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**ALLEGATIONS OF SEXUAL ABUSE WHEN
PARENTS HAVE SEPARATED**

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ALLEGATIONS OF SEXUAL ABUSE WHEN PARENTS HAVE SEPARATED

Nicholas Bala & John Schuman

Introduction - The Context

Parental custody and access disputes are emotionally charged and difficult for everyone involved: parents, children and professionals. If there are allegations of abuse, the emotional tension, bitterness and complexity are invariably heightened. These cases are very distressing for parents and children. They are also very challenging for all of the professionals involved: lawyers, judges, child protection workers, police and mental health professionals.

It is apparent that a significant proportion of allegations of child abuse made in the context of parental separation are unfounded. In some cases of untrue allegations of abuse, the accuser and even the child may be deliberately lying. However, it is more common for the accusers to honestly believe what they are alleging. Pre-existing distrust or hostility may result in misunderstandings and unfounded allegations, especially in cases where the children involved are young and the allegations are reported through a parent. Some cases of unfounded allegations may be the product of the emotional disturbance of the accusing parent.

It must, however, also be emphasized that many abuse allegations made in this context are well founded. While there are legitimate concerns about *the possibility* that accusing parents or children may be lying, those who have abused children *usually* falsely deny or minimize their abuse. Abusers are only likely to admit their wrongdoing if confronted by irrefutable evidence.

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

There may be a number of different mental health professionals and social workers involved in a case, with differing levels of expertise and conflicting opinions about the case. It may be very difficult to prove conclusively that abuse either did or did not occur. Once the issue of abuse is raised, a number of agencies with differing mandates may become involved. There is the potential for a criminal prosecution, a child protection application and a parental custody dispute to be proceeding at the same time in different courts, adding to complexity and expense. In practice, however, criminal or child protection proceedings are most likely in cases where there

is the clearest evidence of more serious abuse, and there is less likelihood of a parental family law dispute reaching the trial stage. On the other hand, cases where there is more uncertainty of whether abuse occurred are most likely to be resolved in family law proceedings.

This paper considers how parental separation affects the making of child sexual abuse allegations, with particular emphasis on how separation may contribute to false allegations. We then review the legal issues which arise in this type of case. This analysis begins with a brief discussion of child protection and criminal law issues, but has a primary focus on questions of concern to family law practitioners and judges. The paper concludes by offering some practical advice to lawyers involved in this type of case.

True Allegations of Sexual Abuse After Parents Separate

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

In many cases, particularly of sexual abuse, the abuse may not commence until after separation, with an emotionally needy and lonely parent starting to exploit the child.⁽¹⁾ Although some parents who sexually exploit their children are pedophiles - i.e. have a sexual preference for children - in many of the cases the abuse is more situational than pedophilic.

In some cases abuse may be perpetrated by a parent's new partner and only begin after that the new partner has begun to reside with the parent.

False and Unproven Allegations of Abuse After Parents Separate

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

There are, however, also a significant number of cases in which the allegations of abuse are not true. While in some cases of false allegations there may be a deliberate effort to deceive, more commonly the parent who brings forward the unfounded allegation of abuse following separation has an honest belief in the allegation. As explained by Leonoff and Montague:⁽²⁾

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

Children can often provide accurate and detailed accounts of abuse that they have experienced. However, a child who has been repeatedly questioned by a parent who may have preconceptions or biases about the possibility of abuse, may be quite suggestible and manipulable. Repeated questioning by a trusted adult can alter the memory of a child, especially a young child, to resemble the beliefs of the accusing parent. As a result of leading questions or suggestions from a parent, a child may come to believe that abuse occurred and create descriptions of events that did not occur.⁽³⁾

Studies on the Incidence of True and False Allegations

When considering the research on false allegations of abuse in the context of parental separation, it is important to distinguish allegations that are considered by a researcher to be clearly unfounded (or false), from those that are uncertain (or unproven). In the clearly unfounded category, it is important to distinguish between those that are a result of conscious fabrication (or lying), either to seek revenge or to manipulate the legal system, from those that are a result of misunderstanding or miscommunication, or are a result of an emotional disturbance of the accuser. If there is a deliberate lie, one must also distinguish between cases where it is a parent or the child who is taking the lead in the fabricating.

Much of the research about the incidence of founded and false allegations of child abuse in the context of parental separation is not as conclusive as one might like. Many studies suffer from small or biased samples. One also has to be cautious in using research from other jurisdictions or even from other periods in time, since public and professional attitudes to child abuse have changed over time. Differences in attitude towards child abuse may affect rates of false and founded claims being made.

The nature and context of different studies is important, and may explain some of the apparent discrepancies in the research. Studies that focus on litigated family law cases - those which go to assessment and on to trial - find relatively high rates of false allegations. On the other hand, studies of all cases of parental separation at the investigative stage generally find lower rates of false allegations. The discrepancy may be a result of the fact where an investigation makes clear that the allegation is true, the case is less likely to be pursued through the assessment and trial

stage in family law proceedings. Whereas cases where there is a false allegation are probably more likely to be pursued through family law litigation.

American research: Although cases that raise abuse allegations are extremely challenging, it is important to remember that they are only a fraction of the total number of litigated custody and access cases. One large scale multisite American study reported that on average only 2% of custody and access court files raise abuse issues, though at some sites the rate was as high as 10%.⁽⁴⁾ Child protection and court workers believed that 50% of these cases actually involved abuse, 33% were unfounded and 17% could not be determined.

Some small scale American studies based on assessors' files of contested custody and access cases raising child sexual abuse issues have reported rates of false and unproven allegations of 36% to 79%.⁽⁵⁾

Ontario Incidence Study: The 1993 Ontario Incidence of Study of Child Abuse revealed that 9% of the 42,000 physical and sexual abuse and neglect allegations involved separated parents. Mothers made two thirds of those allegations, while fathers made a third of the allegations.⁽⁶⁾

Of the allegations made by custodial mothers against noncustodial fathers, 23% were considered substantiated by the child protection workers, 27% suspected and 50% unfounded, but only 1.3% were considered to be intentionally false. The police investigated in 30% of the cases, and criminal charges were laid against the suspected male abuser in 7.6% of the cases.

In cases in which the father alleged that the custodial mother had abused or neglected the child, only 10% were considered by child protection workers to be substantiated, 18% suspected and 72% unfounded, while the rate of reports believed to have been maliciously made was 21%. No abuse related charges were laid against mothers.

Thus while custodial mothers made more reports of suspected abuse against noncustodial fathers, the allegations of abuse made by noncustodial fathers were less likely to be considered founded and more likely to be believed to have been made maliciously.

Canadian Family Law Judgements: As a part of a project funded by the Department of Justice, a study was undertaken of reported Canadian Family Law decisions from 1990 to 1998.⁽⁷⁾ This study considered all reported judicial decisions on the Quicklaw databases in Canada in that period that dealt with sexual and physical abuse allegations in the context of parental separation. It dealt only with family law cases; child protection and criminal decisions were excluded.

One hundred and ninety-six cases were identified. Of these, a judicial finding on the balance of probabilities (the civil standard) that abuse occurred was made in 46 cases (23%). In 89 cases (45%) the judge made a finding that the allegation was unfounded, while in 61 cases (35%) there was evidence of abuse but no judicial finding that abuse occurred. In 45 of the 150 cases (30%) where abuse was not proven, the judge believed that it was an intentionally false allegation.

In the 89 cases where the court found that the allegation was clearly unfounded, the accusing party lost custody in 18 cases, though this was sometimes for reasons not directly related to the making of an unfounded allegation of abuse. In only one case was the accuser charged (and convicted) for false reporting (mischief) in connection with the false allegation, though in 3 other cases the accuser was cited for contempt of court in connection with denial of access. In the 51 cases where abuse was proved on the civil standard, access was denied in 21 cases, and supervised in 16. The abuser was criminally charged in only 3 of these 51 cases.

The cases involved 262 alleged child victims (74% of them alleged sexual abuse). Thirty-two percent of these children were under 5 years of age, 46% were 5 to 9 years of age, 13% were 10 or older; for 9% the age was not specified. About 71% of the allegations were made by mothers (64% custodial and 6% non-custodial), 17% were by fathers (6% custodial and 11% non-custodial), 2% were from grandparents or foster parents. In about 9% of the cases the child was the prime instigator of the allegations. This study found that fathers were most likely to be accused of abuse (74%), followed by mothers (13%), mother's boyfriend or stepfather (7%), grandparent (3%) and other relatives, including siblings (3%).

It must be emphasized that this study may not be representative of all cases where abuse allegations are made after parents have separated, as in cases with strong evidence of abuse, the perpetrator is likely not to contest the issue of abuse in family law proceedings. This study may, however, give some sense of the cases that are likely to be reported in the media or receive attention in legal periodicals. It also gives a flavour of the cases in which false allegations are likely to be the subject of family law litigation.

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

Most parents who separate resolve disputes about their children without going to court. However, cases involving abuse allegations are more difficult to resolve by negotiation or mediation and more likely to go to trial. It is apparent from the literature that abuse allegations are made in less than 10% of contested custody and access cases - perhaps in as few as 1% or 2% of cases. Within the group of litigated family law cases that involve abuse allegations, the rate of unproven and unfounded allegations is quite high, probably in the range of 25% to 75%. However, even where the allegation is considered unfounded, the incidence of deliberate fabrication or lying is low, in the range of 3% to 30% of unfounded allegations.

Most unfounded allegations are a product of miscommunication or misunderstanding. If there is fabrication, it is usually by the accusing parent, but in rare cases the child (usually older) may deliberately fabricate a false allegation.

Child Protection Agency Involvement

When a parent believes that their child has been abused, a child protection agency is likely to become involved in the case. Sometimes the accusing parent directly contacts the agency; in other situations the parent may first contact a doctor or mental health professional, who will then be obliged under child abuse reporting laws to report a *suspected* case of abuse.

When a child protection agency begins an investigation of suspected abuse, the agency is likely to want to take steps to ensure the immediate safety of the child. If, for example, the allegation is against an access parent, the agency may go to court under child protection legislation to suspend visitation by the parent suspected of child abuse, but more typically the agency will "request" a voluntary suspension or supervision of access, with the threat of going to court if there is no agreement. The suspected abuser will generally want to appear co-operative, and may be informed by a lawyer that a court is also likely to "err on the side of caution" at this initial stage and hence will "agree" to restrictions or suspension of access.

Child protection agencies are facing resource constraints. This means that investigations regarding children who are not in immediate danger tend to be given a low priority. Children who have been allegedly abused by an access parent may be protected if there is suspension or supervision of access. As such, investigations of suspected abuse by access parents tend to receive a relatively low priority and tend to proceed relatively slowly. Further, they are often complex cases that require careful assessment which results in an investigation that may take months to complete. If the agency concludes that abuse perpetrated by a parent has occurred, the agency generally has legal authority to seek some kind of court order to protect the child.

Although practices vary between agencies, if the parents have already commenced family law proceedings, the agency often decides not to bring a child protection application to court but rather will rely on the accusing parent to seek a judicial determination and protect the child. Indeed in some cases, the agency may encourage the accusing parent to bring a family law application, and may even threaten that if the accusing parent fails to take adequate measures to protect the child, the agency will bring a protection application that may result in the child being placed in agency care. If the agency does not make a court application, the agency workers may still testify in the family law case, or may be asked to supervise access visits by the alleged abuser.⁽⁸⁾ There are, however, cases in which the agency decides to commence child protection proceedings if it has special concerns or if the accusing parent is not pursuing family law proceedings, for example for financial reasons.⁽⁹⁾

If the evidence of abuse is relatively weak, or if the allegations of abuse are less serious, the agency may decide that no further action on its part is warranted. In this situation the accusing

parent may still proceed with the family law case, and protection workers may be called upon to testify, perhaps by the accused parent if the agency workers have concluded that the allegations are unfounded.

