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Sorting Out Allegations of Child Abuse in Custody and Visitation Cases: The Problem of "System Failure"

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INTRODUCTION

Sound and complete investigations form the only basis for making accurate decisions in child abuse cases. When errors occur during an investigation, there is a compromise made in the process with little chance of a court's making an informed disposition. Law enforcement and social services have two distinct and separate roles in cases of child abuse investigations. What many people in these two disciplines overlook when child abuse is alleged or suspected in the context of custody or visitation cases is that these roles overlap. These individuals must work closely together to assess and make dispositions that assure the safety of the children involved. In these matters, law enforcement must by necessity (and in some cases, by statute) "wear two hats." Law enforcement, social services, and others within the system may make false or unsupported assumptions about the parties involved and/or each other's work or conclusions. The worst cases involve those who come to conclusions and then look only at, or secure only evidence for, that which supports those conclusions — refusing to acknowledge anything that contradicts their theory of the case.

Social services and law enforcement *share the responsibility* of conducting a *comprehensive, unbiased, objective, and dispassionate examination* of the facts. All of the court systems, the juvenile, criminal, and family law¹ courts depend upon the neutrality and comprehensiveness of these investigations to make decisions.

If social services and law enforcement officials do not maintain their independence, there is no way to compare or evaluate those facts brought forward by the parties. System failure is the biggest impediment to protecting children in these matters. Individuals in the system often fail to recognize these potential problems and to then anticipate or mitigate their influence on the case. When these mistakes or errors occur during a case investigation, the system created to protect children fails.

The Roles of Social Services and Law Enforcement

The major role of social service agencies when child abuse is alleged (generally through child

protective services or emergency response units) is to determine and assure the safety of children within family units. In general, they take the position that once it has been established that the child is not, or will not be, at risk their job is basically done. They are not responsible for gathering evidence of a crime, only for determining whether the child is at risk of immediate or future harm.

Evidence gathering for criminal prosecution should be the function of the law enforcement agency. In jurisdictions where there are multidisciplinary or joint response teams, the functions and responsibilities may vary to some degree. However, the basic responsibilities must be clearly delineated, designated, and carried out by one or more members of the team.

Law enforcement's role is to shoulder a greater responsibility in these matters. Generally, when investigating crime, law enforcement's sole responsibility is to determine if a crime occurred.² If so, they gather evidence to prove who did it, and then seek to apprehend the responsible person(s). However, this is only the first hat they wear.

When child abuse is involved, they wear a second hat. They must also determine and assure that the child is safe. This is a very important distinction for law enforcement because traditionally, when they determine that there is insufficient evidence of a crime, they shut down their investigation(s). In cases where child abuse is involved, partially because in child protection matters the burden of proof is less than for criminal prosecution, they must continue to hold the case open and assist social services in the development and assessment of the facts. However, there are more important reasons why they should remain involved.

Law enforcement agencies have two police powers that social service agencies do not, both of which are crucial to assist in making a determination as to whether abuse did or did not occur: the powers of arrest, and search and seizure. When law enforcement officers abdicate their responsibilities to investigate these matters, they severely reduce the chances of making a definitive determination of what happened because the investigations are "short changed," and decisions are made based on incomplete information.

Hindrances to Proper Case Investigations

Premature Conclusion of Investigations

There are several miscues that hinder law enforcement in these cases. Too frequently, law enforcement, when faced with the lack of definitive evidence these cases present, may shut down a case prematurely. Hence, they may not follow up with the social worker, follow leads or conduct investigative procedures that might shed greater light on the case.

Social services may also prematurely cease to investigate when custody or visitation is at issue. They assume that because the family court is currently involved or may be involved at a later date, the child will be adequately protected. When reports of suspected child abuse involving divorce and custody are made to law enforcement and social workers, it has been observed that their eyes glaze over, apparently concluding that reports made in these situations *must* be false. They then incorrectly advise the parent making the report to "see your family lawyer" or to "tell the judge." Consequently, nothing further may be done about the complaint.

This is a mistake—because by the time the matter gets into the family law court there is little chance of establishing credible, *independent* evidence to determine whether abuse did or did not occur. The courts (and their judges) are not investigators. The courts are places where decisions are

made based on evidence presented by either side in a dispute.

