutic intervention in such cases, which the parents or a court may be willing to adopt. (Hewitt 1991). This model involves individual sessions with the child, individual sessions with each parent, and sessions with each parent and the child together. During the latter sessions, the parent and child agree on lists of appropriate and inappropriate touching, and the child is given permission to reveal to the therapist any abuse that has occurred. Monitoring is continued for at least one year.

The reality is that there are cases where children have been molested but, despite the use of good experts, the abuse cannot be proved. Because the party alleging abuse bears the burden of proof, it may not be possible to protect the child. It is essential that the lawyer for the parent who is attempting to protect the child weigh the risks of going forward with allegations that may be true but cannot be proved. Some judges may be willing to take precautionary steps to protect the child in the face of inconclusive proof, but others may penalize a parent perceived to be vindictive or hysterical.

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Such a parent may not only be unsuccessful in attempting to limit visitation, but may even lose custody of the child

## Allegations of Parental Coaching

A frequent charge against the nonabusing parent is that the parent has influenced the child by coercive or leading interrogation or has coached the child in what to say. Sometimes this does happen. Other times, the parent's comments to the child are misconstrued, even by otherwise careful evaluators.

It is unreasonable to expect a parent not to talk to a child about sexual abuse. If a child is hit on the playground and tells his mother, the mother often asks for elaboration about what happened, whether the child is hurt, whether the other person has hit the child before, and so forth. Certainly if a stranger abused or molested a child, the parent would ask many questions and might comfort the child by saying that it was not the child's fault or that the abuser would be caught by the police and put in jail. However, such typical and expected conversations with children are often viewed in a sinister light when the abuser is the other parent and domestic relations litigation is pending between the parents. The lawyer needs to emphasize through testimony and argument the "real-world" context of parents talking to their children about something that has hurt the child.

When a parent takes an abused child to be interviewed by the police, CPS, or an evaluator, the parent generally explains something to the child about where he or she is being taken and why. The parent might say to the child "Be sure to tell Dr. Smith everything you told me about what happened. That's the only way she can help you." There is nothing wrong with such a statement. However, after the child has related what happened, Dr. Smith might ask, "Did anyone tell you to say those things to me?" The child will say that the mother told him or her to say them. The mother did, but not in the way that Dr. Smith might interpret it. Therefore, it is crucial to have the investigator or evaluator determine whether the child is relating something that did not happen because the parent told him to say it, or whether the child was simply told to tell the investigator what had happened.

In the author's experience, most of the time when a child says the parent has told him or her to say something, the evaluator or investigator never clarifies what the child means (even when the expert has enough child development knowledge to know how concretely the child is answering the question). If the investigator or evaluator did not clarify the issue with the child, the possibility of misunderstanding should be raised while

examining the expert witness. Unfortunately, the valid inquiry into coaching is sometimes not as thorough as it should be, and investigations are dropped as soon as the child says that a parent "told me to say that."

A parent may ask very leading questions while trying to ascertain what has been done to the child. This can contaminate the investigation, but it does not invalidate the fact that the child may have been molested. Gail Goodman and her colleagues have demonstrated that children's disclosures to their mothers can be more accurate than their disclosures to people they do not know. In addition, they may be better able to resist the questions by their mothers that seem to prompt them for inaccurate information (Goodman et al. 1995). This research may help judges to realize that abused children may reveal things to their parents that they will not repeat to interviewers.

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However, even assuming that sometimes parents may obtain more and better information from the child than the evaluator, a major role for the lawyer is to assist the evaluator in convincing the client to discontinue asking the child questions, except as specifically authorized by the evaluator. This is good trial strategy for the client, because the client must realize that the child's allegations are less likely to be believed the more the parent talks to the child. The parent should leave the inter-

viewing to properly trained experts.

## Educating the Judge

The lawyer must make a special effort to educate the judge about intrafamilial child sexual abuse. An essential component of that education is the presentation of effective expert testimony. This may require calling a witness who is not directly involved in the case in addition to any professionals who may have evaluated or treated the parents or children. Besides being a qualified professional, the expert must have a good theoretical background and practical experience in this particular facet of child abuse. Many cases are lost because the family physician or counselor doing family therapy did not have sufficient expertise in intrafamilial child sexual abuse. These cases are difficult enough for experienced specialists. Otherwise competent professionals who lack this specialized training and experience may miss or misinterpret important data.

The expert's particular specialized knowledge must be established. It is not enough to accept a stipulation to the expert's qualifications. Ask questions specifically directed to training and experience with intrafamilial child sexual abuse, not just about child abuse in general. Have the expert explain what he or she does to keep up with the rapid expansion of knowledge in the area. It is also important to establish that the expert has determined

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both that some children have and that others have not been molested. That fact will go a long way toward showing the witness's objectivity and fairness

In addition to presenting one's own expert, the lawyer must demonstrate, if true, that the opposing expert really is not trained in the specific area in question. This is a good type of cross-examination, because it does not impugn the integrity or general competence of the expert, but merely shows that intrafamilial child sexual abuse is a highly specialized area and that this expert is not well-trained in that narrow subspecialty. The process of that cross-examination is the reverse of the direct examination of the specialized expert. It should establish lack of specific training in the field, lack of attendance at specialized conferences and seminars, lack of reading in specialized journals, absence of membership in specialized organizations, and absence of speaking or writing in the specialized area.