Many of the reported Canadian family law cases that deal with separated parents and abuse allegations are cases where there has been some form of involvement by a child protection agency, but for one of the reasons outlined here, the agency is not bringing the matter to court.

Criminal Prosecution of Alleged Abusers

In some cases the accusing parent may contact the police directly, but it is more common for the police to be contacted by child protection workers who have become involved in the case. If child protection workers believe that there is strong evidence of serious abuse, they will inform the police and a joint investigation may be conducted. In some cases of abuse allegations in the context of parental separation, there may be a considerable delay between the initial disclosure and the police being informed, complicating the police investigation. Given the nature of the criminal law or investigatory process, it is only when there is strong evidence of abuse that criminal charges will be laid. It is relatively uncommon for there to be simultaneous criminal and civil proceedings, though clearly this does occur. In the study of reported Canadian family law judgements, in fewer than 10% of the family law cases in which the judge found that abuse had occurred was there an indication that criminal charges had been laid. The 1993 Ontario Incidence Study on Child Abuse found that in only 30% of the cases where child protection agencies conducted an investigation of non-custodial fathers accused of abuse by custodial mothers did the police investigate; only a quarter of those police investigations resulted in charges.

It is much more difficult to prove abuse in a criminal proceeding than in a civil context. For a criminal conviction, there must be proof beyond a reasonable doubt while a civil case only requires proof on the balance of probabilities. Further, the criminal rules of evidence and the *Charter of Rights* may exclude evidence in the criminal proceeding that would be admissible in civil child protection or family law proceedings. There is, for example, much more scope in a civil case for the admission of hearsay evidence about a child's out-of-court disclosures of abuse.

Judges in criminal cases are generally aware of the dynamics of parental separation. When they consider the rights of an accused, they are likely to be sensitive to the *possibility* that allegations are fabricated or exaggerated. It is not uncommon for a judge in the criminal trial to acquit the accused, but emphasize that this is being done because of the high criminal standard of proof and to express concerns that the child may well have been abused by the parent.⁽¹⁰⁾

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

permitted by the order of a family law judge. The *Charter of Rights* guarantees that a criminal trial will be held within a reasonable time. This means that a criminal trial will often be held before civil proceedings are fully resolved.⁽¹¹⁾

If there are simultaneous criminal and family law proceedings, the person accused of abuse will often have separate lawyers for each proceeding, though it is highly desirable for these two lawyers to communicate and coordinate their efforts.⁽¹²⁾ Defense counsel in the criminal case will generally be very reluctant to allow a person charged with a criminal offence to testify in a civil case that deals with the same issues, and will generally want any civil proceedings adjourned until the criminal case is resolved. If the accused files an affidavit or testifies in the civil case, for example for a interim access application, the Crown prosecutor may use any inconsistencies between that affidavit and testimony in a later criminal trial to impeach the credibility of the accused.⁽¹³⁾ Similarly, if the accusing parent testifies in the criminal trial, any inconsistencies between that testimony and evidence in a later family law trial may be used to impeach the credibility of that person in the civil case.

If the accused is convicted of abuse in the criminal trial, a judge in a later family law trial is likely to take the criminal conviction as very strong or even conclusive evidence that the abuse occurred.⁽¹⁴⁾ At least in theory, the fact that a person abused a child is not determinative of whether it is in the "best interests" of the child to lose contact with the perpetrator. However, in practice if the accused is convicted of child abuse related offence in a criminal trial, there is little likelihood that there will be any family law hearing on custody or the fact that abuse occurred, and the convicted abuser is likely not to seek visitation rights to the child.

The fact that an alleged abuser is not charged or is tried and acquitted in criminal court is not binding on a judge in a civil proceeding. It is not uncommon for an alleged abuser to be acquitted in criminal court and then have the issues of abuse relitigated in the context of a family law trial, where the rules of evidence and the standard of proof make it easier to prove that abuse occurred. Sometimes the criminal charges against the alleged abuser are dismissed due to a violation of his rights by the police or courts under the *Charter*; this type of dismissal does not prevent the judge in civil family law proceedings from considering the abuse allegation.⁽¹⁵⁾ Further, even if there is no judicial finding of abuse, in either the criminal or the family law proceeding, there may be other concerns about the parenting capacity of a person acquitted in criminal court that lead to a denial of custody.⁽¹⁶⁾

While a criminal conviction for child abuse will often result in the termination of access, a judge in a family law case must still consider whether it is in the "best interests" of a child to continue or resume contact. Children who have been sexually or physically abused by a parent will often feel an attachment to that parent, despite the abuse. A family law court may allow access by a convicted abuser if it is satisfied that this is in the child's best interests. The judge should be satisfied that the children will not be at risk, which may require supervision (especially at first) and evidence of rehabilitation. The judge should be satisfied that the visits will actually promote the welfare of the child, and not simply allow access based on some notion of parental rights.⁽¹⁷⁾

If the Crown withdraws the criminal charges or the alleged abuser is acquitted , there may be a tendency for some accusing parents or others involved in the case to accept this criminal finding

for civil purposes as well. The alleged abuser will often feel a psychological boost from the criminal acquittal or the Crown's decision not to proceed with charges. Indeed in some family law cases the judge has granted interim access to an alleged abuser, taking account of the fact that the police decided not to lay charges.⁽¹⁸⁾ However, in light of the different types of proceedings, it seems inappropriate for a family law judge to place much weight on the decision of the police not to charge or on a criminal court acquittal.

Family Law Proceedings

All federal and provincial family law legislation in Canada requires that custody and access disputes between parents must be resolved on the basis of a judicial assessment of the "best interests" of the child. Newfoundland is the only province with legislation that specifically refers to abuse as a factor in custody or access cases.⁽¹⁹⁾

Despite the absence of explicit legislative mention, when an abuse allegation is made, this will generally become a central focus for the parents and the court. Testimony from various mental health professionals, social workers and assessors is often very important in these cases. However, their testimony is by no means determinative. In cases that are most likely to be litigated, professionals and experts may disagree about whether abuse occurred.

Interim Access

It is apparent from the reported case law that when there is an allegation of abuse, especially sexual abuse, most judges will tend to "err on the side of caution" after the allegation is made and pending a full hearing in determining interim access.⁽²⁰⁾ At this interim stage there is little opportunity for the accused parent to challenge the allegation. However, there are a few reported cases in which judges have decided that even at the interim stage the evidence to support the allegation is so weak that unsupervised access may continue.⁽²¹⁾ Judges are generally prepared to suspend unsupervised access at this stage if there are "real concerns" about abuse, without an actual finding on the civil standard of proof that abuse has occurred.⁽²²⁾ In such a situation a court will generally only allow supervised access, or if this is not possible, will terminate access pending a trial.

It now appears to be accepted that if there are reasonable grounds to believe that a non-custodial parent has been abusing a child during access visits, a custodial parent has the right, and perhaps even the duty, to suspend access until the allegation can be investigated or the matter brought to court for at least an interim hearing. If a child protection agency is involved, the agency will usually advise the immediate suspension of access pending full investigation.⁽²³⁾

Interim hearings are generally decided on the basis of affidavits from parents and any investigators or others who have been involved in the case. It is difficult for an alleged abuser to challenge the validity of an accusation at this stage.

In one British Columbia case, the judge at a trial recognized the unfairness to the father that arose from the mother making unfounded allegations of sexual abuse and the resulting very limited supervised access that he had pending trial. Nevertheless the judge felt that this had been the proper course of action under the circumstances.⁽²⁴⁾

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

Clearly, reducing delay in the investigations and court hearings would help to reduce the unfairness to the wrongly accused parent. It would also ensure that the children do not suffer from the inappropriate loss of a relationship with the wrongly accused parent.

Frequently the alleged abuser will be advised by a lawyer to consent to supervision of access on an interim basis, even if the allegation is unfounded, so as to minimize the possibility of further allegations and to demonstrate appropriate concern for the child.⁽²⁵⁾ While it is understandable that alleged abusers find access restrictions frustrating, especially in cases where the allegation is ultimately not proven, it also understandable that judges will not take a risk with the safety of a child. Counsel representing a person against whom an allegation is made will want to try to ensure that the most generous access possible is maintained pending trial, with whatever supervision that can be arranged that is satisfactory to the court.

The Standard of Proof: Balance of Probabilities or Is a Real Risk of Abuse Enough?

Canadian judges are not consistent in family law trials involving abuse allegations about the issue of the burden of proof and how to deal with uncertainty. Most judgements require that the person making the allegation prove to the court that it is more likely than not that the abuse occurred - the civil standard of proof or proof on the balance of probabilities.⁽²⁶⁾ Some cases, however, focus on the issue of the "best interests" of the child, and take account of situations where there are "serious concerns" about abuse, but the judge is unable to make a clear finding that abuse has occurred. Judges taking this approach may decide to terminate all contact if the child appears to fear the alleged abuser. If the child seems comfortable with the alleged abuser and resources are available, supervised access may be permitted.⁽²⁷⁾ In some cases the judge

adopts this lower standard, but concludes that even at this lower standard of proof there is insufficient evidence to conclude that there is a "real risk" to the child of abuse by the accused parent and allows unrestricted access.⁽²⁸⁾

A Manitoba decision, *Y.S. v. W.B.*, illustrates a judicial response to uncertainty about how to assess allegations of abuse. The case involved a three year old boy, whose parents never cohabited but whose father had access rights. The mother became concerned about improper sexual conduct during the father's access visits. She based her concerns on observations of the child's sexualized behavior, and on disclosures made to her and to a child psychologist to whom she sent the child. At trial, the court admitted the child's hearsay evidence, as related by the mother and psychologist, concerning improper exposures to male genitalia during access visits. It was unclear from this evidence, however, whether the acts were committed by the father or his friend. The judge observed:⁽²⁹⁾

This is a very unsatisfactory state of affairs.

The father appears to be an intelligent, responsible, and loving father, with an unblemished record in the community. There is nothing about him which would raise the suspicion of child molestation. Unfortunately, experience has shown over the years that many persons clearly shown to be child abusers have these same attributes. In short, one of otherwise exemplary character may yet, in fact, be a child abuser. There is simply no way to tell. This, unfortunately, leaves an innocent parent in a horrendous situation. He cannot prove he is innocent. It leaves the court in a very difficult position as well. To grant access in such cases may be the wrong decision if, indeed, there has been abuse. If so, the child is clearly put at great risk of serious harm. On the other hand, to refuse access may also be the wrong decision if the father is indeed innocent. The consequence to the child will also be harmful in depriving him of a relationship with a good and loving father.

The governing principle here is to do what is in the child's best interest, not what serves the interests and needs and rights of the parents.

The judge concluded that there was insufficient evidence to terminate the father's relationship to the child, but enough evidence to require that further access visits were to be supervised, either by a child care professional or by another adult acceptable to both parties.

Founded Allegations

About one quarter of the reported family law cases from 1990 to 1998 that dealt with allegations of abuse in the context of parental separation resulted in a clear finding by the trial judge that the child had been abused by the alleged perpetrator. The portion of true allegations of abuse in the context of parental separation that is reported to investigators is undoubtedly higher than this, as the cases that are litigated in the family law context are more likely to be unfounded, or to have weak evidence of abuse.

