

Chapter 22: Child Abuse Allegations in Custody Cases

§ 22.1 Introduction

Occasionally child abuse allegations are leveled against one or both parents in various types of custody proceedings. Obviously, the issue is extremely concerning and demands the immediate attention of all of the participants, including the parents and other family members, the judicial officers, and the other professionals involved in the case. Child abuse can be of various types, and it arises in a whole variety of contexts that affect custody matters. The purpose of this chapter is to discuss this topic generally and offer legal professionals some thoughts and insights on how to manage these issues in a way that will protect the best interests of the child and protect as much as possible the rights and interests of all involved persons.

Child abuse, as with domestic abuse between adult family members, comes in many varieties. It may range from verbal abuse, to neglectful or poor parenting and caregiving, to threatened or actual physical abuse, to perhaps the most challenging and potentially damaging to child and family - sexual abuse. The allegations may be leveled by a parent, school personnel, therapist, medical professionals, friends and neighbors, and even by complete strangers. The mandated reporter statute, which requires certain professionals with access to children to report potential child abuse to the local county child protection office, has a broad and strict sweep.¹ In the family court context, child abuse allegations may arise in paternity actions, in domestic abuse actions between adult family members, in divorce proceedings, in third-party custody proceedings, or in post-decree family court proceedings.

There is certainly a question whether family court is the best venue to address child abuse allegations. Even well-staffed court services departments that conduct custody studies and parenting time evaluations are generally not equipped with the skills, training, resources, and statutory powers of the child protection department to deal with the most serious child abuse allegations. Guardians ad litem who do not regularly appear in juvenile court may also be lacking in experience in addressing abuse allegations in any great depth. The medical investigations that are needed, especially when the allegations involve physical or sexual abuse, will tax many communities' resources, with these types of evaluations requiring great training to preserve evidence, to interview appropriately, and to provide useful information to courts and law enforcement personnel. Judicial officers and family law attorneys usually dread these types of issues more than any other. They tend to be emotionally charged, often require quick, if not ex parte, emergency action, they tend to arouse suspicions as to motivations and timing, and they can be enormously disruptive to parent-child relationships and the otherwise orderly processing of other family court proceedings. Yet, they involve incredibly important issues and concerns that reasonably lead judicial officers, attorneys, guardians ad litem, and court

¹ See, Minn. Stat. § 626.556, subd. 1, which deals generally with the mandated reporting of the maltreatment of minors, and subd. 3, which specifies persons who are mandated to report, which includes medical personnel, psychologists and social workers, child care providers, education personnel, and law enforcement and corrections personnel.

services personnel to err on the side of caution and restrict custody and access until the matter can be fully investigated. The stakes are high, the procedures complex, and the outcomes unpredictable.

In addition to family court, child abuse is and can be addressed in juvenile court, in criminal court, or perhaps administratively in the county child protection office. In fact, family court judges and family court personnel will often indicate that they lack the resources and powers to adequately address a serious child abuse allegation and do what they can to involve child protection, the juvenile court, and if necessary, the criminal court. It is certainly beyond the scope of this chapter to discuss the complex procedures and statutory provisions in juvenile and criminal court. However, because child abuse allegations frequently may begin in a family court proceeding or significantly affect a family court custody proceeding, a working knowledge of basic principles and some practice pointers for the family court professional would be helpful so that appropriate referrals can be made or so that further complications are not created if appropriate steps are not taken in the family court matter involving custody issues.

§ 22.2 Definitions and Procedural Rules.

