

# **DEFENDING ACCUSATIONS OF SEXUAL ABUSE IN DIVORCE AND CUSTODY CASES**

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## **I. Introduction**

There have been an increasing number of cases of false allegations of sexual abuse in recent years and it is not uncommon for these types of allegations to surface in the context of a divorce. Cases dealing with allegations of sexual abuse present unique challenges for the attorneys who represent both the accuser and the accused. Each case is different. The following is an outline of topics for attorneys to consider when defending accusations of sexual abuse in divorce and custody proceedings.

## **II. Determining Whether to Take the Case**

- A. Initial conference with client.
  - 1. Discuss emotional and financial costs with potential client.
  - 2. Determine whether there is any objective evidence to support the allegation.
    - Has child protective services been contacted?
    - Have the allegations been investigated by the police?
- B. Research.
- C. Recommend counseling.

## **III. Provisional Orders on Custody and Parenting Time**

- A. Sealing the record.
  - 1. Attempt to agree with opposing counsel that the entire record of proceedings be sealed.
  - 2. Request that the Court enter an Order keeping all interviews, reports and investigations sealed pursuant to I.C. 31-17-2-20.
- B. Should you agree to supervised parenting time? If so, should you limit timeframe for supervision?
  - 1. Who will supervise?
  - 2. Who will pay the supervisor?
  - 3. Where will parenting time take place?

- C. If parenting time with non-custodial parent is supervised, the Court shall enter a conditional order naming a temporary custodian for the child in the event of custodial parent's death. I.C. 31-17-2-11.
- D. Keep in mind custody proceedings must receive priority in being set for hearing. I.C. 31-17-2-6.
- E. Do you want to request that a Guardian Ad Litem be appointed for the child? I.C. 31-17-6.

**IV. Discovery**

- A. Timing of Discovery.
  - 1. Benefits of commencing discovery immediately.
- B. Types of Discovery.
  - 1. Interrogatories, Request for Production of Documents and Requests for Admissions.
  - 2. Depositions.
  - 3. Mental health examinations of accuser and accused.

**V. Experts**

- A. Consider retaining expert psychologist immediately for consultation purposes.
- B. Custody evaluation process.
- C. Accuser may hire a computer expert to search hard drive for child pornography.
- D. Accuser may hire forensic psychiatrist to determine whether accused is a pedophile.

**VI. Use of Testing**

- A. MMPI/MMPI-II.
  - 1. Usually part of custody evaluation.
  - 2. Certain scales may be elevated in offenders.
- B. Psycho-physiological detection exam (polygraph/lie detector).
  - 1. Commonly requested.

2. Results may be inconclusive.
- C. Penile plethysmography.
  1. Test used by forensic psychiatrist to determine whether accused has pedophilia.
- D. Abel assessment for sexual interest.
  1. Test used by forensic psychiatrist to determine whether accused has pedophilia.

## VII. **Trial**

- A. Request Findings of Fact pursuant to Rule 52 of the Indiana Rules of Trial Procedure.
- B. Consider whether to request that the Court interview the child pursuant to I.C. 31-17-2-9. Determine whether to request that counsel be present and that a record be made of the interview for purposes of appeal.
- C. Move for separation of witnesses.
- D. Presentation of evidence/evidentiary issues.
  1. Admissibility of lie detector tests.
  2. Admissibility of reports and records relied on by experts as exception to hearsay rules.
- E. Cross-examination of accuser's expert.
  1. Potential questions for cross-examination of an expert include<sup>1</sup>:
    - a. Did the examiner evaluate the role of alcohol or other substance abuse in sexual abuse allegations?
    - b. Is the examiner aware of "normal" sexual behavior of children?
    - c. During a child sexual abuse allegation evaluation interview, did the examiner follow the guidelines set forth by the American Professional Society on the Abuse of Children?

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<sup>1</sup> Marc J. Ackerman and Andrew W. Kane *Psychological Experts in Divorce Actions*; Aspen Law & Business (1998).