In some cases the court will conclude that not all of the allegations of abuse were proven, but sufficient abuse was proven to terminate or curtail parental contact. In *E.H. v. T.G.* there was some expert testimony to support the mother's claim that the two children were subjected to physical and sexual abuse during access visits with the father, though one of the children, then aged 8, testified that the father had not sexually abused the children. The trial judge allowed unsupervised access. The Nova Scotia Court of Appeal ruled that there was sufficient evidence of physical and emotional abuse during the visits that access should be terminated, even though the sexual abuse was not proven.⁽³⁰⁾

Though a finding by a judge that an allegation of abuse is founded will often result in a termination of access, or closely supervised access, in some cases a judge may allow unsupervised access even after making a finding that abuse occurred. Unsupervised access has been allowed when the judge is satisfied that the child will not be at risk in the future. Judges recognize that even children who have been abused often want to have some contact with the parent with a history of abusive conduct towards the child. Unsupervised access is most likely if the parent has recognized that he has been abusive and sought treatment, and if the child is older and is likely to report any inappropriate parental behavior.⁽³¹⁾ In some cases the abuser is a person who resided with a parent, like a mother's boyfriend or an older step child, and the court may allow the parent to have access if satisfied that the perpetrator will not be in the house while the child visits.⁽³²⁾

Unfounded Allegations: Misunderstanding, Fabrication or Mental Disturbance?

There is a range of circumstances that may lead a parent to make of an unfounded allegation of abuse in the context of parental separation. The situations of unfounded allegations can arise when: 1) allegations are made in the honest but mistaken belief that abuse has occurred, often due to some misunderstanding or misinterpretation of events; 2) allegations are made knowingly with the intent to seek revenge or manipulate the course of litigation; 3) allegations are made as the result of an emotional disturbance of the accuser. It may be difficult to determine which of these factors, or what combination of factors, resulted in the unfounded allegation being made. One must also remember that there are cases where the allegations are in fact true but where a judge has made a finding that the allegation was not proven.

In the majority of cases of unfounded allegations of abuse the accusing parent has an honest but erroneous belief that the child has suffered some form of abuse. For example, the allegation may arise from misinterpretation of a young child's answers to questions about having red genitalia after a visit. A unfounded allegation may also arise from a misunderstanding about innocent conduct, such as parental nudity or bathing with a young child.

Consider the British Columbia case of *K.E.T. v I.H.P.*⁽³³⁾ where the mother's concerns about possible sexual abuse began when the three year old girl returned from her father and was "very upset." The child also reported that she had showered with her father, though this did not appear to disturb the child. The mother, who was in the process of dealing with her own experiences as a

victim of childhood abuse, began to question the young child about whether her father had ever given her a "bad touch" and the child apparently pointed to her vagina. The mother contacted the child protection agency and the police who began an investigation. The father's contact was immediately reduced from shared custody of the two children (the girl and her older half brother) to very limited supervised access. The mother was genuinely concerned that the children had been sexually abused; the children clearly identified with the mother and began to tell investigators that they did not want to see the father (the step father to the boy). Various mental health professionals and physicians became involved. Most of them concluded that the children had not been sexually abused, although the older boy, then about eight, eventually made some vague "disclosures" that his step father may have touched his penis when he was three or four.

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

In some cases the judge will conclude that the accusing parent was intentionally making a false allegation, as occurred in one Manitoba case, where the judge concluded.⁽³⁴⁾

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

In theory a parent who *knowingly* makes a sworn statement that contains a false allegation of abuse could be prosecuted for an offence such as perjury. If the accusing parent knowingly makes a false report to the police, there could be a charge of mischief or obstruction of justice. However, such prosecutions are very rare.⁽³⁵⁾ This is at least in part because the falsely accused parent is often so emotionally exhausted by the end of the family law process that police are rarely contacted about the possibility of laying charges. Further, even if the police are contacted, there is real difficulty in proving on the criminal standard that the accusing parent was *aware* that the allegation was false when it was made.

In extreme cases, a parent may recover damages for slander from a parent who made false allegations of sexual abuse.⁽³⁶⁾ It is also theoretically possible for a falsely accused parent to launch a civil suit for malicious prosecution against a person who knowingly made a false report

to the police that resulted in a criminal prosecution, but there are no reported Canadian cases of such suits in the context of parental separation.

Not infrequently a custodial parent who falsely accuses the access parent of abuse will interfere with access even after a judge concludes that the allegation is unfounded, which may result in contempt proceedings.⁽³⁷⁾ The use of civil contempt proceedings to enforce access can be a cumbersome and expensive process judges only make a finding of contempt and the impose of a sanction like jail as a last resort.

There are a number of cases in which it is apparent that the accusing parent is suffering from some form of emotional or mental disturbance that results in the making of an unfounded allegation. In some of these cases a mental health professional will testify about the accuser's mental disturbance. In some (but certainly not all) cases this may be related to that person having been abused as a child. For example, in one British Columbia case the custodial mother terminated the father's access and made sexual abuse allegations . Both the police and child protection services investigated and found the allegations to be without substance. The father gained interim custody while the mother continued to make the allegations in the local media and court. The mother was seen by a number of mental health professionals. They included a psychologist, retained by the lawyer appointed for the child, who concluded that the mother was suffering from a "delusional disorder." The judge terminated the mother's access, commenting:⁽³⁸⁾

For the past two years, the defendant [mother] has persisted in allegations that S. [the child] has been ritualistically abused by a cult or occult group. Extensive investigations have proven those allegations to be unfounded but the defendant, who has been diagnosed as suffering from a delusional disorder, continues to assert repeatedly... that S. has been abused.

In some cases the accusing parent's mental state may affect her perception of reality, so that it is not clear whether an unfounded allegation is being made honestly, manipulatively, or as a result of mental disturbance. For example, in one Ontario case, a bitter, protracted custody litigation went on for three years between parents who were both physicians. The case centered around the mother's sexual abuse allegations. Although the young child made some "disclosures" of sexual abuse to investigators, it became apparent that these were a result of her mother's influence. The allegations were thoroughly investigated by child welfare workers, the police and the Suspected Child Abuse and Neglect Team at the Hospital for Sick Children in Toronto. All of these agencies concluded that the allegations were unfounded. There was, however, support for the allegations from some less experienced mental health professionals, including the mother's therapist. The mother's therapist purported to conduct her own "assessment" and concluded that the child had been abused. Justice Janet Wilson rejected the allegations and concluded that the mother was "an emotional, at times irrational person...she has exaggerated, dramatized and modified her evidence to adjust to her reality. This adaption may be conscious, unconscious or a combination of both."⁽³⁹⁾ The child had spent nine months in a foster home during the proceedings. In the end, custody was awarded to the father with supervised access to the mother.

In most child related litigation judges usually do not follow the ordinary rule of civil litigation of ordering the unsuccessful party to pay at least a portion of the legal costs of the successful party.

However, in cases where a judge believes that a parent has deliberately made a groundless allegation for the purpose of gaining a tactical advantage in family litigation, the judge will sometimes order the accusing parent to pay at least a portion of the legal costs of the parent who was unfairly accused of abuse. Judges are most likely to do this if the accusing parent has proceeded to trial in the face of clear professional advice that the fears of abuse are groundless. Judges are also likely to order costs if accusing parent appears to have manufactured evidence. [\(40\)](#)

Making an Unfounded Allegation - Effect on Family Law Decisions

Some lawyers and advocates for women worry that the courts may "punish" accusers if an allegation of abuse is made which the judge does not accept. [\(41\)](#) Of particular concern is that a custodial mother may lose custody if she makes an allegation of abuse against an access father which is not proven in court. There are some reported cases where judges have suggested that a custodial parent who makes an unfounded allegation is by that very act harming the child and should therefore lose custody. For example, in one Ontario case the judge commented: [\(42\)](#)

it is also my opinion that if the allegations of abuse are determined to have been unfounded, then the raising of these allegations by the accuser parent are in themselves the ultimate abuse by that parent against the child, for it spoils or at least shadows, the future relationship that child has with the now proven innocent parent.

There is an understandable concern that this type of judicial response may discourage parents from bringing forward valid concerns of abuse for fear that they might not be able to prove them, and that parents who make true allegations which are not proven in court may be unfairly punished for bringing these allegations to the attention of the authorities.

While these are legitimate concerns, it would appear that most judges take a sensitive and contextual approach to cases where there are abuse allegations that are not proven. Where an allegation of abuse is rejected by a judge, the most common response is to then proceed to a "best interests" assessment. That assessment considers the accuser's motive in making the allegation, the reaction of the children to the allegation, and whether the accuser can maintain a positive relationship with the child and the other parent.

In a majority of reported cases where a judge finds an abuse allegation by a custodial parent to be unfounded, the accusing parent continues to have custody. [\(43\)](#) Although in some of these cases the judge warns the accuser that if she persists in making unfounded allegations of abuse, custody might be varied. Those cases in which a judge is most likely to reverse custody (or terminate access if the allegation was made by an access parent), are ones where the accuser appears to be suffering from an emotional disturbance that contributes to the making of the allegation, or appears to be so hostile towards the wrongfully accused parent that the children would suffer.

An example of a case where the accusing parent lost custody is the Ontario decision of *Ross v. Aubertin*.⁽⁴⁴⁾ Following separation and the establishment of a joint custody regime for a young girl, the mother repeatedly made allegations of physical and sexual abuse against the father. She made the allegations to doctors, who could find no evidence to support them. The doctors began to have concerns about the effect on the child of relatively intrusive medical examinations and about the mother's open discussion of her allegations in the presence of the child. Assessors from the Family Court Clinic expressed similar concerns and concluded that the father was more "child focused and more likely to promote a positive relationship with both parents." Counsel for the child expressed "great concerns about the [lack] of insight of a parent who would continually make these false allegations and not be apparently aware of the risk to the child." The judge terminated the mother's custody and awarded custody to the father, with reasonable access to the mother.

In some cases, it is the access parent who makes the unfounded abuse allegations. In *D.F. v A.F.*⁽⁴⁵⁾ after the parents separated, the mother was feeling great stress and consented to the father having custody. Over the next few years the mother made several unfounded complaints to the child protection authorities and police about abuse by the custodial father. There was considerable difficulty with access. On one occasion, the mother assaulted the father's new partner in the presence of the child, and invited the child, then aged five, to join in the attack. The mother was criminally charged and wanted the boy, then aged five, to testify in the criminal case, though the Crown prosecutor prevented this. The mother regularly tried to involve the child in her disputes with the father. She showed the child all the court papers and questioned the child about his meetings with the Children's Lawyer. In the family law proceedings the judge referred to the mother's "harassment" of the father and step-mother, and expressed concerns about the "outrageous" conduct of the mother and her failing to recognize the harm caused to the child by the repeated investigations arising from her accusations. The judge nevertheless allowed the mother to have access on alternate Saturdays, supervised by her own mother, as well as ordering that the child should receive counseling. In some cases the non-custodial parent makes repeated unfounded allegations that result in intrusive assessments and investigations. These parents cause real harm to their children and demonstrate an insensitivity to the interests of the children and a manipulative personality. In such cases a judge may well suspend access rights to the accusing parent.⁽⁴⁶⁾

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

Dealing with the Uncertain Outcome

No matter how careful the investigation and assessment, there will be cases in which judges, professionals and parents will have to accept that there are *reasonable suspicions of abuse*, but

not sufficient proof to convince a court. Learning to live with uncertainty may be a difficult aspect of some of these cases.