Even when the family law courts have the assistance of court-appointed or aligned evaluators, and investigators who examine such allegations, they are involved too late in the disclosure process to secure the kind of evidence law enforcement and social services might have found had they properly been involved at the initial reporting stages of a case. For example, evidence may have been tampered with or destroyed. Witnesses' accounts and memories may have been contaminated through their exposure to either of the parties or other alliances and influences that arise in these cases. As a result, there is generally no physical evidence presented, and the court is left to test the credibility of whoever testifies to make its determination of what happened.

"No-Fault" and Child Support

Day-in and day-out, family courts are faced with people who exaggerate minor indiscretions into major felonies. Divorce with its attendant mistrust, disappointment and outright hate between the parties has jaded the perceptions of judges, court personnel and those who investigate child abuse allegations which arise in the context of custody and visitation cases. This is especially true in jurisdictions where "no fault" divorce is available and where child support is tied to the amount of timeshare a child spends with the respective parents. These factors may result in false or exaggerated allegations to better custody status and thus, "poison the well" when other cases, the vast majority of which involve bona fide allegations,³ come to court.

Investigations are Complicated and Time-consuming

The dilemma that people in law enforcement and social services face when these allegations arise is in determining the proper manner to deal with an allegation of child abuse within the context of a matter that is already in or on its way to the family law courts. These cases are very sticky and are the proverbial "tar baby" of a case. They take more time than other cases, and require a great deal of experience to properly assess and investigate.

The difficulties and political pressures that arise in these matters often are the cause of the case's demise. The "system" is overloaded. When there is another system involved, investigators often feel their work is duplicated or not necessary and therefore they do not do a complete or thorough job. Time consuming cases are given short shrift; investigators may take shortcuts causing important information or revelations to be missed. In some instances, complicated cases are ignored entirely.

Protocols have been created for investigation of child abuse for both police and social services. They are used and reviewed by many professionals in all of the disciplines involved in such cases. The problem is that law enforcement and social services investigators often fail or refuse to use these protocols.

All too often, investigators believe that cases involving allegations of child abuse should be handled differently than other cases. Although these cases are the same as any other, once a case is given this distinction, the system begins to fail. In fact, the only difference is that the potential for a false allegation is more readily apparent because of the context in which the complaint arises. Actually, this should make the case easier because the first issue regarding a potential defense has already surfaced. Now, all the investigators need do is follow the path of verification and suspicion to see which facts are supported or refuted. When investigators fail to do this, the system fails.

Investigations of this nature take an inordinate amount of time. To thoroughly investigate

allegations of abuse requires interviews with (not necessarily in this order) the child, the two parents, and the parent's "significant others," as well as teachers, care providers, medical doctors and collateral witnesses who know the child and family in whatever context is applicable. These cases require the review of countless documents along with creating timelines to correlate facts. They require investigative practices that pull an investigator from other tasks and duties, including search warrants, subpoenas for records, surveillance and other time-consuming practices such as file checks and searches.

Evidence and Witnesses

Child abuse cases pose the same problems that all matters of abuse engender—the allegations are difficult to prove. It is hard to secure enough evidence to make a confident decision about what happened, especially when the children are very young. However, nothing less than an independent, complete, thorough and comprehensive examination of the facts will provide the basis for disposition.

Furthermore, witnesses are often uncooperative. Few people want to get involved in these matters because they are either personally familiar with the parties, or they fear the consequences of making statements that could bring them into court.

Victims are often uncooperative. They are afraid they might be in trouble. They are afraid to get one or the other parent in trouble. They may have been threatened (implied or expressed). Once children have had visits with the parties, they may change their account of events to conform to what they think the particular circumstances dictate. Often times children will not repeat what they have told the protective parent,⁴ regardless of what they are told by investigators or how they are approached. When this happens, it is frequently incorrectly interpreted as the protective parent having made up the allegation or having influenced the child to make up the allegation.

Evidence is often disposed of by offenders and "concerned" parties. Sometimes the protective parent destroys valuable evidence. For example, refusing to believe such things about the offending parent,⁵ numerous parents have discovered incriminating pictures of the offending parent involved in sexual acts with the children and destroy the evidence. When they later realize the truth of what has happened, they make the report. This results in their account being discredited and the case being dismissed as fabricated.

Most of the time, there is no medical evidence of abuse. The young body heals itself too quickly to secure this evidence. This, too, discredits or diminishes the believability of the complaining party. When evidence is brought forward, it is often not verified or accepted by investigators who then dismiss it as fabrication or find inappropriate alternative explanations that they take as evidence against the complaining parent.