Definitions of various types of child abuse are found throughout the Minnesota Statutes. Most family court professionals are aware of the definition of domestic abuse, which can certainly include child abuse. Chapter 518B deals with domestic abuse actions in family court. Domestic abuse is defined in that chapter as any of the following acts perpetrated by a family or household member against another family or household member: (1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; (3) terroristic threats; (4) criminal sexual conduct; or (5) interference with an emergency call.² The actions are commenced in family court and can be commenced by an adult against another adult, or by an adult against a child, or on behalf of a child against an adult. Chapter 260C, which deals with child protection matters in juvenile court, has provisions addressing domestic child abuse, but such separate juvenile court actions are rare and are usually addressed within a child in need of protection or services (“CHIPS”) petition and proceeding rather than as a separate juvenile court domestic child abuse proceeding.³

A judicial officer hearing a domestic abuse matter under Chapter 518B has many powers available to him or her. For example, the court can issue restraints against the behavior of the abusing party, exclude the abusing party from the home of the parties or the victim’s workplace, award temporary parenting time and custody, provide counseling or social services, order the abusing party to participate in treatment or counseling services, award temporary use and possession of property, order the abusing party to pay restitution, order the continuance of available insurance coverage, and order other relief

² Minn. Stat. § 518B.01, subd. 2.

³ Minn. Stat. § 260C.148 sets forth the procedure for this type of action, including the contents of the petition, what can be ordered on a temporary basis, how the orders are to be executed and served, how the orders are to be modified and other remedies that are available.

deemed necessary to protect the family members.⁴ This relief is to be for a fixed period not to exceed one year, unless the court determines a longer fixed period is appropriate.⁵ Such an order may not be vacated or modified in a proceeding for dissolution of marriage or legal separation, except that the court may hear a motion for modification concurrently with a proceeding for dissolution of marriage upon notice of motion and motion.⁶

The Chapter 518 provisions dealing with custody and parenting time all provide that domestic abuse, including child abuse, is to be taken into account. For example, the best interest factors that courts are to consider in determining legal and physical custody provide that the effect on the child of the actions of an abuser are to be considered.⁷ The best interest factor requiring the court to consider the disposition of each parent to encourage and permit frequent contact by the other parent with the child is not to be considered where there has been a finding of domestic abuse.⁸ The court is to also consider evidence of false allegations of child abuse when determining custody, and such false allegations are considered a violation of Minn. Stat. Sec. 609.507.⁹ When joint legal or physical custody is sought, the courts are to consider whether domestic abuse, as defined in Minn. Stat. §. 518B.01, has occurred between the parents. The court is to use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in Chapter 518B, has occurred.¹⁰

It appears that the court's ability to consider domestic abuse, whether found by a court in a domestic abuse proceeding, or simply alleged by a parent, is broader in the context of parenting-time determinations, with the court needing to determine if parenting time with a parent is likely to endanger the child's physical or emotional health, or impair the child's emotional development. An actual finding of domestic abuse under Chapter 518B must be considered in determining parenting time.¹¹ It has been this author's experience that many courts will not consider the existence of domestic abuse when making these determinations if there has not been a court finding in a domestic abuse proceeding that such domestic abuse has occurred, despite there being no statutory provision requiring that interpretation.

If child abuse allegations are serious enough, and child protection becomes involved, the complexity of the substantive law and procedural requirements is significantly magnified. Indeed, the family court matter will most likely become much more complicated if the juvenile court and the criminal court become involved in the abuse allegations. Minnesota statutes set forth in great detail how child abuse and maltreatment claims are to be investigated.¹² Minn. Stat. § 626.556 sets forth the authority of child protection to

⁴ Minn. Stat. § 518B.01, subd. 6(a).

⁵ Minn. Stat. § 518B.01, subd. 6(b).

⁶ Minn. Stat. § 518B.01, subd. 6(c).

⁷ Minn. Stat. § 518.17, subd. 1(12).

⁸ Minn. Stat. § 518.17, subd. 1(13).

⁹ Minn. Stat. § 518.17, subd. 1a.

¹⁰ Minn. Stat. § 518.17, subd. 2.

¹¹ Minn. Stat. § 518.175, subd. 1; subd. 1a.