It is often possible to take steps to protect the child against the *possibility* of further abuse without completely terminating contact with a *suspected* abuser. This may be done, at least for a time, through supervision of access, first in a neutral setting and perhaps eventually in the home, provided that the supervisor is a person committed to the welfare of the child.⁽⁴⁷⁾ In some cases concerns about physical or even sexual abuse may be a result of inappropriate parenting as opposed to a desire to exploit a child; in such cases the court may order counseling or education of the parent if appropriate.⁽⁴⁸⁾ A long term plan to ensure the safety of the child may include therapy by a skilled neutral professional, who can both provide support for the child after the stresses of litigation and monitor for possible abuse. In some cases educating the child about inappropriate touching and the need to report is useful, though it must be recognized that in some cases the children may be too young or otherwise unable to protect themselves.

There are also cases in which the judge determines that the allegation of abuse is unfounded and the accusing parent, who is unwilling to accept that conclusion, "goes underground" rather than expose the child to the prospect of further abuse. In some cases the abducting parent may be correct and the judge was indeed wrong to have concluded that abuse did not occur.⁽⁵⁰⁾ However, in other cases the abducting parent may be the one who is wrong. That parent may be suffering from some form of emotional or mental disturbance, perhaps a consequence of her own history of abuse.

Child Takes a Leading Role in Making a False Allegation

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

There are, however, a few reported cases of false allegations where the child is taking the lead in making the allegation. In these cases the child repeats the statements to investigators or even in court, but the judge ultimately concludes that the allegations have been fabricated by the child. These relatively rare cases may involve older children, often preadolescent or adolescent girls, who may be manipulative or emotionally scarred by the process of separation. In some cases the child may be subtly encouraged by a parent to make these false allegations. In other cases the false allegation may arise from a child's desire for revenge against a father who has left the home,⁽⁵¹⁾ or from a desire to remove a person, such a stepfather, from the child's life.⁽⁵²⁾

In the British Columbia case of *G.E.C. v M.B.A.C.* ⁽⁵³⁾ the parents separated when the two girls were very young. After an initial trial in which the mother made allegations of sexual abuse that were not proven, the mother had custody of the two girls and the father had generous access. The litigation had been very stressful resulting in the girls seeing various counselors. The older girl, in particular, became upset when the father began to live with a new partner and announced plans to marry her. About two years after the first trial, when she was about 8, the older girl reported to her mother that during an access visit the father had slid his hand down the back of her trousers into her "bum hole." The disclosure was reported to police and social services, and a psychiatrist who had been working with the children carried out an assessment. The investigators and psychiatrist concluded that the allegation was unfounded, with the psychiatrist noting that the child reported the allegation without emotional affect and could give no context or details. The child's psychiatrist concluded that the girl was the "central player" who was attempting to manipulate her father, although the mother was "only too willing to accept what [the child] says at face value." In a 1995 trial Madame Justice Newbury concluded that the allegation was unfounded and awarded custody to the father. She awarded the mother limited supervised access and made a recommendation for counseling for the children. The change in custody was not on the basis of the "fault" of either party, but rather because of the mother's lack of parenting skills and hostility and the "psychological damage" suffered by the girls while in their mother's custody.

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

The Role of Therapists in Making False Allegations

It is apparent that in some cases a therapist, counselor or other professional, like a shelter worker, ⁽⁵⁴⁾ has had a critical role in the making of a false allegation of child abuse. In some cases these professionals led the accusing parent to misinterpret statements or behavior of the child. Typically these therapists are acting in a professionally inappropriate fashion, and outside their area of expertise.

The problematic role of a parent's therapist is most obvious when that professional comes to court and testifies about the child's condition. Less obvious, but also problematic, are cases in which a therapist may be inappropriately encouraging a parent to make an unfounded allegation. In addition, there are cases involving abuse allegations in which the courts have ordered the accusing parent's therapist to disclose records related to the therapy for possible use in the custody case. ⁽⁵⁵⁾

In *M.K. v. P.M.* ⁽⁵⁶⁾ the mother alleged that the father had sexually abused their six year old daughter. Child protection, police and experienced medical investigators all concluded that the

allegations were unfounded. They felt that the child's "disclosures were a result of the mother's manipulation and suggestions to the child." However, two mental health professionals testified to support the mother's allegations. Both had been involved in a therapeutic relationship with the mother. One had been the mother's therapist for over two years. Neither therapist had interviewed the child or the father. They nevertheless came to court to critique the work of the independent assessors and investigators, and to express their "professional opinion" that the mother did not "consciously or unconsciously" suggest anything to the child. In rejecting their evidence, Madame Justice Janet Wilson commented:

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

In some cases it is the child's therapist who has become inappropriately "allied" with one parent in supporting or even inducing unfounded allegations of abuse. In *D.A.B. v J.J.K.*⁽⁵⁷⁾ there was ongoing difficulty between the parents of a four year old child over access, including concerns by the mother that the father was drinking alcohol during visits. The mother reported to the police and child welfare workers that the child told her that: "Daddy pee-peed in my mouth" and "Daddy punched me." The child was interviewed by investigators three times but was non-communicative and made no disclosure. However, on the basis of the mother's statements the child was referred for counseling. In addition the mother stopped allowing access. After several months without seeing his son, the father began court proceedings to obtain access. As soon as the mother received the court documents, she again contacted the child welfare authorities and said that her son was ready to talk.

A videotaped forensic interview was conducted at the offices of the child protection agency, with the mother present and the therapist taking the lead in conducting the interview. The child was repeatedly asked leading questions. However, the child was still unable to provide any contextual details, or to say what occurred before or after the alleged abuse. At one point in the interview he said to his mother: "You told me it was Daddy who did that." Later the boy said: "He didn't do anything else, right Momma?" Throughout the interview the therapist clearly reinforced the mother as the source of goodness and the father as the problem. The child accurately stated that the father is a stranger since the boy had not see him for almost eight months. Madame Justice Benotto rejected the allegations of abuse, and ordered a schedule of access, starting with short visits progressing towards overnight visitation. The judge believed that the child had been coached by the mother into making the "disclosures." The judge was also highly critical of the child's therapist, who had testified at trial and recommended no access, despite the fact that the therapist had never met the father or any members of his family. The therapist had told the mother that there was no need for a court ordered independent assessment, since nothing would be added to her opinions. The judge criticized the child's therapist for her "lack of objectivity" and "fundamental misunderstanding... of the respective roles of therapist, investigator and assessor."

When professionals demonstrate the most obvious and serious professional bias and incompetence, they may face civil liability for their negligence. A few such cases are discussed

below. More commonly, their involvement does not entail civil liability, but it causes needless anguish and expense to the family.

It is apparent that most professionals who work with abuse cases are sensitive and aware of the complexity of such cases. There are cases where professionals may have a legitimate difference of opinion about whether abuse occurred. Further, depending on their professional role, some professionals have a legitimate role of support or even advocacy for an accusing parent or child. There are, however, some professionals who may have their own psychological or political "agendas." They become inappropriately "enmeshed" in their clients' lives.

Children's Evidence in Family Law Cases - The Admission of Hearsay Evidence

It is quite rare for children to testify in family law cases. Judges recognize the emotional stress that will inevitably arise if the child is forced to testify in court, and openly "take sides" with one parent against the other.

In most family law cases judges receive hearsay evidence about the child's out-of-court disclosures of alleged abuse to individuals such as parents or professionals like social workers or police officers. In some cases one of the parties will introduce a videotape of an investigative interview with the child.⁽⁵⁸⁾ While it is desirable to have this type of record of the child's out-of-court statements, it is not necessary to have this type of evidence for the court to hear about the child's out-of-court statements.

Relatively few family law cases discuss the legal basis for the admission of the child's hearsay evidence. The decisions that consider the issue usually cite the Supreme Court of Canada decision in *R. v. Khan*,⁽⁵⁹⁾ for the general principle of admission of hearsay if it is "reliable" and "necessary." The circumstances of disclosure are often considered sufficient to give the statements an element of "reliability." "Necessity" arises from the desire to prevent the emotional harm that might arise if the child were required to testify, or the court may consider the child too young to be competent to be a witness. These factors can create the "necessity" to rely on hearsay disclosures.⁽⁶⁰⁾

In some cases the judge will admit testimony about the child's out-of-court disclosure "not for its truth," but just as evidence of the child's "state of mind," for example as revealing fear of the alleged abuser.⁽⁶¹⁾ If a person is testifying as an "expert witness," whatever the child told them may also be admissible as the basis of their opinion evidence.

Judges feel the burden of making decisions about abuse allegations. As a result they generally take a flexible approach to evidentiary issues, wanting to receive as much information as possible before making such a difficult decision. There are, however, a few reported cases in which the court ruled that statements by children made to parents involved in a custody or access dispute are inadmissible as they could not be satisfy the *Khan* requirement that they be "reliable,"

as there was such a potential for the children to say what they thought the parent wanted to hear. ⁽⁶²⁾

Although it is rare, children sometimes testify in family law cases involving abuse allegations. Their evidence is entitled to careful consideration by the court. However, the court should recognize that a child who is testifying may be manipulated or coached into making an unfounded allegation, or into denying a previous true allegation. ⁽⁶³⁾

The Role of Assessors and Experts

Assessors, mental health professionals, police and child welfare investigators play a very important role in the resolution of cases where abuse allegations are made. Few of these cases proceed without some type of "expert" involvement. Indeed in most cases in which serious allegations of abuse are made, there are likely to be a number of professional investigators and assessors involved. One of the difficulties in this area is that some of the assessors, investigators and other "experts" who are involved in these cases lack the experience, skills and knowledge to deal effectively with this type of child abuse case. Many of the behavioral patterns that may be consistent with a child having been abused by a parent may also be consistent with a child suffering from the effects of a high conflict parental separation. Some research suggests that mental health professionals have considerable difficulty in reliably assessing whether young children have been sexually abused based on observing an interview of a "disclosure." ⁽⁶⁴⁾

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

Cases seem most likely to proceed for a family law trial if there is a division of opinion among the various mental health professionals and investigators, or if one parent seems especially hostile or emotionally unbalanced and is ignoring the expert opinions.

Judges in family law cases are generally reluctant to make a decision that is contrary to unanimous expert opinions. However, they will do so if there is a careful critique that demonstrates bias or lack of competence. Lawyers may have an important role in challenging the opinions of some "experts" in court.

In some cases there are divergent expert opinions about whether abuse occurred and the judge must decide which expert opinion to follow. Occasionally, counsel may be able to persuade a judge to discount one opinion on the basis of a lack of expertise with child sexual abuse assessments, or because the professional has been involved in a therapeutic relationship with one parent and hence is not in a position to present an unbiased position about whether or not the child has been abused. ⁽⁶⁵⁾ In some cases the bias of an assessor or investigator may be apparent from the manner in which the professional became "allied" with one parent (often the accusing

parent who is usually the first person to get in contact with an investigator) and the unfair or unprofessional treatment afforded the other parent (often the accused parent).⁽⁶⁶⁾

In some cases the judge must assess the methodology of each of the experts. For example in *K.M.W. v. D.D.W.*,⁽⁶⁸⁾ the judge rejected a mother's allegations of inappropriate sexual conduct and permitted the father of a four year old child to have unsupervised access. The court severely criticized an assessment conducted by a psychologist, which was characterized as a "blitzkrieg assessment," because it was conducted in 6 hours on one day. The psychologist, who had initially been selected with the consent of both parties, asked the child leading questions about the disclosure and relied on his interpretation of the child's play with anatomically correct dolls to come to his conclusion that abuse had occurred. The psychologist ignored the fact that the child also reported that the mother had kissed the child's genital area. The judge preferred the opinion of a child protection worker, who followed the investigative protocol of the Institute for the Prevention of Child Abuse, and rejected the abuse allegation. While the protection worker was not accepted as an "expert witness," the judge gave "her testimony great weight," noting that she had 14 years experience. Her interview with the child, following the Institute protocol, avoided asking leading questions, and included questions challenging the child's story. The protection worker concluded that the child was "highly suggestible" and exposed to "inappropriate sexual material" on television, at her mother's home. The child's original "disclosure" to her mother, that her father "touched her peepee," may have been related to the child's diaper rash at the time.