The following case study provides an example of an investigator who apparently had a set idea in his mind before any facts were gathered and then attempted to simply verify his opinion. It also provides an example of two child protective systems (CPS and law enforcement) failing the child.

Case Study

In a case where physical abuse was alleged during a very contentious divorce, a mother found what was clearly a faint bruise left by a belt across the back of her 3-year-old son when he returned from a one week visit with his father. The bruise was yellow and brownish in color, in the advance stages of healing.

When she asked what happened, her son said his father hit him with a belt. When she called social services, they refused to verify it. When she called the law enforcement agency, the investigator waited for several days until the boy was returned to the father before he verified the bruise. Before the investigator left for the father's home, he called the father and told him that he was coming over to look at the boy because the mother saw a bruise on the back she said was the result of the father's abuse. When he arrived, the father presented the boy with the boy's underpants on. The officer never examined below the shorts. When he didn't see any bruise, he charged the mother with making a false police report and the DA filed the case. It was later dismissed after the DA learned the following.

The mother had taken pictures of the bruise at the time she discovered it. Witnesses testified the bruise was present at the time the mother claimed she saw and photographed it. The mother learned of the bruise on the night the boy returned from his visit with dad when he refused to take off his shirt to take a bath. When the mother removed her son's shirt, she discovered the bruise. When asked if the father's girlfriend had hit him with a belt (the bruise was linear, approximately 1" wide, and wrapped around the side of the back, into the small of the back and on to the buttocks), he replied, "No, Daddy did." (The child later refused to talk about the bruise.)

The bruise was in such a position that it was clearly a strike made by a right-handed person (the father was right-handed) standing above the child and striking the child diagonally. The numerous pictures of the bruise location taken by the mother depicted the impression of the boy's underpant's elastic band on his hips. This gave a reference point, as did a red spot on the boy's back. The officer's photos (only two were taken) showed the boy standing back to the camera, pants hiked up over his waist, at the red mark.

Strategy

An investigation of this nature is like a chess game and the moves of the opposing party must be anticipated. Early in the development of a case, the investigator must try to figure out the potential defenses which could be raised and then seek evidence which refutes these defenses. Unfortunately, the fact that an allegation arises in the context of custody or visitation prematurely discredits the case under the assumption that the allegation is a false report made for the purposes of securing advantage in a custody matter.

Stereotypes

Unfortunately, stereotypes, gender bias, lack of training and understanding about child abuse and unsupported mistrust of the parents who make the reports, interfere with the ability of the courts to fairly and dispassionately resolve these matters. Therefore, it is paramount that law enforcement and social services properly act to resolve these cases before they get to the family courts.

Myths and misconceptions interfere in the decision making process. The most common stereotypes are those that characterize the mother as a "lying, hysterical, histrionic, b____" because she becomes emotional in her attempt to protect her child. The father is characterized as an "innocent, falsely accused individual" because he appears normal, hails from a well-to-do family or background, has a good job or comes from a good neighborhood. Other misconceptions include the belief that "children never lie" (children would never say such things unless they happened), or

that the father *must* be guilty if he is a member of a minority group, has been involved in other crimes or is involved in activities that are not considered "normal." When these cases are improperly discounted or founded, it is the child who loses.

Acceptance of Mistaken Assumptions

When a case has been examined by one part of the child protection system independent of the other, mistaken assumptions are made that interfere in the ability to protect the child. For example, a social worker might take the initial report. The social worker determines that the child is being properly protected by the protective parent. He or she then refers the matter to the police agency and closes the investigation because the child is not at risk. When the parent calls the police, they call the child protection agency and find that the case has been closed. The investigator then makes the false assumption that the case has been fully investigated and discounted. With little further inquiry, the matter is then closed. Even when social services has done some investigation, law enforcement personnel sometimes incorrectly assume that because the social workers were unable to establish a case (which has a lesser burden of proof), there is no case to be had. This is a false assumption because social workers do not have the resources or the investigative experience, and they do not approach a case in the same manner as law enforcement. More importantly, this is an abdication of responsibility. A case should not be discounted merely because someone else says they cannot establish that abuse occurred.

This problem is compounded when a court evaluator has reached a conclusion that no abuse has occurred. Once again, neither law enforcement nor social services should dismiss an allegation of abuse merely because someone else concludes that it did not happen. Clearly the conclusions others make are considerations, but only after all conclusions are examined in detail and compared to other factors, may a decision be intelligently made.

