

GENDER BIAS IN THE COURTS

What can
judges do?

INSIDE: Misguided judicial reform

Lynn Hecht Schafran, *Adjudicating Allegations of Child Sexual Abuse When Custody Is in Dispute*, JUDICATURE, July-Aug. 1997 at 30. Reprinted with Permission.

Adjudicating allegations of child sexual abuse when custody is in dispute

A new curriculum helps judges evaluate child sexual abuse allegations and decide on appropriate dispositions.

by Lynn Hecht Schafran

The mother of a 6-year-old boy seeks a divorce and sole custody impelled, she says, by the discovery that her husband has been forcing their child to perform oral sex. The boy relates a detailed story of abuse inflicted as part of a "game."

An unmarried couple who never lived together but shared the care of their 2-year-old daughter split up and the mother seeks sole custody. The father alleges that she sexually abuses their daughter during bathing and seeks sole custody.

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A corporate executive is divorcing his wife and bitterly resisting her demands for alimony and child support. His 13-year-old daughter alleges that on a weekend when she visited her father alone because her brother was on a scouting trip, her father raped her. The mother seeks to end visitation.

The wife of a divorced couple is about to marry her new boyfriend. She reports no-

table changes in the behavior of her 4 year-old daughter from the previous marriage. The mother states that the child has said "Daddy hurts me," and that she no longer wants to visit him. The mother believes her ex-husband sexually abuses their daughter and seeks to end visitation.

There is no conclusive medical evidence in any of these cases.

How should a judge evaluate these allegations of child sexual abuse? Should the judge assume all these charges are just the latest tactics in custody/visitation litigation and treat them as fabrications? If the judge orders an investigation, what kind of temporary custody/visitation should be ordered while the investigation proceeds? Should the judge cut off all contact between the child and the alleged abuser in the interim? What should a judge look for in a child sexual abuse investigation? What qualifications should an expert have? What constitutes reliable expert testimony? Does *Daubert v. Merrill Dow Pharmaceuticals, Inc.*¹ establish new criteria for reliable expert testimony? Are there scales or profiles that can give guidance? Can a child's testimony be trusted? If the allegation is founded, what kind of visitation

provides psychological as well as physical safety for the child—or should there be any visitation at all? If the allegation is a fabrication, should the accuser always be denied custody?