In some cases a parent has retained an expert to critique incompetent work by a court appointed assessor or by child welfare investigators in order to persuade the court to reject their opinions. In *M.T. v J.T.*⁽⁶⁹⁾ parents were involved in a custody litigation in which the mother alleged that the child had been sexually abused by the father. A child psychiatrist was appointed by the court to conduct an assessment, but he was not an expert in child sexual abuse. The assessor saw the child only once. At the assessment the child disclosed that the father had done "something bad" to her, but the assessor did not pursue this with the child. Instead, he concluded that the child had not been sexually abused because she seemed to play happily with her father during an observation session and spoke positively about her father. After this assessment the child welfare agency conducted its own assessment and two psychologists with expertise in child sexual abuse investigations were retained to critique the first assessment. It became clear that the child was afraid of being alone with her father. In the family law trial the judge was persuaded that the first assessment was inadequate and concluded that the father had inappropriately touched the child in a sexual manner. The father was only permitted limited professionally supervised access.

Litigation involving allegations of abuse is very expensive and many parents lack the resources to retain experts. If court appointed assessors or state paid investigators lack knowledge or skill, or are biased, this may be seriously and perhaps irreversibly prejudicial to the parent and child whose case has been improperly assessed.

It is possible for a child protection agency to be held civilly liable for negligence in carrying out an investigation that results in a parent being falsely accused of sexually abusing his or her child. However, to succeed it is necessary to demonstrate that the agency was both negligent *and* acting in bad faith when it was treating the parent unfairly.⁽⁷¹⁾ An assessor or other mental health

professional who testifies in court cannot be sued in negligence for their testimony. Testimony in court is generally viewed as "privileged" and cannot be the basis for a civil suit. However, if the professional has acted in a professionally inappropriate fashion discipline sanctions may result.⁽⁷³⁾ There may also be situations in which an assessor or therapist is liable for slander if the professional inappropriately circulates unfounded reports of abuse.⁽⁷⁴⁾

Assessing the Validity of Sexual Abuse Allegations

When child sexual abuse is alleged in the context of parental separation, there is rarely a single conclusive piece of evidence that abuse did, or did not, occur. The allegations almost always relate to times when the parent was alone with the child.

There is usually no conclusive forensic evidence; most sexual abuse allegations do not involve penetration and hence there is unlikely to be physical evidence. While a medical examination of a child is usually appropriate in these cases, it is rarely conclusive. Physical symptoms like vaginal irritation and non-specific vulvovaginitis, or rectal irritation or fissures, are common in young children. These conditions are sometimes misinterpreted by parents (or even by inexperienced physicians) as proof of abuse.⁽⁷⁵⁾

Children's statements are significant, but not unproblematic. There are possibilities for misunderstanding by the child, as well as suggestion, manipulation or intimidation by parents, especially if the child is young. An accused parent is likely to have had legitimate reasons for touching the child, and if the child is young, for touching the child's genitalia. An assessment of whether abuse occurred may require the child draw inferences about the parent's intent. This may be very difficult or impossible for a young child to do. In the context of parental separation, the child is likely to have discussed the allegations with the accusing parent, often many times. After these discussions any interview by investigators or assessors suffers from potential problems of "tainting."

A child's sexualized play, genital handling, masturbation or interest in adult genitalia may be evidence of sexual abuse. However, these are not uncommon behaviours in children and may be misinterpreted. Various non-specific behavioural symptoms such as sleep disturbance, regressive behaviour or even fear of or rejection of the suspected abuser may be evidence of abuse. Further, these signs can also likely to be attributable to the stresses of parental separation or other factors.

Many of the founded sexual abuse allegations in this context do not arise out of paedophilia (i.e. a sexual preference for children). Rather the sexual abuse may be a product of an emotionally needy, immature parent who has lost his sexual partner, and hence phallometric testing (sexual preference testing for males) may not be very useful as an exclusionary tool.

Usually investigators and assessors, as well as judges and lawyers, must try to assess all of the evidence to make an often difficult determination. In *J.A.G. v R.J.R.*⁽⁷⁶⁾ Justice Cheryl Robertson

offers a helpful summary of factors for assessing allegations of sexual abuse in the context of parental separation:

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

- 1) What were the circumstances of disclosure - to whom and where?
- 2) Did the disclosure or evidence of alleged abuse come from any disinterested witnesses?
- 3) Were the statements made by the child spontaneous?
- 4) Did the questions asked of the child suggest an answer?
- 5) Did the child's statement provide context such as a time frame or positioning of the parties?
- 6) Was there progression in the story about events?
- 7) How did the child behave before and after disclosure?
- 8) Is there physical evidence that would be available by medical examination? If so, and no medical report has been filed, is there a sufficient explanation for its lack?
- 9) Was there opportunity?
- 10) What investigative or court action was taken by the parent alleging abuse?
- 11) Who provided background information to the experts and investigators, and is it accurate, complete and consistent with both parties' recollections?
- 12) Was there other evidence supporting the allegations of sexual abuse?
- 13) Was the custodial parent cooperative regarding access, or was access resisted on other grounds prior to the allegations and after disclosure?
- 14) Was there harmony between the evidence of one witness and another, and between the evidence of the experts?
- 15) Was there consistency over time of the child's disclosure.
- 16) Did the child use wording in statements which appeared to be prompted, rehearsed or memorized?

- 17) Was the language used by the child consistent and commensurate with the child's language skills?
- 18) Was the information given by the child beyond age-appropriate knowledge?
- 19) What was the comfort level of the child to deal with the subject matter, in particular with respect to the offering of detail?
- 20) Did the child exhibit sexualized behaviour?
- 21) Was there evidence of pre-existing inappropriate sexual behaviour by the alleged perpetrator?
- 22) Was a treatment plan put forth by either parent?
- 23) Was the child coached or prompted?
- 24) Did the evidence of the expert witnesses, as accepted by a trial Judge, support the allegations of sexual abuse?

A proper assessment will normally include interviews with each parent alone, and with each parent together with the child, as well interviews with the child alone. The assessors should have specific training in dealing with allegations of abuse in the context of parental separation. They should be asking the child open-ended non-leading questions about the allegations of abuse. If at all possible, investigative or assessment interviews with children should be videotaped, or at least audiotaped.⁽⁷⁷⁾ Some of the factors that assessors should consider in evaluating abuse allegations include:⁽⁷⁸⁾

The Child:

- In false allegation cases, the child may be more likely to make the allegations only in the presence of the accusing parent, and to "check in" with the parent. In the absence of the accusing parent, the child may appear disinterested or unaffected when describing the allegations, or may have an inappropriate emotional tone. In some cases of false allegations the child may appear to have memorized the disclosure, but this is rare. More commonly the child will be unable to provide the type of contextual or descriptive information about the setting or mental state of the perpetrator that one would expect of a child of that age.
- In false allegation cases there can be a discrepancy between negative attitudes expressed by the child in the presence of the accusing parent and an affectionate and relaxed demeanour in the presence of the accused when the child is free from the accuser's influence. However, there is also a need to be alert to the possibility of "gentle" fondling of a young child who is unaware of its abusive nature and maintains an affection

relationship with that parent. A child should not be interviewed with the accused parent if the child is firmly opposed.

- The child who has actually been abused is more likely to express feelings of self-blame, and quite possibly affection towards the abuser. The child whose unfounded allegation is a result of "alienation" by one parent is more likely to express only hostility towards the alleged abuser;
- In founded allegation cases, the child may have profound distress or deeply disturbed behaviour that will have been apparent before the child disclosed the abuse, as the abuse may have been going on for some time before disclosure. In unfounded cases, behavioural disturbances are more likely to begin only after the reported disclosure.

The Accusing Parent:

- In founded allegations, the accusing parent is more likely to have been initially shocked at the possibility of abuse. This results in an initial degree of doubt and checking with the other parent about the suspected abuse. The parent who is fabricating an allegation is more likely to appear certain that the abuse occurred and to immediately contact the police or child welfare investigators. This parent is likely to be hostile towards professionals who express any doubt that the child has been harmed.
- In unfounded allegations, the accusing parent is likely to present as vengeful and aggressive, or paranoid and hysterical. Parents making false allegations tend to have little awareness of the effects of parental demeanour on the child. The parent may also appear to be unconcerned about the effects of the investigative process on the child, focusing on establishing the guilt of the other parent.

The Accused Parent:

- A parent who sexually abuses his child is likely to have a childhood history of family dysfunction, often of abuse, neglect or violence. Abusers often engage in drug or alcohol abuse. This person is likely to engage in voyeurism or have a fixation with pornography, and to present as aggressive and self-centered.

Representing the Accusing Parent

When an allegation of abuse is made in a custody or access case, it usually becomes a central focus of investigation and litigation. The fact that an allegation has been made will invariably heighten tensions between the parents. Counsel for the accusing parent should warn that parent that the litigation is likely to be especially intense and nasty.⁽⁷⁹⁾ The actions and motivations of accusing parents are likely to come under intense scrutiny. Their mental state and personal history may also be closely examined.

Counsel should advise the accusing parent to leave the determination of whether abuse occurred to independent investigators and assessors. Counsel should caution the client about the need to

focus on the child rather than hostility to the other spouse. If competent professionals support the allegations, the court is unlikely to be negatively disposed towards a parent who shares honest, reasonably based concerns about the child's welfare with the court. The basis for concerns about abuse should be presently fairly and without overstatement to investigators. If the report of abuse by the accusing parent appears to be made in a biased fashion and there is a lack of independent support for the allegations, the court may view the accusing parent as acting inappropriately or as mentally unbalanced.

An important role for counsel is to ensure that any professionals involved are competent in carrying out abuse investigations in the context of parental separation. Some investigators, assessors, social workers or physicians who work with children may lack the training and experience to express a well founded opinion about this complex type of case.

If the case proceeds beyond the initial investigation stage, it will often be helpful to try to get independent legal representation for the child. In Ontario the Office of the Children's Lawyer is quite frequently involved in these highly contentious cases. This lawyer should ensure that all the relevant evidence is before the court, and that the child's needs are being met. The Children's Lawyer can have an important role in helping parents to focus on their child's best interests.

It is important for counsel for an accusing parent to be aware of any investigations carried out by the police or child protection workers. However, there may be limits on the information that can be shared by these investigators with counsel for the accusing parent. If other proceedings are commenced, it will be important for counsel for the accusing parent to liaise with counsel for the child protection agency or Crown, to share information and to discuss scheduling issues. In some cases, the accusing parent may, with the advice of counsel, decide not to pursue family law proceedings if the child welfare agency is prepared to commence proceedings that will adequately protect the child. Counsel for the parent may have a role in persuading the agency to do this. While the accusing parent will not have control of the protection proceeding, these proceedings have financial advantages for the accusing parent. In addition, they may reduce the possibility for the accused parent to argue that the allegations are the result of a "vendetta" by the other parent.