CONCLUSION

Every writer, study, committee and organization that has examined the problems described in this article has concluded that the system currently in place has serious flaws. The repeated failures to protect children adequately in matters where custody and visitation are litigated and child abuse is alleged, cry out for change. People at every level, including the judiciary, need special training to prevent them from making the mistakes and errors that cause the system to fail. Policy and practice needs to be improved to anticipate, accommodate and address the problems these cases present. Until this happens, children, the very people the system is created to protect, will suffer at the system's own hands.

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ENDNOTES

1. Also called the domestic relations or divorce courts in some states.
2. The author would add that in these matters, they also have the equal responsibility to establish, by whatever evidence is available; that a crime did not occur, if in fact that is the conclusion reached. There is no accusation as damaging as one of child abuse and the fate of the accused often rests in the hands of the investigators in these cases. Whenever possible, investigations should be carried out to the fullest to establish a sound conclusion either way.
3. Thoennes, N., & Tjaden, P.G. (1990). The extent, nature, and validity of sexual abuse allegations in custody and visitation disputes. *Child Sexual Abuse & Neglect*, 14(2), 151-163.
4. The "protective parent" is defined as the parent seeking protection for the child. Most of the time it is a mother, but fathers have also experienced the same discrimination when they report the abuse they suspect has occurred.
5. In addition, the protective parent may refuse to believe the fact they have made such a mistake and married a person who would do something like this.

REFERENCES

- Briere, J., et al. (Ed), *The APSAC Handbook on Child Maltreatment*, American Professional Society on the Abuse of Children, Sage, 1996.
- California Attorney General's Office, *California Child Victim Witness Judicial Advisory Committee: Final Report*, Sacramento, 1988.
- California Office of Criminal Justice Planning, *The California Children's Justice Act Task Force: Report for 1996*, Sacramento, 1996.
- Judicial Council of the State of California, Administrative Office of the Courts, *Achieving Equal Justice for Women and Men in the Courts, The Draft Report of the Judicial Council Advisory Committee on Gender Bias in the Courts*, Sacramento, 1990.
- Conte, Jon R. & Shore, David A., *Social Work and Child Sexual Abuse*, The Haworth Press, N.Y., 1982.
- DePanfilis, Diane & Salus, Marsha K., *A Coordinated Response to Child Abuse and Neglect: A Basic Manual*, U.S. Department of Health and Human Services, Administration of Children and Families, Wash., D.C., 1992.
- DePanfilis, Diane & Salus, Marsha K., *Child Protective Services: A Guide for Caseworkers*, U.S. Department of Health and Human Services, Administration of Children and Families, Wash., D.C., 1992.
- Edwards, Leonard P., "The Relationship of Family and Juvenile Courts in Child Abuse Cases", *Santa Clara Law Review*, Vol. 27, Spring 1987, No.2.
- Feller, Jan Nusbaum, et al, *Working With the Courts in Child Protection*, U.S. Department of Health and Human Services, Administration of Children and Families, Wash., D.C., 1992.
- Gatineau, James M., Jr., Ph.D., *Child Neglect: A Guide for Intervention*, U.S. Department of Health and Human Services, Administration of Children and Families, Wash., D.C., 1993.
- Goldstein, Seth, *The Sexual Exploitation of Children: A Practical Guide to Assessment, Investigation, and Intervention*, 2nd ed., CRC Press, Boca Raton, 1998.
- Goldstein, Seth, & Tyler, Toby, "Sexual Abuse Allegations in Custody and Visitation Cases: Difficult Decisions in Divisive Divorces", *The APSAC Advisor*, American Professional Society on the Abuse of Children, Chicago, Vol.11, No.3, 1998.
- Goldstein, Seth, & Tyler, Toby, "Frustrations of Inquiry: Child Sexual Abuse Allegations in Divorce and Custody Cases", *The FBI Bulletin*, July, 1998.