- d. Does the examiner explore alternative interpretations of data presented in sexual abuse allegation cases?
- e. If sexual abuse took place during the childhood of either of the parents, what therapeutic steps have taken place to resolve the conflicts associated with experiencing such trauma during childhood?
- f. If the parent has experienced any of these kinds of abuse and has not undergone extensive psychotherapy, how does the psychologist performing the evaluation justify considering this parent as an appropriate custodial parent?
- g. If the parent or child reports any form of abuse, has the psychologist obtained detailed descriptions of the abuse in an effort to determine whether the allegations are overstated or exaggerated?
- h. If sexual abuse allegations have been made against one of the parents by one of the children, did the psychologist or other professional use the criteria discussed in this chapter to discriminate bona fide from fabricated sexual abuse allegations?
- i. If allegations of sexual abuse have been made, is there any official documentation from an objective third party (police department, social service agency, or other professional)?
- j. Is there any evidence that the child who is the alleged victim of sexual abuse has been coached by either parent, any other adult, or a sibling?
- k. If one of the parents was a victim of abuse during childhood, does he or she still act as a victim during adulthood? If so, how will this affect his or her ability to be an effective custodial parent?
- l. If there have been abuse allegations, has the mother handled them appropriately? Has the mother been able to put the issue to rest at an appropriate time?
- m. Has a convicted perpetrator of any form of abuse sought treatment? Has that treatment been successful? If not, why not?

- n. In sexual abuse cases, were sexually anatomically correct dolls used? Were conclusions drawn that went beyond the data available from the use of such dolls?
- o. Did the examiner attempt to preserve the rights of both the alleged victim and alleged perpetrator?
- p. Is the psychologist familiar with the research on the repressed memory/recovered memory controversy?
- q. If hypnosis was used, did the psychologist use appropriate guidelines?
- r. Does the psychologist understand the special considerations in incest families?

### **VIII. Psychology Related Issues**

#### **A. Psychologists use of anatomically detailed dolls.**

The American Psychological Association Council of Representatives adopted a statement on February 8, 1991, with regard to the use of anatomically detailed dolls. The statement adopted is as follows:

Anatomically detailed dolls are widely used in conducting assessments in cases of alleged child sexual abuse. In general, such dolls may be useful in helping children to communicate when their language skills or emotional concerns include direct verbal responses. These dolls may also be useful communication props to help older children who may have difficulty expressing themselves verbally on sexual topics.

These dolls are available from a variety of vendors and are readily sold to anyone who wishes to purchase. The design, detail, and the nature of the dolls vary considerably across manufacturers. Neither the dolls, or their use, are standardized or accompanied by normative data. There are currently no uniform standards for conducting interviews with the dolls.

We urge continued research in quest of more and better data regarding the stimulus properties of such dolls and normative behavior of abused and non-abused children. Nevertheless, doll-centered assessment of children, when used as part of a psychological evaluation, and interpreted by experienced and competent examiners, may be the best available practical solution for a pressing and frequent clinical problem (i.e. investigation of the possible presence of sexual abuse of a child).

Therefore, in conformity with the *Ethical Principles of Psychologists and Code of Conduct*, psychologists who undertake the doll-centered assessment of sexual abuse should be competent to use these techniques. We recommend that psychologists document by videotape (whenever possible), audiotape, or in writing the procedures used for each administration. Psychologists should be prepared to provide clinical and empirical rationale (i.e. published studies, clinical experiences, etc.) for procedures employed and for interpretation of results derived from using ADDs [anatomically detailed dolls].

B. Maintaining relationship between child and alleged perpetrator.

It is important to maintain or restore the relationship between the child the alleged perpetrator during the evaluation process. Sometimes all contact between the alleged perpetrator and alleged victim is terminated when the allegation occurs in the context of a custody dispute.