The accusing parent is likely to find any proceedings that raise abuse allegations very stressful, and may need professional support during the process. However, as noted above, if the parent discusses the child's disclosures of abuse with a therapist, the therapist may become a potential witness, and the records of the therapist may be the subject of disclosure.⁽⁸⁰⁾

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

In some cases, counsel for the accusing parent may believe that the evidence of abuse appears very weak and is concerned that the allegations are not supported by investigators or assessors.

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

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

Representing the Alleged Abuser

It is highly stressful to be accused of abusing one's child, and counsel for this parent will also have a challenging role. If the allegation is actually false, the client will understandably feel that he is being treated most unfairly, especially if some of the investigators or assessors appear to be acting in a biased or unprofessional fashion. Passions may be inflamed by the receipt of affidavits or other court documents.

It is important for the accused parent to appreciate that investigators and assessors are usually working to achieve what they perceive to be the child's best interests, and, especially initially, are likely to err on the side of caution. The accused parent should be encouraged to understand the role of these professionals and to maintain a cooperative attitude towards them. In some cases it is appropriate to explore with the client whether some other person could have been abusing the child during visits with the client.

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

Counsel for a parent accused of abuse must try to ensure that any investigations or assessments are carried out by competent professionals who are approaching the case in an unbiased fashion.

If there is a concern that the initial investigation has been conducted in a biased or incompetent fashion, it may be necessary to obtain expert evidence to critique the original investigation.

In some cases it will be helpful for an accused parent to offer to take a polygraph test.⁽⁸¹⁾ Although polygraph results are clearly not admissible in a criminal case, in family cases there is a less stringent approach to evidentiary issues. Judges may admit polygraph results as corroborative of other evidence.⁽⁸²⁾ Even if not admissible in court, polygraph results (or even the offer to take a polygraph test) may also affect how investigators and assessors view a case. The accused may also offer to take phallometric testing. However, this is a weak exclusionary test for sexual abuse within the context of parental separation, since abuse is often more situational than paedophilic. It is also a relatively invasive test.

If criminal proceedings have been commenced, it is important for the criminal defence lawyer and family law counsel to communicate and coordinate their efforts.⁽⁸³⁾ Although these are very distinct legal proceedings, they are interrelated.⁽⁸⁴⁾ Often the criminal proceeding is resolved first, and its outcome can affect the family law case. Further, as discussed above, evidence that is used in one proceeding, can often be used in the later proceeding. Criminal trial counsel should be kept informed about what family law counsel plans to include in an affidavit for a interim access motion. Similarly family law counsel will want to have access to information, and if possible transcripts, of key testimony from the criminal trial.

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

If a family lawyer believes that the client has abused the child, perhaps with the client admitting some of the less serious allegations, the lawyer may face some difficult ethical and tactical decisions. If a client wishes to pursue a course that the lawyer considers harmful to the child, the client may be advised that counsel will not advocate this position and will withdraw from the case rather than advocate a position that would harm the child.⁽⁸⁵⁾

Counsel for the Child

Custody and access disputes where there have been allegations of abuse are especially contentious. It may be very useful to have counsel appointed for the children involved, though this lawyer may also have a very challenging role. An important role for counsel will be to ensure that the best evidence is available for the court. In cases involving allegations of abuse, the evidence should include an assessment of all of those involved by a professional experienced

with this type of case. In some cases counsel for the child will believe that the allegations of abuse are definitely unfounded, or clearly true, and the position to advocate may be relatively easy to determine. In these cases, counsel for the child may have a role in encouraging the parents to accept this position and avoid embittering litigation that may be harmful to the child and make it very difficult for the parents to both continue to be involved in their child's life.

In other cases, counsel for the child, and perhaps the judge, may be uncertain about the allegations, and faced with the cruel dilemma of either restricting or terminating access to a suitable parent or exposing the child to the risk of abuse. In these cases, there should be a long term plan in place to provide support and protection for the child, perhaps involving a neutral experienced child therapist who can meet regularly with the child to deal with safety and other issues. It will usually be appropriate to have supervised access at least initially. That access could start in a neutral controlled setting and then move to the home of the alleged abuser, provided that the supervisor is someone who is committed to the welfare of the child.

It may also be appropriate to have some type of counselling in place for one or both parents, especially if the issue seems to be more inappropriate parental conduct rather than exploitative abuse.

Conclusion

Parental separation cases in which sexual abuse allegations are made are among the most challenging that justice system professionals have to deal with.

There are undoubtedly some incompetent professionals involved in cases of allegations of abuse after parents separate. However, it is also apparent that at least some of the parents involved in these cases are emotionally unbalanced, either before the process starts or as they are dragged through the legal system. Those parents are all too willing to blame others for their own failings. If these parents are not vindicated in court they may be inclined to complain about the lawyers, judges or other professionals involved. This understandably makes some professionals wary of being involved in this type of case, and should make those professionals who are involved handle these cases with special care.

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

There should be more societal support for services that assist in dealing with these difficult cases, such as supervised access. There is also a need for better education and training for the professionals who deal these cases, as well as for more research to better understand the

dynamics and characteristics of these cases,⁽⁸⁶⁾ and to allow professionals to more effectively distinguish between founded and unfounded allegations.

1. See e.g. K.C. Faller, "Possible Explanations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991), 61 *Am. J. Orthopsychiatry* 86-91; and S.P. Penfold, "Mendacious Moms or Devious Dads? Some Perplexing Issues in Child Custody/Sexual Abuse Allegations" (1995), 40 *Can J. Psychiatry* 337-341.

2. A. Leonoff & R. Montague, *Guide to Custody and Access Assessments* (Toronto: Carswell, 1996), p. 357.

3. See Ceci & Bruck, "Children's Testimony: Applied and Basic Issues" (p.713-774) and Goodman, Emery & Haugaard, "Developmental Psychology and Law: Divorce, Child Maltreatment, Foster Care and Adoption (p.775 -874) in William Damon, *Handbook of Child Psychology, Child Psychology in Practice*, vol 4, (New York: John Wiley & Sons, 1998); and Saywitz & Camparo, "Interviewing Child Witnesses: A Developmental Perspective"(1998), 22(8) *Child Abuse & Neglect* 825, at 830.

4. Thoennes & Tjaden, "The Extent, Nature and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes" (1990), 14 *Child Abuse & neglect* 151-163.

5. See e.g. Benedek & Scetky, "Allegations of sexual abuse in child custody and visitation disputes" in Scetky & Benedict eds *Emerging Issues in Child Psychiatry & the Law* (New York: Brunner/Mazel, 1985) 18 cases of which 55% were considered false; Green "True and false allegations of sexual abuse in child custody disputes" (1986), 25 *J. Am Acad. Child Psychiatry* 449-56, 11 cases, 36% were considered false; Yates & Musty (1987), "False allegations in molestations of preschool children", presented at meeting of American Psychiatric Association, 19 cases, 79% could not be substantiated. Faller & DeVoe "Allegations of Sexual Abuse in Divorce (1995), 4(4) *Journal of Sexual Abuse* 1 -25 found a substantiation rate of 72% based on clinical assessments (n = 215), though of the "substantiated (by clinical standards) cases in the study that went to domestic relations court only 45% were also considered by the court to be cases where there was a civil finding that abuse occurred.

6. This Ontario Incidence Study by is discussed at greater length in Bala et al, *Allegations of Child Abuse in the Context of Parental Separation* (Calgary: Canadian Research Institute for Law & the Family, forthcoming 1999)

7. The caselaw study by Schuman & Bala (1999) was undertaken as part of Bala et al, *Allegations of Child Abuse in the Context of Parental Separation* (Calgary: Canadian Research Institute for Law & the Family, 1999), funded by the Department of Justice Canada. It should be emphasized the Quicklaw databases depend on receiving written decisions from judges. Many decisions delivered in Canada are not included in any legal databases. "Less significant" judicial decisions usually do not result in written reasons and do not appear on legal databases; some

judges tend to give only short unreported decisions. These are generally cases that the judge considers to be relatively simple and do not involve complex issues of fact or law. In addition, some judges tend to give only short unreported decisions. This may mean that certain types of decisions are under-represented in the legal databases. For example, in a case where there is clear evidence that a father sexually abused his daughter and consequently he has lost access to that daughter, the result may be viewed as unremarkable and not result in written reasons. These types of cases, where there is clear evidence of abuse, may well be underrepresented in the databases in the study. The Quicklaw databases, however, are one of the most complete set of judgments in Canada. They give a sense of what is happening in the most highly contentious cases that family law judges are called upon to resolve.

8. In some family law cases where there are abuse concerns the court will order that access should be supervised by a child protection agency (see e.g. *Beckett v. Beckett*, [1995] O.J. 2185 (Gen Div.) Kent J.). Though agencies are sometimes willing to do this, they may lack resources. Also there is doubt as to whether a child protection agency can be *legally required* to supervise access unless there is a child protection application; see *Levesque v Levesque* (1983), 54 B.C.L.R. 164 (B.C.C.A.)

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

10. *R v. J.C.P.*, [1998] O.J. 3883 (Gen. Div.); *R .v. B.L.*, [1998] O.J. 2522 (Gen. Div.)

11. If the civil case comes to trial before the criminal case, it is possible for the accused to seek a stay of the civil trial. However, judges are reluctant to grant a stay, especially if this would delay the making of a decision about the best interests of the child: see e.g. *Forbes v. Througnow* (1993), 23 C.P.C. (3d) 107 (Ont. Gen. Div.); for an unusual civil case (not involving abuse allegations) where a stay was allowed see *Gilles v. Eagleson* (1995), 23 O.R. (3rd) 164 (Gen. Div.)

12. See e.g. Todd White, "Spousal Abuse Issues and Their Impact on the Resolution of the Family law Case" and H. Niman & J. Pirie, "How to Deal with Allegations of Spousal Assault in a Family Law Case" in Canadian Bar Association - Ontario, *Family Law Institute*, (Toronto, January 1999). Niman & Pirie suggest that it might also be possible that counsel for an alleged abuser may try to get access to the file of the lawyer for the accusing spouse in the family law case to assist in preparation of the criminal defence. Before allowing production the court would also have to decide whether the accused's right to disclosure and a fair trial should take precedence over the right of the accusing parent to solicitor client privilege in the civil case.

13. Section 13 of the *Charter of Rights* creates a right against self incrimination so that prior affidavits or testimony of an accused in other cases cannot be used *if* the accused fails to testify. However, if the accused does testify in the criminal trial, the prior statements from the family law proceedings can be used to impeach his credibility; see e.g. *R. v. B.(W.D.)* (1987), 38 C.C.C.(3d) 12 (Sask. C.A.); and *R. v. Kuldip* (1991), 61 C.C.C. (3d) 385 (S.C.C.). Counsel in the

civil case may try to get an order to seal the civil trial record until after the criminal case is over; this would prevent any use of the material in the criminal case; see e.g. *Forbes v. Througflow* (1993), 23 C.P.C. (3d) 107 (Ont. Gen. Div.) where such an order was made.

14. In ordinary civil cases judges have held that since the parties to a civil case are not the same as those in criminal case, the criminal conviction is only *prima facie* evidence of guilt. The accused may in theory attempt to relitigate the issue in a later civil trial; *Taylor Estate v. Baribeau* (1985), 51 O.R.(2d) 541 (Div. Ct.). See, however, *D.E. v O.L.*, [1996] O.J. 3136 (Prov Div) which applied the doctrine of "issue estoppel" to prevent the accused from relitigating the issue of abuse after a criminal conviction at a later interim access hearing and terminated unsupervised access. See also *Demeter v. British Pacific Life Insurance.* (1984), 13 D.L.R. (4th) 318 (Ont. C.A.) which held that in some circumstances it may be an "abuse of process" to allow a person convicted of an offence in a criminal trial to relitigate the issue of guilt in a later civil case if the primary purpose of the civil case is a collateral attack on the criminal conviction.

