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

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INTRODUCTION

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

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

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

The Roles of Social Services and Law Enforcement

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

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

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

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

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

Hindrances to Proper Case Investigations

Premature Conclusion of Investigations

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

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

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

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

“No-Fault” and Child Support

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

Investigations are Complicated and Time-consuming

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

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

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

All too often, investigators believe that cases involving allegations of child abuse should be handled differently than other cases. Although these cases are the same as any other, once a case is given this distinction, the system begins to fail. In fact, the only difference is that the potential for a false allegation is more readily apparent because of the context in which the complaint arises.

Actually, this should make the case easier because the first issue regarding a potential defense has already surfaced. Now, all the investigators need do is follow the path of verification and suspicion to see which facts are supported or refuted. When investigators fail to do this, the system fails.

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

Evidence and Witnesses

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

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

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

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

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

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

Case Study

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

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

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

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

Strategy

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

Stereotypes

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

Myths and misconceptions interfere in the decision making process. The most common stereotypes are those that characterize the mother as a “lying, hysterical, histrionic, b——” because she becomes emotional in her attempt to protect her child. The father is characterized as an “innocent, falsely accused individual” because he appears normal, hails from a well-to-do family or background, has a good job or comes from a good neighborhood. Other misconceptions include the belief that “children never lie” (children would never say such things unless they happened), or
that the father must be guilty if he is a member of a minority group, has been involved in other crimes or is involved in activities that are not considered “normal.” When these cases are improperly discounted or founded, it is the child who loses.

Acceptance of Mistaken Assumptions

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

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

CONCLUSION

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

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ENDNOTES

1. Also called the domestic relations or divorce courts in some states.

2. The author would add that in these matters, they also have the equal responsibility to establish, by whatever evidence is available; that a crime did not occur; if in fact that is the conclusion reached. There is no accusation as damaging as one of child abuse and the fate of the accused often rests in the hands of the investigators in these cases. Whenever possible, investigations should be carried out to the fullest to establish a sound conclusion either way.


4. The “protective parent” is defined as the parent seeking protection for the child. Most of the time it is a mother, but fathers have also experienced the same discrimination when they report the abuse they suspect has occurred.

5. In addition, the protective parent may refuse to believe the fact they have made such a mistake and married a person who would do something like this.

REFERENCES


Nicholson, E. Bruce, ed., Sexual Abuse Allegations in Custody and Visitation Cases. American Bar Association, Wash., D.C.,