C. Other explanations of behavior.

Exploratory behavior, such as masturbation, maybe misconstrued as sexual abuse. Regressive behavior on the part of a child such as bedwetting and separation anxiety are also common behaviors of preschooler's reaction to divorce.

D. Problems with the child as a witness.

1. Dealing with a limited memory capacity of very young children.
2. Suggestibility can play a role.

Five factors that affect suggestibility:

- a. An increase in time between the event and the questioning about the event increases the effect of suggestibility.
- b. Suggestibility is affected by the perceived authority of the individual providing the misleading information.
- c. The more the suggestions are repeated, the greater the impact.
- d. Suggestibility is increased when the suggestions are more plausible to the individual than implausible.

- e. Memory confusions increase the more vague the questions are about the individual's memory.<sup>2</sup>

### 3. Sources of Memory Error

E.K. Johnson and Robert Howell identified potential sources of error in memory. They include:

- a. *Encoding.* Children's memories tend to be more fragmented and less complete than adult memories.
- b. *Retention.* The longer the memory has existed, the more malleable it is over time.
- c. *Retrieval.* Although children's retrieval is accurate, it is more limited than adult memories. They tend to omit details unless they are prompted to provide them.<sup>3</sup>

## IX. Relevant Statutes

A. **I.C. 31-17-2-8. Factors considered—Standard.**—The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interest of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
  - (A) the child's parent or parents;
  - (B) the child's sibling; and
  - (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:

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<sup>2</sup> Stephen Lindsay & J. Don Read, *Psychotherapy and Memories of Childhood Sexual Abuse: A Cognitive Perspective*, 8 *Applied Cognitive Psychol.* 281 (1994) [hereinafter Lindsay & Read].

<sup>3</sup> E.K. Johnson and Robert Howell, *Memory Processes in Children: Implications for Investigations of Alleged Child Sexual Abuse*, 21 *Bull. Am. Acad. Psychiatry and L.* No. 2, at 213 (1993).



- (A) home;
- (B) school; and
- (C) community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic violence by either parent.

[P.L.1-1997, § 9.]

B. **I.C. 31-17-2-9. Interview of child.**—(a) The court may interview the child in chambers to ascertain the child's wishes.

(b) The court may permit counsel to be present at the interview. If counsel is present:

- (1) a record may be made of the interview; and
- (2) the interview may be made part of the record for purposes of appeal.

[P.L.1-1997, § 9.]

C. **I.C. 31-17-2-10. Advice of professional personnel.**—(a) The court may seek the advice of professional personnel even if the professional personnel are not employed on a regular basis by the court. The advice shall be given in writing and made available by the court to counsel upon request.

(b) Counsel may call for cross-examination of any professional personnel consulted by the court. [P.L.1-1997, § 9.]

D. **I.C. 31-17-2-11. Temporary custodians—Duties.**—(a) If, in a proceeding for custody or modification of custody under I.C. 31-15, this chapter, I.C. 31-17-4, I.C. 31-17-6, or I.C. 31-17-7, the court:

- (1) requires supervision during the noncustodial parent's visitation privileges; or
- (2) suspends the noncustodial parent's visitation privileges; the court shall enter a conditional order naming a temporary custodian for the child.

(b) A temporary custodian named by the court under this section receives temporary custody of a child upon the death of the child's custodian parent.

(c) Upon the death of a custodial parent, a temporary custodian named by a court under this section may petition the court having probate jurisdiction over the estate of the child's custodial parent for an order under I.C. 29-3-3-6 naming the temporary custodian as the temporary guardian of the child. [P.L.1-1997, § 9.]

E. **I.C. 31-17-2-12. Investigation and report on custodial arrangements—Powers of investigator—Report—Cross-examination.**—(a) In custody proceedings after evidence is submitted upon the petition, if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by any of the following:

- (1) The court social service agency.
- (2) The staff of the juvenile court.
- (3) The local probation department or the county office of family and children.
- (4) A private agency employed by the court for the purpose.
- (5) A guardian ad litem or court appointed special advocate appointed for the child by the court under I.C. 31-17-6 (or I.C. 31-1-11.5-28 before its repeal).