- Koralek, Derry, *Caregivers of Young Children: Preventing and Responding to Child Maltreatment*, U.S. Department of Health and Human Services, Administration of Children and Families, Wash., D.C., 1992.
- Melton, Gary B., Barry, Frank D., *Protecting Children from Abuse and Neglect*, Guilford, N.Y., N.Y., 1994.
- Myers, John E.B., *Evidence in Child Abuse and Neglect Cases*, 3rd, ed., Wiley, N.Y., N.Y., 1997.
- National Center for State Courts, *California Court Improvement Project Report*, Denver, 1997.
- National Judicial Education Program to Promote Equality for Women and Men in the Courts, *Adjudicating Allegations of Child Sexual Abuse When Custody is In Dispute, Facilitator's Manual and Curriculum Text*, American Bar Association and the State Justice Institute, N.Y., N.Y., 1996.
- National Resource Center on Child Sexual Abuse, *Allegations of Child Sexual Abuse in Custody and Visitation Situations. Proceedings of a Think Tank*, Huntsville, Alabama, 1989.
- Nicholson, E. Bruce, ed., *Sexual Abuse Allegations in Custody and Visitation Cases*, American Bar Association, Wash., D.C.,
- Packard Foundation, *The Future of Children: Sexual Abuse of Children*, Los Angeles, Vol.4, No.2, Summer/Fall, 1994.
- Packard Foundation, *The Future of Children: Children and Divorce*, Los Angeles, Vol.4, No.1, Spring, 1994.
- Packard Foundation, *The Future of Children: Protecting Children from Abuse and Neglect*, Los Angeles, Vol.8, No.1, Spring, 1998.
- Pence, Donna & Wilson, Charles, *The Role of Law Enforcement in the Response to Child Abuse and Neglect*, U.S. Department of Health and Human Services, Administration of Children and Families, Wash., D.C., 1992.
- Pence, Donna & Wilson, Charles, *Team Investigation of Child Sexual Abuse*, Sage, Thousand Oaks, 1994
- Peterson, Marilyn Strachan & Urquiza, Anthony J., *The Role of Mental Health Professionals in the Prevention and Treatment of Child Abuse and Neglect*, U.S. Department of Health and Human Services, Administration of Children and Families, Wash., D.C., 1993.
- Rosen, Leora N. & Etlin Michelle, *The Hostage Child*, Indiana University Press, Bloomington, 1996
- Sacramento County Grand Jury, *Final Report 1995-1996*, Sacramento, Ca.
- Sagatun, Inger J. & Edwards, Leonard P., *Child Abuse and the Legal System*, Nelson-Hall, Chicago, 1995.
- U.S. Department of Health and Human Services, Office of Human Development Services, *Child Abuse and Neglect: Critical First Steps in Response to a National Emergency*, Wash., D.C., 1990.
- United States Department of Justice, Office of Justice Programs, *Police and Child Abuse: New policies for Expanded Responsibilities*, National Institute of Justice, Wash., D.C., 1991.
- United States Department of Justice, Office of Justice Programs, *A Research Report: Joint Investigations of Child Abuse*, National Institute of Justice, Wash., D.C., 1993.
- Winner, Karen, *Divorced From Justice*, Regan, N.Y., 1996.
- Zorza, Joan, "Why Courts Are Reluctant to Believe and Respond to Allegations of Incest", in *The Sex Offender: Theoretical Advances, Treating Special Populations and Legal Developments*, Vol. III, Schwartz, Barbara K., Ed., Civic Research Institute, Kingston, N.J., 1999.

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.

There are sound reasons why a child would choose to disclose actual abuse during a highly volatile and divisive custody or visitation litigation.

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 (Thoennes, 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 sug-

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gested 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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Sexual Abuse Allegations in Custody Visitation Cases

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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.

References

- Bulkley, J. (1989). *Think Tank Report: Allegations of Sexual Abuse in Child Custody and Visitation Situations*. Huntsville, Alabama: The National Resource Center on Child Sexual Abuse.
- California Judicial Council. (1990, March). *Achieving equal justice for women and men in the courts: The draft report of the Judicial Council Advisory Committee on Gender Bias in the Courts*. San Francisco: Author.
- Gassaway, D. and Rawlins, R. (1993). The telephone: tool or tort? *APSAC Advisor*, 6, n.3.
- MacFarlane, K., Wasserman, J., Conerly, S., Damon, L., Durfee, M., and Long, S. (1986). *Sexual abuse of young children*. New York: Guilford.
- Schafran, Lynn H. (Ed.). (1996). *Adjudicating allegations of child sexual abuse when custody is in dispute: A model judicial education curriculum*. New York: National Judicial Education Project.
- Association of Family and Conciliation Courts Research Unit. (1988) Summary of findings from the sexual abuse allegations project. In Nicholson, E. and Bulkley, J. (eds) *Sexual Abuse Allegations in Custody and Visitation Cases*. Washington D.C.: American Bar Association.
- Thoenes, N. and Tjaden, P. (1990). The extent, nature, and validity of sexual abuse allegations in custody/visitation disputes. *Child Abuse and Neglect*, 14, 153-163.

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