## Dealing with the Client's Emotions

Most parents of abused children in custody cases are angry with the abuser. What good parent would not be? It is not difficult to understand anger, hatred, and even vindictiveness toward a parent who has hurt one's child. Although the lawyer must convince the judge that this response to abuse is perfectly natural and even desirable, the lawyer must also try to get the client to be circumspect in his or her expression of the anger. It is safe to express anger to the lawyer or a therapist who is treating the client and who understands the basis for the anger. It is not wise to express anger with abandon to evaluators and the court. This does not mean that the client should deny the anger. It is a matter of how much emotional energy the client expresses.

A more difficult situation is presented by the client whose anger predates the allegations. If the parent was already angry, it is easier to assume that the allegations are a product of the anger. But this is not necessarily the case. Under such circumstances, it is especially important to have a well-qualified mental health professional evaluate the client and analyze the content and timing of the anger, as well as the parent's motivation to fabricate abuse. Friends and relatives may have information that will help distinguish the anger from the allegations. For example, the client may have told somebody that he or she wondered whether or not to make a report because the child would be hurt by the investigation or because the other parent might retaliate. Such an expression of ambivalence about reporting would undermine the position that the parent fabricated the allegations out of vindictiveness.

The client's anger may be related to a continued pattern of abuse that is consistent with an extension of abuse to the child. It may be a part of the dysfunction in the family, which set up the conditions that allowed the abuse to occur. In any event, the client's anger is an issue that must be thoroughly investigated and discussed at trial to prevent the judge from assuming that the client's apparent anger has led him or her to fabricate or at least greatly exaggerate the allegations.

## Dealing with Dropped CPS and Criminal Cases

In many contested cases, CPS and/or the police have already investigated the allegations and elected not to proceed. The consequence of those decisions in a domestic relations case is often to substantially weaken the case of the parent attempting to prove the abuse.

Therefore, one of the major tasks is to neutralize the power of that negative evidence. The purposes and criteria for proceeding with CPS and criminal cases are different from those applied to custody cases between parents. Although judges realize this, they may confuse the agency's decision not to proceed with a factual determination on the truth of the allegations.

Prosecutors may decide not to prosecute cases even if they are convinced the abuse occurred, because they do not feel they will be able to present sufficient evidence to convince a jury beyond a reasonable doubt. In addition, some prosecutors believe that child abuse should not be dealt with in the criminal justice system and, as a matter of policy, do not prosecute those cases unless the abuse is severe.

One study found that prosecutors were less likely to prosecute if the abuse was not recent or the offender was accused of abusing only one child (Brewer, Rowe & Brewer 1997). Cases are also less likely to be prosecuted when the abuser is a parent (Chapman & Smith 1987).

What is insufficient abuse to file a dependency and neglect petition may, however, constitute grounds on which to decide custody between parents or even to restrict one parent's visitation to supervised only. Further, CPS often forgoes filing a petition if one parent appears willing and able to protect the child. If the parents are separated or divorcing, or if the nonabusing parent is willing to seek court protection for the child, the case may be closed even though the agency believes that the abuse occurred. The judge needs to be aware of these considerations.

There is often misunderstanding about what the following terms mean: "substantiated," "valid," "founded," and "unsubstantiated," "invalid," and "unfounded." Researchers have had a hard time accurately

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determining rates of true abuse because of the imprecision of the terms and idiosyncratic ways in which the terms are applied. In the domestic relations forum, the terms "unsubstantiated," "invalid," and "unfounded" are frequently construed to mean "false," "untrue," or "fabricated." Many CPS agencies do not even have a category that would cover "I don't know." It is essential to have the CPS worker or other expert explain what the phrase in question does and does not mean and to clarify whether the negative finding implies bad faith. Even if the CPS worker testifies that the agency determined that the abuse never took place, the worker may be unaware of additional information that has come to light subsequent to that investigation. Had all of that information been available to the worker, the findings might have been very different.

## Conclusion

The primary focus of the case should always remain on the child: what happened to the child, what effect it had on the child, what special needs the child may now have, and what the ramifications for custody and visitation are. It is a mistake to focus the case on how bad the other parent is or how good your client is. Further, even if the parent is responding badly to the allegations (interrogating the child, coaching the child to elaborate on what really happened, and so forth), the child must still be protected. The critical inquiry is which custody/visitation scheme best protects the child's interests. That may involve deciding between two parents who both have problems. Too many extraneous factors enter the case when anything other than the child is at the heart of the case, with every vein of inquiry leading directly to that heart.

Lawyers often argue that the judge should not lightly brand a parent an abuser. But, by the same token, the court should not lightly place a child, ill-equipped to protect himself or herself, in a position of jeopardy. This is particularly true because of the deep and far-reaching effects of sexual abuse on a child. The expert must testify clearly about both the short- and long-term effects of abuse. Many judges do not realize how pervasive the consequences of abuse can be to a child. They do not understand the powerlessness a child feels when he or she is not believed or not protected. The expert must make the judge aware of just how crucial the decision is to the child's well-being, and how necessary it is to make protection of the child a high priority.

The judge's failure to believe a true allegation may result in failure to protect the child or, even worse, in a change of custody from the protective parent to the abusive parent. The rationale for this response is that a falsely accused parent may have no ability to reestablish or maintain a healthy relationship with the child if the child remains with a custodial parent who continues to maintain that the child was abused, especially if that parent continues to take the child to a series of evaluators in an effort to prove the nonexistent abuse.

The best strategy is to manage the legal case well and, if the judge makes a devastatingly wrong decision, to continue to work within the system, even if immediate protection is not possible. The lawyer must keep the client focused on the long-term interests of the child, even if that means accepting a short-term set back. It is not that continued molestation for the short term is acceptable. It is that the alternative may be much worse for the child and the parent who desires to be protective.

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