(b) In preparing a report concerning a child, the investigator may consult any person who may have information about the child and the child's potential custodian arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian. However, the child's consent must be obtained if the child is of sufficient age and capable of forming rational and independent judgments. If the requirements of subsection (c) are fulfilled, the investigator's report:

- (1) may be received in evidence at the hearing; and
- (2) may not be excluded on the grounds that the report is hearsay or otherwise incompetent.

(c) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least ten (10) days before the hearing. The investigator shall make the following available to counsel and to any party not represented by counsel:

- (1) The investigator's file of underlying data and reports.
- (2) Complete texts of diagnostic reports made to the investigator under subsection (b).
- (3) The names and addresses of all persons whom the investigator has consulted.

(d) Any party to the proceeding may call the investigator and any person whom the investigator has consulted for cross-examination. A party to the proceeding may not waive the party's right of cross-examination before the hearing. [P.L.1-1997, § 9.]

- F. **I.C. 31-17-2-16. Counseling for child.**—Upon:
- (1) the court's own motion;
  - (2) the motion of a party;
  - (3) the motion of the child; or
  - (4) the motion of the child's guardian ad litem; the court may order the custodian or the joint custodians to obtain counseling for the child under such terms and conditions as the court considers appropriate.

[P.L.1-1997, § 9.]

- G. **I.C. 31-17-2-18. Continuing supervision.**—If both parents or all contestants agree to the order or if the court finds that, in the absence of the order, the child's physical health might be endangered or the child's emotional development significantly impaired, the court may order:
- (1) the court social service agency;
  - (2) the staff of the juvenile court;
  - (3) the local probation department;
  - (4) the county office of family and children; or
  - (5) a private agency employed by the court for that purpose; to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out. [P.L.1-1997, § 9.]

- H. **I.C. 31-17-2-19. Expenses incurred by necessary persons may be taxed as costs.**—The court may tax as costs the payment of necessary travel and other expenses incurred by any person whose presence at the hearing the court considers necessary to determine the best interests of the child. [P.L.1-1997, § 9.]

- I. **I.C. 31-17-2-20. Confidentiality.**—If the court finds it necessary to protect the child's welfare that the record of any interview, a report, or an investigation in a custody proceeding not be a public record, the court may make an appropriate order accordingly. [P.L.1-1997, § 9.]

X. **Relevant Caselaw**

- A. *Kanach v. Rogers*, 742 N.E.2d 987 (Ind. App. 2001)(the Court did not abuse its discretion in declining to seal the family therapist report because it was not an "investigation and report concerning custodial arrangements" under I.C. 31-17-2-12, but more accurately characterized as "advice of professional personnel" that the Court may seek at any time pursuant to I.C. 31-17-2-10.
- B. *Clark v. Madden*, 725 N.E.2d 100 (Ind. App. 2000) (the trial court misapplied or misinterpreted subsection (b)(1), where it made no

specific finding that the child would be endangered absent a restriction on the non-custodial parent's parenting time; a specific finding that the child would be endangered was required before the court could order such restriction).

- C. *Hanson v. Spolnik*, 685 N.E.2d 71 (Ind. App. 1997) (where mother engaged in pattern of parental alienation, made repeated allegations of sexual abuse against father, none of which were substantiated, substantial change of circumstances occurred since dissolution of marriage to justify modification of joint custody and award of sole custody to father).
- D. *Albright v. Bogue*, 736 N.E.2d 782 (Ind. App. 2000) (evidence supported trial court's factual findings regarding wife's allegations that child had been sexually abused while visiting father and determination that wife was causing harm to child by placing pressure on him to say he was being molested, and by attempting to interfere with father's visitation, and thus there had been a substantial change in circumstances warranting modification of custody, was within the trial court's discretion).