15. *S.S. v P.S.* , [1994] O.J. 995 (Prov. Ct.), Main J.

16. *S.S. v P.S.* , [1994] O.J. 995 (Prov. Ct.), Main J.

17. *M.R.P. v P.P.* (1989), 19 R.F.L. (3d) 437 (N.S.Ct. Ct.), a new trial was ordered when trial judge allowed unsupervised access to a father convicted of sexually abusing the children five years earlier and trial judge satisfied that father was rehabilitated and there was no risk to safety of children. The appeal court held that the trial judge should have not only considered the issue of risk of further abuse but should have also required evidence that access was in the best interests of the children.

18. *Stuart v Stuart* (1985), 32 A.C.W.S. (2d) 53 (Ont.S.C.) per Cork M. In *Bartlesko v Bartlesko* (1990), 31 R.F.L. (3d) 213 (B.C.C.A.), McEachern C.J.B.C. suggested that the fact that no charges were laid is "less than conclusive" but it "was at least a matter that the trial judge was entitled to comment upon."

19. *The Children's Act* R.S.Nfld. 1990 c. C-8, s. 31(3) specifies that the court shall consider the person's history of "violence" towards a spouse or any child when making a determination about whether that person shall have custody or access to a child.

20. See e.g. *S.S. v A.S.*, [1987] W.D.F.L. 897 (Ont.S.C.) per Cork M.; Zarb, "Allegations of Sexual Abuse in Custody and Access Disputes (1994), 12 Can J.Fam.L. 91, at 100; and J. Wilson, "The Ripple Effect of the Sexual Abuse Allegation and Representation of the Protecting Parent" (1987), 1 Can Fam. L.Q. 138, at 160.

21. For examples of cases where the judge concluded at the interim stage that the allegation of sexual abuse was unfounded and allowed unsupervised access, see *Flanigan v. Murphy* (1985), 31 A.C.W.S. (2d) 448 (Ont. S.C.), per Cork M.; and *B.J.A.B. v. K.J.R.* (1996), 21 R.F.L. (4th) 401 (Ont. Gen. Div.) per Aston J.

22. See e.g. *G. (D.) v Z. (G.D.)* (1997), 30 R.F.L.(4th) 458 (B.C.S.C.) per Power M.

23. See e.g. *B.M. v N.G.W.*, [1998] O.J. 297, 36 R.F.L. (4th) 249 (Ont Gen Div); see also comments of L'Heureux-Dubé J. in *Young v Young* (1993), 49 R.F.L.(3d) 117 (S.C.C.).
24. *T. (K.E.) v P.(I.H.)*, [1991] B.C.J. 133 (S.C.), per Prowse J.
25. See e.g. *R.M.C. v. J.R.C.* (1995), 12 R.F.L. (4th) 440 (B.C.S.C.)
26. See e.g. *M.T. v J.T.*, [1993] O.J. 3379 (Prov. Div.). per Hatton Prov. J.; *H. v J.* (1991), 34 R.F.L. (3d) 361 (Sask. Q.B.) Gagne J.; and *R.A.G. v R.J.R.*, [1998] O.J. 1415 (Ont. Fam. Ct.) Robertson J.
27. See, however, *J.A.M. v J.J.B.*, [1995] B.C.J. 1395 (Prov. Ct.) where Auxier J. was "unable to reach any definite conclusions" about the sexual abuse allegations, but felt that there was a "substantial degree of risk that the child must be protected against" and terminated access. See also *E.S. v D.M.*(1996), 143 Nfld. & P.E.I.R. 192(Nfld. U.F.C.) where Puddester J. considered allegations by a custodial mother that the father had sexually abused their young child during access visits. The judge concluded that there was a "substantial possibility" that the abuse may have occurred, and ordered supervised access, albeit at the father's home.
28. See e.g. *M. (P.A.) v M.(A.P.)*, [1991] B.C.J. 3020 (S.C.) per Errico J.
29. (1993), 49 R.F.L. (3d) 429 at 435 (Man. Q.B. - Fam. Div.) per Bowman J. See also *Levesque v. Levesque* (1983), 54 B.C.L.R. 164 (B.C.C.A.) ("real risk" of sexual misbehaviour by father resulted in supervised access); *Cameron v. MacDonald* (1989), 20 R.F.L. (3d) 119 (N.S. Co. Ct.); and *Migliore v. Migliore*(1989), 23 R.F.L. (3d) 131 (B.C.S.C.)
30. (1995), 18 R.F.L. (4th) 21 (N.S.C.A.).
31. See e.g. *F.(E.) v S. (J.S.)*(1995), 17 R.F.L.(4th) 283(Alta C.A.); and Zarb, "Allegations of Childhood Sexual Abuse in Custody and Access Disputes: What Care is in the Best Interests of the Child" (1997), 12 Can J.Fam. L.91, 108-113.
32. *C.H.M. v K.W.* , [1983] O.J. 744 (Prov. Ct. Fam. Div.)
33. [1991] B.C.J. 133 (S.C.); see also *M. (P.A.) v M.(A.P.)*, [1991] B.C.J. 3020 (S.C.) per Errico J.
34. *Plesh v. Plesh* (1992), 41 R.F.L. (3d) 102(Man Q.B.)
35. *A.N. v A.R.* [1995] O.J. 3420 (Prov. Ct.) Magda Prov. J. is one of the very few cases where there was a criminal conviction arising out of the making of a false allegation of sexual abuse against a parent. The parents were never married and had separated shortly after the child was born. The mother initially had *de facto* custody, and began to make allegations that the father was sexually abusing the child; the allegations became increasingly serious. At first the father was denied access, though he later obtained interim supervised access, and eventually interim custody. He only obtained custody after the police and Children's Aid Society thoroughly

investigated, and assessments were carried out by four mental health professionals. These professionals all concluded that the mother had an "irrational fixation" and suffered from "delusional thinking." As a result of her persistence in making these allegations, the mother was charged with and convicted of public mischief. Nevertheless, she continued to maintain that the allegations were true and raised the issue of abuse at the custody trial. The judge observed that the child's emotional health improved since he ceased living with his delusional mother, and awarded custody to the father with supervised access to the mother. The judge warned the mother that if she continued with her "delusional thinking" access would become harmful to the child and would have to be terminated. The mother's criminal conviction for mischief did not deter her from raising the false allegations in the subsequent family law proceeding.

36. See *R.G.H. v. Christison*, [1996] S.J. 702 (Q.B.) discussed below.

37. In *L.B. v R.D.* (1998), 35 R.F.L.(4th) 241 (Ont. Prov. Ct.), varied 39 R.F.L.(4th) 134 (Ont. Gen. Div.) the custodial mother persistently made allegations that the father sexually abused their daughter and that his new wife was physically abusive to the child. The Children's Aid Society investigated and could find no evidence to support the allegations, but supervised access was ordered. The mother repeatedly interfered with the father's supervised access visits; the mother's testimony about the reasons for failure to allow supervised access was refuted by the access supervisors, who were professionals, as well as by the Office of the Children's Lawyer. There were several attempts to enforce access, involving both the police and court appearances. Ultimately Judge Dunn decided to impose a sentence of 60 days in jail for civil contempt, finding that there were at least forty occasions on which the mother deliberately failed to comply with the access order. The appeal judge reduced the sentence to the time served, nine days.

38. *H.B.M. v. J.E.B.* [1998] B.C.J. No 1181 (S.C) per Allan L.J.S.C..

39. *M.K. v P.M.*, [1996] O.J. 3212 (Gen. Div.)

40. See e.g. *Scott v Scott*, [1990] O.J. 607 (S.C.) Fitzgerald J. where the judge recommended that the Director of Legal Aid should exercise his discretion to assist a father falsely accused of sexual abuse with his legal fees. The mother had been indigent and her lawyer had been paid by Legal Aid. Although the father has a substantial income he was heavily in debt as a result of the litigation. The judge commented: "The protracted litigation was made possible by legal aid financing [the mother's legal expenses] and I feel it only fair that legal aid bear the consequences [and assist the father]."

41. See e.g. Law Society of British Columbia Gender Bias Committee, *Gender Equality in the justice System* (1992), Vol. II: 5-49.

42. *Flanigan v. Murphy* (1985), 31 A.C.W.S. (2d) 448 (Ont. S.C.), per Cork M.

43. See discussion of Schuman & Bala study (1999) above. See e.g. *D.W.H. v. D.I.S.*, [1997] O.J. 3074 (Gen. Div.); *M. (S.A.J.) v M. (D.D.)* (1998), 40 R.F.L. (4th) 95 (Man. Q.B.).

44. [1994] O.J. 806 (Prov. Div.) per Pedlar J. See also *R.S.S. v S.N.W.*, [1994] O.J. 1572 (Prov. Div), per Zuker Prov. J.; *V.A.L. v. J.F.L.*, [1994] O.J. 642 (Gen Div) per Pardu J; *Metzner v. Metzner* (1997), 28 R.F.L.(4th) 166 (B.C.C.A.); *A.L.J.R. v. H.C.G.R.*, [1995] O.J. 4226 (Prov. Div.) per Fisher Prov. J.; *Scott v. Scott*, [1990] O.J. 607; *S.W.C. v. T.L.C.*, [1996] O.J. 4577 (Gen. Div.) per Fleury J.; and *Bartlesko v Bartlesko* (1990), 31 R.F.L.(3d) 213 (B.C.C.A.)

45. [1998] O.J. 3198 (Gen. Div.) per Lack J.

46. See e.g. *Jeanson v. Gonzalez*, [1993] O.J. 3269 (Gen Div) MacLeod J. terminated access to a mother who repeatedly made false allegations of sexual abuse against the two fathers of her two daughters, each of whom had custody. In *J.K.L. v. J.S.H.*, [1997] O.J. 1305 and *A.H.T v E.P.*, [1997] A.J. 739 (Alta Q.B.) unfounded allegations of abuse were made against the custodial mother and the accusing party (the father and grandparents respectively) lost access rights.

47. See Fahn, "Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991), 25 F.L.Q. 193, at 213-16; and Bross, "Assumptions About Child Sexual Abuse Allegations at or About the Time of Divorce" (1992), 1(2) *Journal of Child Sexual Abuse* 115. See *E.S. v. D.M.* (1996), 143 Nfld. & P.E.I.R. 192 (Nfld. U.F.C) where the court was concerned that there was a "significant possibility" that the father had sexually abused the child during access visits, and allowed supervised access at the father's home.

48. *C.A.S. Waterloo v. B.D.* [1991] O.J. 2398 (Prov. Ct.) was ⁽⁴⁹⁾

49.

50. In one infamous American case the mother, Elizabeth Morgan, was jailed for contempt of court for refusing to allow an abusive father to visit her daughter. Only later was it established that the judge was wrong to conclude that the father was not sexually abusing his daughter during access visits. A network of American feminists - the "Underground Railroad" helps women and children to "disappear"; see Fahn, "Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991), 25 F.L.Q. 193, at 194 -197.

51. See e.g. "The accused", Toronto Sun, July 16, 1994 reporting on a case where a 13 year old boy made allegations of ritual abuse against his father and the father's family in the midst of a custody dispute between his parents. The allegations were ultimately not proven, and there was a suggestion from the judge that the boy may have been influenced by his mother in the making of the initial allegations. He continued to concoct the stories to fuel the attention he was receiving from police and counsellors.