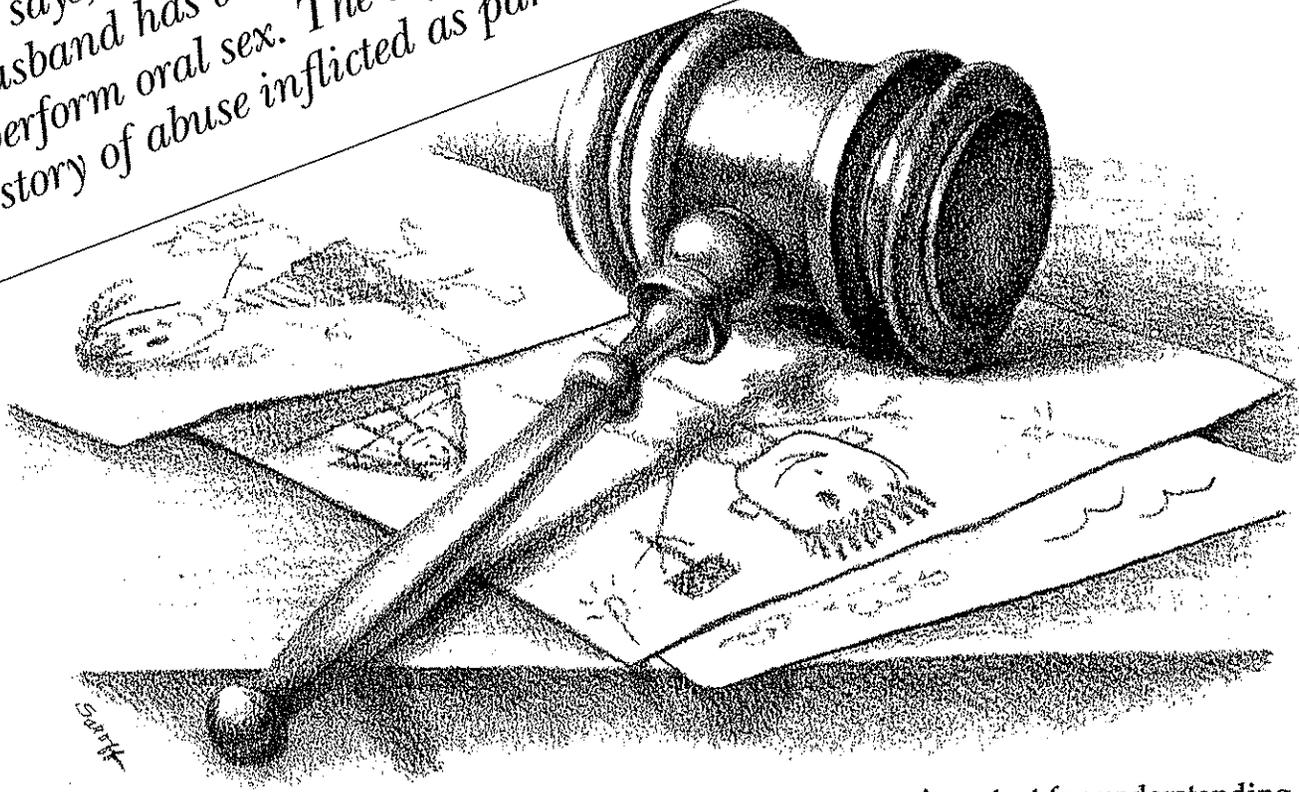
There is no more vexing question for judges today than how to evaluate allegations of child sexual abuse in the custody-visitation context. To assist the courts in this troubled area of the law, the National Judicial Education Program, working in collaboration with the American Bar Association Center on Children and the Law, recently published a model judicial education curriculum titled *Adjudicating Allegations of Child Sexual Abuse When Custody is in Dispute*.² Funding was provided by the State Justice Institute. The four fact patterns at the beginning of this article summarize the hypotheticals that are the core of the curriculum, which provides judges an opportunity to test and apply their own knowledge about these types of cases, query experts, and explore their own decision-making processes with judicial colleagues.

Adjudicating Allegations of Child Sexual Abuse When Custody is in Dispute

1. 509 U.S. 579 (1993).

2. The curriculum was written by Lynn Hecht Schafran and Yolanda Wu of the National Judicial Education Program and Josephine Bulkley and Claire Sandt of the ABA Center on Children and the Law.

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was developed in consultation with an advisory committee of judges, judicial educators, and leading child sexual abuse experts. It provides the most current data on child sexual abuse allegations in the custody-visitation context and the methods for evaluating allegations. The curriculum promotes the fair administration of justice by improving judges' ability to assess child sexual abuse allegations in this particular context in an informed and equitable manner, and to make decisions about custody and visitation that protect the best interests of the child. The materials are presented in three parts: a primer on child sexual abuse; a four-unit education program; and a set of readings that judges can review and refer to on an as-needed basis.

The "Pre-Program Primer on Child Sexual Abuse, Its Perpetra-

tors and Effects" provides a short, comprehensive overview of current knowledge about child sexual abuse in all contexts, including incidence and prevalence data, the characteristics of offenders, and the consequences for victims. Reviewing the primer before the program insures that all attendees have a baseline knowledge about child sexual abuse so program time can focus on custody-visitation.

The education program covers four units through a combination of expert presentations and small group exercises based on the four hypotheticals. Working in small groups, judges evaluate expert qualifications and testimony and issue temporary and permanent custody and visitation orders. In plenary sessions they hear from experts in these fields and explore with them the decisions reached in the small groups.

A context for understanding

Unit 1 of the education program provides essential background for adjudication. It analyzes all studies on the incidence, prevalence, and validity of child sexual abuse allegations in custody/visitation cases and explains the criteria for reliable research. This knowledge is important because although judges do not base their decisions on statistics, the mental health professionals and others who evaluate child sexual abuse allegations are highly aware of these studies, which often color their thinking, if not shape it entirely. Judges should be wary of experts who mischaracterize research (for example, generalizing from a study of 11 cases) and espouse theories unsupported by empirical data.