¹² Minn. Stat. § 626.556, subd. 2(c), defines "substantiated child endangerment," which includes such things as egregious harm to a child, sexual abuse, abandonment, neglect, murder, manslaughter, assault,

investigate, defines the various types of child maltreatment that can be found, sets forth how the investigation is to be conducted, and states the potential consequences of a finding of maltreatment. The county child protection office has many options to consider based on its findings resulting from an investigation of alleged maltreatment. For example, it can find that maltreatment did not occur and do nothing further. It can find that maltreatment did not occur, yet at the same time offer the family services to address various issues. It can actually make a finding that the allegations are substantiated and make a maltreatment finding; this is an administrative determination that will remain on the perpetrator's record for ten years, will appear on any background checks on that person, and could affect that person's ability to do such things as adopt a child, be a foster care provider, obtain certain professional licenses, provide daycare, or work with vulnerable adults. Such findings are appealable administrative determinations, with a specific statute setting forth the timing and procedural rules that need to be followed within strict timelines. The administrative appeal must be completed before review can be sought in district court, and then the standard of review is a difficult one.

The county can also file a child in need of protection or services ("CHIPS") petition. A finding of maltreatment is often a precursor to the filing of a CHIPS petition, but it is not required. Depending on the seriousness of the allegations and concerns, a case plan will usually be put in place by the child protection office requiring the parents to do certain things to correct the problems giving rise to the petition. Failure to address the concerns and follow the case plan can result in the child being removed from the home of the parent and placed in foster care, either temporarily or permanently, having custody transferred permanently to another person, or the parent could even have his or her parental rights terminated and the child placed for adoption. The juvenile court, and indeed the county child protection office and county attorney, has sweeping powers to address child abuse and maltreatment issues that come before them. It is beyond the scope of this chapter to discuss all of the substantive law that is found in Chapter 260C¹³ and the procedural rules found in the Minnesota Rules of Juvenile Protection Procedure. It is critically important for family law attorneys to consult with an attorney knowledgeable of juvenile court and child protection procedures if these issues or the potential for maltreatment findings or the filing of a CHIPS petition arise in your custody and access matter.

Perhaps the most serious consequence resulting from a child abuse allegation is the potential for criminal charges. There are many potential criminal charges that can be brought based on the nature of the abuse allegations. One such criminal offense is found in Minn. Stat. § 609.378 which defines the crime of neglect or endangerment of a child. Often law enforcement works hand-in-hand with child protection officers in investigating the most serious child abuse allegations. This might result in criminal charges going

solicitation to induce promiscuity and prostitution, malicious punishment, neglect, and endangerment of a child. Subd. 2(d) defines sexual abuse; subd. 2(f) defines neglect; subd. 2(g) defines physical abuse, and subd. 2(n) defines threatened injury.

¹³Minn. Stat. § 260C.007 contains various definitions of child abuse. These include child abuse itself (subd. 5); child in need of protection or services (subd. 6); domestic child abuse (subd. 13); egregious harm (subd. 14); and emotional maltreatment (subd. 15).

forward often simultaneously with a juvenile court child-protection proceeding. Here the need for a family law practitioner to consult with a criminal law attorney is even more critical than working with a juvenile law practitioner, as the stakes can be even higher and the need to protect a client from implicating him or herself criminally even more critical if your client is the alleged perpetrator.

§ 22.3 Practice Pointers

Above all else it is critically important to protect the child when allegations of child abuse arise. A court will most likely want to appoint a guardian ad litem to be the neutral eyes and ears of the court to investigate the basis of any claims. Family court services will often do many of the necessary background checks and in the course of the investigation, mandated reports may need to be made to child protection. Family court must defer to juvenile court proceedings, so if the abuse allegations end up in juvenile court proceedings, some aspect of the family court matters may need to be held in abeyance until the juvenile matters are resolved. Juvenile court transfers of custody or placements in foster care supersede family court custody determinations, at least until the juvenile court matters are completed, although actions in juvenile court often provide a basis for a subsequent modification of custody or access in family court.