## **XI. Hypothetical Situation for Discussion**

Father and Mother were married for 12 years. Father is a registered nurse. Mother is a retail store manager. Father and Mother dated for 2 years before becoming engaged, after meeting while Father was in college and a customer at the store where Mother worked. Father has a master's degree in nursing. Mother completed her associate's degree.

Father and Mother have two children. The elder child, Ryan, is 9. The younger child, Emma, is 7.

During her childhood, Mother was sexually molested by an uncle. The molestation took the form of fondling and insertion by the uncle's finger. No intercourse occurred. Mother does not recall whether any oral sexual activity occurred. She did not report the molestation to anyone until she was 12, by which time, according to her report, it had been happening for "a few" years. After she reported it, her parents stopped leaving her alone with her uncle, but he was not prosecuted and Mother does not know whether a report was ever made to Child Protective Services or whether an investigation occurred. Mother received no counseling initially. When she was 18, and had emotional problems at the time of her first sexual relationship, she sought counseling. She discussed the molestation with her therapist, felt she was dealing with it appropriately, and discontinued counseling after 4 months of bi-weekly appointments. The uncle is now dead.

Mother and Father's marriage was good at first, but gradually deteriorated. The quality and frequency of sexual intimacy became an issue, with Father insisting on sex more often and in a greater variety of ways, and with Mother resisting. Mother and Father finally sought counseling. They participated in counseling for 3 months, then stopped, because Mother thought

counseling wasn't needed and Father thought it wasn't helping. Shortly thereafter, Father filed a petition for dissolution. Because both parents are devout in their religious beliefs, particularly as to the sanctity of marriage, neither began dating anyone while the action was pending.

At first, Father and Mother shared the children approximately equally, and in a fairly amicable way, because Father could often arrange his working hours around Mother's schedule so that he was working when Mother was free to have the children, and was not working when Mother was working. Mother, however, became dissatisfied with the arrangement. She was concerned that the children lacked a solid home base, did not know on any given day where they would sleep that night, often left prized toys and security items at the other parent's house, and that the transportation arrangements were creating conflict between the parties. So, Mother suggested that the children reside primarily with her and spend alternate weekends and one night per week with Father. Father did not agree. Mother filed a petition to modify the preliminary parenting time arrangement. Father did not react well. He became angry and a shouting match ensued. Whatever level of trust had previously existed between the parties disappeared.

Shortly thereafter, Emma reported to Mother that Father had engaged in "bad touch" with her while supervising her bath and while putting her to bed. She also reported that sometimes she would wake up in Father's bed and would not have all her pajamas on. Mother asked Emma whether Father had his pajamas on; Emma wasn't sure but "didn't think so." Mother then asked Ryan whether Father had ever touched him "in a bad way". Ryan responded that he didn't remember Father ever touching him that way but that he sometimes "felt weird" taking a bath at Father's house, and that once he saw a magazine with a naked woman in it while hunting for a toy under Father's bed. Mother began to notice increasing masturbatory behavior on Emma's part; she would occasionally see Emma rubbing her genital area while playing.

Mother immediately:

- A. called the Child Protective Services office;
- B. took Emma and Ryan there for an interview;
- C. reported that she believed Father had molested Emma;
- D. asked her attorney to file a petition to have Father's visitation limited and supervised;
- E. refused to allow Father to visit with the children until the petition had been heard by the court;
- F. engaged a local child psychologist to begin counseling the children, and scheduled the first 3 meetings one week apart; and
- G. took the children to their pediatrician, who examined them and found no physical evidence that they had been molested.

Questions:

1. If you are Father's attorney, what requests do you make of the court?
2. What expert(s) do you engage and when?
3. What discovery do you do and when?

4. What position do you take on agreeing to supervised visits? If so, by whom? Where? For how long?
5. What investigation do you conduct of Mother's family background and mental health?
6. Do you respond by filing a petition asking for sole or principal custody of the children? If so, why? If not, why?
7. Do you request the appointment of a Guardian Ad Litem for the children?
8. What else do you do?