The collection of studies presented highlights the lack of current information. The few large-scale inci-

dence/validity studies present data from the late 1980s. The largest and most methodologically sound is the Association of Family and Conciliation Courts study of 9,000 custody cases from 12 states. It found an incidence rate of child sexual abuse allegations of 1.9 percent (169 cases), and that eight of these cases were deliberately fabricated. The AFCC research and two other large-scale studies also suggest more cases of insufficient evidence and mistaken but good faith allegations in the custody/visitation context than in the non-divorce context. This raises the critical point, stressed throughout the curriculum, of the importance of using accurate terminology and avoiding the fallacy of binary thinking.

Accurate terminology. The current controversy over the incidence of fabricated cases is fueled by using the term "false" to lump together cases that are unfounded because of insufficient evidence, mistaken but good faith allegations, and deliberate fabrications. (Other frequently used terms that conflate these three types of cases are "unsubstantiated" and "fictitious.") "Insufficient evidence" cases are an especially large category because in this type of litigation the age of the child and the lack of medical evidence often make it difficult or impossible to determine if sexual abuse occurred. However, a finding of insufficient evidence does not mean it did not occur.

It is essential to differentiate insufficient evidence and mistaken cases from deliberate fabrications. Maintaining distinctions is difficult because our legal system imposes a binary true/false way of thinking, leaving little room for gray. The binary model is not useful in custody disputes where, unlike the guilty/not guilty framework of criminal sexual abuse cases, the legal inquiry centers on the best interests of the child. The binary model is also not useful for sorting out child sexual abuse allegations because it is frequently not possible to know whether abuse occurred. The parent who makes an allegation with insufficient evidence to satisfy a legal standard, or who

makes a good faith but mistaken allegation, should not be equated with the malicious parent who deliberately fabricates.

Genuine allegations. There are well-documented reasons why child sexual abuse often begins or comes to light during divorce or shortly thereafter. It is essential that judges understand the dynamics behind child sexual abuse and the emotional and societal pressures associated with divorce that explain disclosure or onset of child sexual abuse at this time. The curriculum explores the three specific situations in which child sexual abuse comes to light:

- discovery of child sexual abuse precipitates divorce;
- child sexual abuse is revealed during divorce;
- divorce precipitates child sexual abuse.

With respect to the second category, for example, after divorce proceedings are initiated for other reasons and the sexually abusive parent leaves the home, the child who has been intimidated into silence with threats that disclosure will break up the family now feels safe in disclosing. The sexually abused child may also disclose now to avoid a custodial placement or extended visitation with the abuser.

Good-faith mistakes. Parents involved in a custody dispute may make a good faith but mistaken, as distinguished from fabricated, allegation. A complex range of factors account for mistaken allegations of child sexual abuse. Accusing parents can be mistaken about whether abuse occurred and who perpetrated the abuse. For example, if a child exhibits changes in behavior related to visits with the suspected abuser, such as having nightmares before and after the visits, the protective parent may attribute the behavior to sexual abuse when the cause is actually stress related to the divorce and fear of losing the custodial parent if loyalty to the other parent is shown. Mistakes about the identity of the perpetrator arise when sexual abuse is misattributed to the other parent and the actual abuser is a step-parent,

older step-siblings, a parent's new boy- or girlfriend, or other relative.

Fabrication. Although, as noted above, the currently available research shows both a low rate of child sexual abuse allegations in the divorce context and a very low rate of fabrication, the unfortunate reality is that parents and children acting independently do sometimes fabricate. Parents fabricate to get the former spouse out of the child's life, to get the judge to suspend visitation when the parent is dissatisfied with the custody arrangement, to avoid paying child support, or out of vindictiveness. In rare cases children themselves fabricate. A child may show his or her anger toward a father who left the home by accusing him of child sexual abuse. The child's fabrication may also be an effort to avoid a custody placement with the accused parent.

Fishing expeditions. A fourth category of allegations can be described as "fishing expeditions." The emotional pressures of divorce cause some parents to become solely motivated by the need to shut the other parent or other parent's family out from the child's life. They may go on a "fishing expedition" to find some evidence of child sexual abuse by the other parent, or by the new step-parent or boy/girlfriend. In these cases parents go doctor shopping until they finally find someone to confirm their hopes. And parents are not the only ones known to go on fishing expeditions. Attorneys and mental health professionals may take the lead by suggesting that finding child sexual abuse would help in the custody fight. Parents and professionals who go on a fishing expedition differ from those who make mistaken good-faith allegations because they do not act out of concern for the child but from a bad faith desire to meet their own needs.