When there are serious child abuse allegations, especially those involving such complex and serious allegations as shaken baby syndrome, Munchausen's syndrome by proxy, or sexual abuse, it may be critical for the court, the guardian ad litem, court services, or the parent who has not been alleged to have perpetrated the abuse to have the child evaluated by a reputable professional. There are several clinics in the Twin Cities area and several forensic psychologists specializing in such investigations, many of whom are retained by county offices and also see private individuals in order to conduct neutral, medically and forensically sound evaluations.

If representing the parent who is alleging the abuse to have occurred, it may be critical to have that client meet with a psychologist or other mental health professional to evaluate that person's emotional stability and mental health, to assist in determining the veracity of the claims, and to review the circumstances giving rise to the alleged abuse. The attorney should carefully review the version of events being told by the parent, and apply sound logic and common sense. No attorney should become a party to false allegations, and it will be critical to counsel your client on the consequences to both future custody and access if such allegations are found to not be substantiated. Often it is that parent's attorney who will steer that parent and the child to the appropriate professionals who can objectively evaluate the situation. Such parents will often be traumatized by the allegations and will need your calm and objective advice, a discussion of the possible ramifications and events to follow, as well as an overall strategy if the case involves domestic abuse filings, maltreatment determinations, juvenile court proceedings, and worst of all, criminal proceedings. It may, in the most serious of cases, be necessary to counsel the parent alleging the abuse to leave the other parent or significant other, even if they are not certain the abuse occurred. This action may be taken in order to prevent the

child from being removed from both parents. Such draconian actions may be necessary in order to preserve as much continuity and protection for the child as possible.

Perhaps the biggest challenge will face the attorney representing the accused parent. As mentioned at the outset, when serious abuse allegations arise, courts and investigating officials often move fast and err on the side of protecting the child. Often the best course of action is to go on the offensive to put in place an arrangement to preserve access between the accused and the child, even if it requires your client to move out of the house for a period of time while the investigation is underway or requires parental access to be in a supervised setting for a time. Make sure your client understands that these investigations can be very complex, may result in a significant disruption to that parent's relationship with the child, and may involve several different courts and court proceedings, all of which will cause delays and drive up expenses. It is also critically important to do what you can to have your client evaluated by neutral and competent forensic professionals so that you and the court have corroboration of your client's position beyond just what he or she say happened.

With sex abuse allegations, some accused parents submit to lie detector tests, have sex offender assessments performed, and try to get involved as early as possible in any forensic evaluations involving the child so as to protect the integrity of the process. Early on, strategies as to how much to cooperate with child protection and law enforcement investigators will need to be formulated. Often it makes sense to cooperate if you are certain the client is being truthful and can convince the investigators of that. You and the client may want to meet together with child protection investigators, explain what happened, and try to head off further, more difficult proceedings. If there is doubt as to the client's veracity, and law enforcement is actively investigating, that may be the time to contact and involve a good criminal defense attorney. Sexual abuse situations or severe child abuse allegations, such as shaken baby cases and Munchausen's syndrome by proxy, involve enormously complex forensic issues. The importance of studying the literature on those types of cases and involving forensic professionals early on in the process cannot be overstated.

Unfortunately, in some child abuse situations involving serious sex or physical abuse allegations, the courts and forensic professionals are never able to determine with any certainty whether the abuse actually happened. Depending on what occurred during the investigation and court proceedings, the relationship between the child and the accused parent may have been significantly disrupted and perhaps the relationship between the two parents will have deteriorated dramatically. In such cases, assuming the parent-child relationship has not been legally terminated, it may be very helpful to engage the services of a qualified child psychologist to work on reunification therapy. There are lifelong consequences to serious child abuse allegations -- whether substantiated or not -- and if the most important task is to protect the best interests of the child and preserve relationships with both parents, if possible, the services of such a psychologist may be the best action to take in a difficult situation.