52. See Green, "Factors Contributing to False Allegations of Child sexual Abuse in Custody Disputes" (1991), in *Assessing Child Maltreatment Reports* (Binghamton N.Y.: Haworth Press, 1991)

53. [1995] B.C.J. 1810 (S.C.) per Newbury J. See also *D.R.P. v D.J.P.*, [1997] B.C.J. 2024 (S.C.) where a girl made allegations of physical, emotional and later sexual abuse against her mother. After the initial allegations were made, child welfare authorities transferred care of the child to

the father. The family law judge ultimately found that the allegations of physical and sexual abuse were without substance. However, the 11 year old girl had a troubled relationship with the mother. The judge awarded custody to the father and the mother was given access one weekend per month.

54. See e.g. Donna Laframboise, "One-stop divorce shops", National Post, Nov. 21, 1998. She reports on a claim by Ms. Louise Malenfant that over a four year period she had been advocate for 62 individuals in Manitoba who had been falsely accused of sexual abuse in divorce proceedings. In one third of those cases women's shelters were involved. Ms. Malenfant claimed that shelter workers gave children sessions "educating" them about sexual abuse. The workers then followed this up with suggestive questioning that resulted in false allegations.

55. *Smith v Smith* (1997), 32 R.F.L. (4th) 361 (Sask Q.B.)

56. [1996] O.J. 3212 (Gen. Div.).

57. [1998] O.J. 27 (Gen. Div.); see also *B.A. v D.M.A.*, [1996] O.J. 352 (Gen. Div.) per Perkins J.

58. See e.g. *H. v. J* (1991), 34 R.F.L. (3d) 361(Sask. Q.B.) and *Z.M. v S.M.*, [1997] O.J. 1423 (Gen. Div.)

59. [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92

60. *J.A.G. v R.J.R.* [1998] O.J. 1415 (Fam Ct)

61. See e.g. *G.E.C v M.B.A.C.*, [1995] B.C.J. 1810 (S.C.) Newbury J., footnote 1.

62. *M. (L.E.) v M. (P.E.)* (1996), 22 R.F.L. (4th) 83 (Alta C.A.)

63. In *E.H. v. T.G.*(1995), 18 R.F.L.(4th) 21(N.S.C.A.) the appeal court discounted testimony of child who was apparently recanting. The girl had testified at trial she made never been abused and previous allegations were "dreams."

64. See e.g. Horner & Guyer, "Prediction, Prevention and Clinical Expertise in Child Custody Cases in Which Sexual Abuse Allegations Have Been Made" (1991-92), 25 Fam L.Q. 217 -252; 381-409 & 26 Fam. L.Q. 141-170; Horner, Guyer and Kalter, "Clinical Expertise and the Assessment of Child Sexual Abuse" (1993), 32:5 J. Am Acad. Child & Adol. Psychiatry 925-931. See also Penfold, "Questionable Beliefs about Child Sexual Abuse Allegations during Custody Disputes" (1997), 14 Can J. Fam.L.11, at 26 -29.

65. See e.g. *M.K. v P.M.*, [1996] O.J. 3212 (Gen Div.).

66. See e.g. *L.T.K. v M.J.K.*, [1991] O.J. 1381 (Ont. Prov. Div.) where Pickett Prov. J. rejected the opinion of the staff at a hospital child abuse clinic that a two and a half year old child had been sexually abused by her father during an access visit. A physical examination by the physicians did not produce evidence of abuse (though that is not unusual even if the child has

been abused), and the only source of the "disclosure" was through the mother. The assessors never interviewed the father and the judge characterized the staff as "anything but fair and open-minded." They "grossly overinterpreted innocent behaviour" such as how the child played with anatomically correct dolls. See also discussion below about *D.B. v. C.A.S. of Durham Region*⁽⁶⁷⁾

67. [1994] O.J. 643 (Gen. Div.).

68. (1993), 47 R.F.L. (3d) 378 (Ont. Ct. J. - Prov. Div.), per Webster Prov. J.

69. [1993] O.J. 3379 (Prov. Div) per Hatton Prov. J.. For other cases critical of the role of assessors or child protection investigators; see e.g. *M.K. v P.M.*, [1996] O.J. 3212 (Gen Div.); *Brigante v Brigante* (1991), 32 R.F.L.(3d) 299 (Ont. U.F.C.) per Beckett J.; and *D.B. v. C.A.S. of Durham Region*⁽⁷⁰⁾

70. [1994] O.J. 643 (Gen. Div.).

71. *D.B. v. C.A.S. of Durham Region*⁽⁷²⁾

72. [1994] O.J. 643 (Gen. Div.).

73. In *Carnahan v Coates* (1990), 27 R.F.L. (3d) 366 (B.C.S.C.) per Huddart J. a psychologist who worked with the clinic that was treating the mother was retained by the mother to provide an opinion that supported her application to terminate visits with the father. Although the psychologist did not interview the father, he concluded that the children had considerable anxiety about their visits with the father, and that their negative attitudes were their own views, rather than merely a reflection of the mother's concerns. Supported by the testimony of the psychologist, the court terminated access, though after four years, supported by an independent expert who concluded that the "children's wishes were a mirror reflection of their mother's destructive manipulation," the father was able to persuade the courts to reverse the decision and gain a legal right to access, Unfortunately by that time it was too late for the father to establish a meaningful relationship with the children, and he "conceded defeat" and ceased trying to enforce access. In the meantime, the father complained to the British Columbia Psychological Association, which censured the first psychologist for "unethical and unprofessional conduct" in the course of preparing his assessment, including failing to adequately interview the children to ascertain the true reasons for their expressed preferences. The father then sued the psychologist for negligence an abuse of process that resulted in him losing his relationship with his children. The court rejected the civil claim as the psychologist had a "qualified privilege" that gave him immunity from civil suit for the opinions he expressed in court, even if he was negligent in formulating them. The judge did, however, recognize that the grant of privilege was not "absolute" and a witness could be liable if it was proved that there was a "conspiracy" to put forward false testimony.

74. In *R.G. v. Christison* (1996), 150 Sask. R. 1, 31 C.C.L.T. (2d) 263, 25 R.F.L. (4th) 51 (Sask. Q.B.), varied with respect to costs (1997), 153 Sask. R. 311 (Q.B.). a counsellor was held liable for slander for having told teachers and others in the community that a father and his new wife sexually abused the children. The judge was critical of counsellor noting that she "must be, or

should be, aware that in the heat custody battles [unfounded] charges of emotional, physical and sexual abuse are made with increasing frequency." The court was critical of how she assessed the case, and how she wrote her report and identified completely with one parent. The mother and counsellor were held jointly liable for \$27,000 for defamation (loss of reputation) and various expenses incurred by the plaintiffs. The counsellor was held solely liable for \$15,000 in aggravated damages. The court still had some sympathy for the position of the mother, and did not want to bankrupt her since she had joint legal custody and liberal access to the children. As a result the mother was held solely liable for only \$1,000 in aggravated damages.

75. Green, "Factors Contributing to False Allegations of Child Sexual Abuse in Custody Disputes" in *Assessing Child Maltreatment Reports* (Binghamton N.Y. , Haworth Press, 1991), 177-189, 182.

76. [1998] O.J. 1415 (Fam Ct)

77. For a discussion of the way that children should be interviewed in the investigation of sexual abuse, see Lamb, Sternberg & Esplin, "Conducting Investigative Interviews of Alleged Sexual Abuse Victims" (1998) 22 (8) *Child Abuse & Neglect* 813 -823; and Saywitz & Camparo, "Interviewing Child Witnesses: A Developmental Perspective" (1998) 22(8) *Child Abuse & Neglect* 825-843.

78. Leonoff & Montague, *Guide to Custody and Access Assessments* (Toronto, Carswell, 1996) 341- 377; Green, "Factors Contributing to False Allegations of Child Sexual Abuse in Custody Disputes" in *Assessing Child Maltreatment Reports* (Binghamton N.Y. , Haworth Press, 1991), 177-189.

79. See Jeffery Wilson, " The Ripple Effect of the Sexual Abuse Allegation and Representation of the Protecting Parent" (1987) 1 *Can. Fam. L.Q.* 159; and Sandra Morris, "Abuse Allegations: A Child's Story, A Lawyer's Nightmare" [Summer 1996] *Compleat Lawyer* 20 -25.

80. *M.K. v. P.M.*, [1996] O.J. 3212 (Gen. Div.)

81. Sandra Morris, "Abuse Allegations: A Child's Story, A Lawyer's Nightmare," [Summer 1996], *Compleat Lawyer* 20 -25.

82. *C. (R.M.) V. C. (J.R.)* (1995), 12 R.F.L. (4th) 440 (B.C.S.C.) Edwards J. See also *Whiten v. Pilot Insurance*, [1999] O.J. 237 (C.A.) which held that in a civil case where the defendant is alleging criminal conduct, evidence of plaintiff's willingness to take a polygraph is admissible evidence of "good faith" and willingness to allow a full and fair investigation. However, in a criminal case not only are polygraph test results inadmissible (*R. v Beland*, [1987] 2 S.C.R. 398), further the fact that an accused volunteered to take a polygraph test is ordinarily inadmissible in a criminal case, as the fact of volunteering poses no risk to an accused since a "negative" result would not be admissible.

83. Todd White, "Spousal Abuse Issues and Their Impact on the Resolution of the Family law Case" and H. Niman & J. Pirie, "How to Deal with Allegations of Spousal Assault in a Family

Law Case" in Canadian Bar Association - Ontario, *Family Law Institute*, (Toronto, January 1999).

84. See generally discussion above about "Criminal Prosecution of Alleged Abusers."

85. It is our view that counsel *for a parent* in family law proceeding has an ethical *right* (but perhaps *not a duty*) not to advocate a position that the lawyer believes will harm the child, and may withdraw from a case if the client insists on advancing such a position. Although there are no explicit statements in the *Rules of Professional Conduct* that support this, Beverley Smith, *Professional Conduct for Lawyers and Judges* (1998, Fredericton, Maritime Law Book) suggests that a lawyer should take "personal standards and values into any situation in which a lawyer is professional engaged."(p. 24).

In *Law Society of Upper Canada v Curtis*, Lawyers Weekly , October 13, 1993, 1323-018 (one of the few reported Canadian cases involving professional ethics of a family law practitioner) a lawyer was found not guilty of professional misconduct for advising a mother to defy a court order that called for the child to be returned to the custody of the father whom the mother believed was sexually abusing the child, as long as the lawyer had an "honest reasonably held belief" that the child was in danger *and* took immediate steps to appeal the order, even though it was later established that the allegations were unfounded. This decision indicates that the ordinary rules about lawyers not counselling defiance of court orders should be modified when the welfare of a child *might* be affected, and perhaps more broadly that the rules of professional conduct for lawyers need to be interpreted in light of responsibilities to children, as well as to courts and clients.

The American lawyer Louis Parley, *The Ethical Family Lawyer: A Practical Guide to Avoiding Professional Dilemmas* (1995, Family Law Section, American Bar Association) writes that the American "courts have been consistent in finding that lawyers in a divorce proceeding owe a duty to their clients - the parents - and not to the children of their clients." (p. 157). He does, however, allow that a lawyer may withdraw from representation of a client if the lawyer finds continued representation "repugnant or imprudent," or if the client is being "unreasonably difficult." An example of this would be a client wishing to seek custody of a 17 year old child who does not want to live with the client.

86. The federal Minister of Justice, Anne McLellan has recognized learning more about the issue of false allegations of abuse and pledged to carry out a research agenda. See Canada Department of Justice, "Minister of Justice Responds to Special Joint Committee Report on Child Custody and Access" (May 10, 1999).