Assumptions. Unit I concludes with a discussion of the assumptions about child sexual abuse allegations in the custody/visitation context that can distort the adjudication process. Courts are expected to rely on child protective services reports. But re-

search shows that some of these CPS units prejudge all child sexual abuse cases in the custody/visitation context as fabrications and do not treat them seriously. Although deliberately fabricated allegations made to influence the custody decision or to hurt an ex-spouse do happen, knowledgeable professionals view these as infrequent events, and it is critical that every allegation be treated with the utmost seriousness.

With respect to judges, unlike juvenile/criminal court judges who typically see mothers forced by child protective services to come forward, and who therefore try to downplay sexual abuse charges, family court judges hearing divorce cases routinely hear all types of exaggerated accusations, which lead them to be skeptical of negative claims by either party. While child sexual abuse allegations can seem like a natural outgrowth of the emotionally charged divorce scenario, judges need to ask whether the allegations arise out of angry vindictiveness, or whether the anger is a response to the realization that someone the parent once loved has done something reprehensible to their child. Finally, these cases are enormously stressful for everyone involved because the stakes are so high. The wrong decision can return a child to an abusive parent, or brand an innocent parent as an abuser. In assessing these cases, judges need to be alert to all the dynamics that can undermine fair decision making.

Evaluating the evaluators

Unit II of the curriculum explores medical and psychological evidence. New medical examination techniques are making it possible for specially-trained physicians to document previously undetectable evidence of internal injuries in child sexual abuse victims. But rarely is there any definitive medical evidence. Acts such as fondling and oral sex typically leave no physical trace. Even injuries from penetration heal very quickly in young children. And because the children in these cases are often very young, they may be unable to articulate what did or did not happen to them. This absence of direct evidence has resulted in extensive reliance on mental health professionals' psychological evaluations of the child, the parents, and sometimes other family members.

The "Evaluating the Evaluators" unit explores what the mental health and medical community consider "best practice" in evaluating child sexual abuse allegations. It describes which approaches are viewed as useful, which are controversial, and which are without the peer review and empirical support required by *Daubert*. Mental health professionals have no special ability to know what really happened, or to discern truthfulness, deception, or a mistaken belief that abuse occurred. In addition, there are no syndromes, psychological tests, devices, procedures, checklists, indicators, characteristics, or cri-

teria that accurately distinguish sexually abused from nonabused children, sexual offenders from nonoffenders, or "true" from "false" claims. Having offered this caveat, the unit explores the following questions:

- How can judges assess whether a professional is qualified to conduct an evaluation and provide expert testimony in court?
- What are the essential components of an evaluation for sexual abuse in a custody case?
- How can judges assess whether a particular expert has used appropriate methods or procedures for gathering information?
- What are the controversies surrounding evaluations and expert testimony in court?
- What information should a qualified mental health professional include in stating an opinion regarding whether a child has been abused?
- What mental health testimony should be allowed regarding sexual abuse in a custody or visitation case?

The evaluators unit is built around a small group exercise based on the four hypotheticals summarized at the beginning of this article. For each hypothetical, judges receive a fact sheet, the credentials of a proposed expert, and an excerpt from the expert's testimony. Then they decide whether they would qualify the proposed expert, the credibility they would afford his or her testimony, what they see as the strengths and

Obtaining the curriculum and funding

Copies of *Adjudicating Allegations of Child Sexual Abuse When Custody is in Dispute* may be purchased for \$60 from the National Judicial Education Program, 99 Hudson Street, 12th floor, New York, N.Y. 10013, (212) 925-6635; fax (212) 226-1066.

The State Justice Institute will consider Curriculum Adaptation Grant applications for up to \$20,000 to enable a state or local court to replicate

or adapt a model training program. Another funding resource is the Trainer's Bureau in the Department of Justice Office of Victims of Crime. It will pay up to \$2,500 of the cost of travel and consulting time to bring in a trainer on victim/witness issues. The program specialist for the Trainer's Bureau can be reached at (202) 307-5950. Even though custody/visitation cases are civil rather than

criminal, the Trainer's Bureau will provide support for the curriculum.

Additionally, the Children's Justice Act, 42 U.S.C. 5101, et seq., funds activities undertaken to improve judicial handling of child sexual abuse cases. These funds are administered by the Department of Health and Human Services.

weaknesses of the testimony, and what else they would like to know. During the expert's presentation that follows, each small group reports on its discussion of a key issue in the cases. The expert ties his or her presentation to the multiple aspects of evaluating a child sexual abuse allegation as they are raised in the four hypotheticals.

Unit II explores a multiplicity of issues such as what constitutes age-inappropriate sexual behavior, why abused children delay reporting and recant, the lack of empirical support for the Sexual Abuse Legitimacy Scale, the use of interview aids such as dolls and drawings, the credibility of young teenagers in these cases, the implications of children's and parents' presentation styles for their credibility, and the misuse of profile evidence.

Children's testimony

To decide custody/visitation cases involving child sexual abuse allegations, judges need to be familiar with the growing knowledge about children's statements, testimony, and memory. This will assist them in interviewing a child in chambers, presiding over courtroom proceedings where lawyers question and cross-examine the child, and assessing the interviewing techniques of experts who testify about their own interviews with the child. Within the past decade, research on children's statements and memory has grown considerably, with much attention focusing on children's capabilities as witnesses.

The purposes of Unit III on children as witnesses are to:

- inform judges of the various ways information is obtained;
- inform judges about appropriate interviewing techniques;
- inform judges of children's developmental capabilities, limitations, and the factors that may influence their reports; and
- advise judges of special procedures and protections available to help children provide accurate information during interviews.

Virtually all of this information—for example, the need for age appro-

priate questions, short questions, and simple grammar—is applicable to any type of case in which a child gives a statement or testifies. However, the areas of suggestibility and the use of leading questions and aids such as anatomical dolls have drawn particular interest in the context of child sexual abuse cases. The curriculum explores the relevant research and explains why mildly leading questions may be essential in questioning children, whose responses to general open-ended questions may not be as accurate as answers to specific questions. The curriculum illustrates bad and good interviewing techniques with a role play and a film, and makes clear that with appropriate interviewing techniques, even young children can be good witnesses.

Custody and visitation

For this final unit judges meet in small groups to discuss what temporary custody/visitation awards they would make in the four hypothetical cases. They look again at the hypotheticals' fact sheets and make a temporary award as if they had not heard any expert witness testimony. Then the judges are provided with a ruling about the validity of the allegation in each case and asked to make permanent custody/visitation awards. This exercise is followed by an expert presentation that utilizes the four cases to address key issues in making custody/visitation decisions focused on the best interests of the child. The learning objectives for Unit IV are to enable judges to:

- Make temporary and permanent decisions about custody and visitation in the wake of child sexual abuse allegations that promote the best interests of the child rather than the needs of parents.
- Understand the role of children's developmental needs in making custody/visitation awards.
- Select responsible supervisors for supervised visitation.
- Know when to deny visitation.
- Know the criteria in considering the resumption or expansion of visitation.
- Order offender treatment based

on state of the art knowledge about offenders and offender treatment.

- Direct/monitor treatment programs, offender progress, and supervisor effectiveness.

This unit explores a number of difficult issues, such as the fact that child sexual abusers may continue to psychologically manipulate and terrorize their victims during visitation, making it essential to select supervisors able to recognize and check this behavior. Judges who participate in the program must grapple with some real-life dilemmas. What should a judge do when the abuse is so severe that the judge and the child's family perceive *any* contact between the child and the abuser unfathomable, but the child expresses a wish for some form of safe contact? How should the judge respond to a case in which the abuse is fabricated, but the child's developmental needs would be best met through continued placement with the fabricator?

Adapting the curriculum

Adjudicating Allegations of Child Sexual Abuse When Custody is in Dispute was designed for judges, but much of this curriculum is important for other decision makers such as child protective services workers, prosecutors, and police, and can be adapted to meet their needs. As the primer for the curriculum points out, we know from retrospective studies in which adults in the general population are asked about their childhoods that 20 to 30 percent of American women and 5 to 10 percent of American men report some form of sexual abuse as children; that the majority of offenders, particularly those who victimize girls, are male family members; and that although some children emerge from abuse unscathed, for most it is a deeply scarring experience with life-long repercussions. Knowing the prevalence and pain of intrafamilial child sexual abuse makes it imperative that everyone in the justice system strive to afford children maximum protection. ☞