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REVEALING THE EXISTENCE OF CHILD ABUSE IN THE CONTEXT OF MARITAL BREAKDOWN AND CUSTODY AND ACCESS DISPUTES

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ABSTRACT

Objective: Child abuse in the context of legal and de facto marital breakdown has received little attention internationally. Many believe it does not exist in this context and regard it as just a "gambit in the divorce wars." Recently, however, family courts in a number of countries have become concerned over the management of child abuse allegations in custody and access cases, known more commonly now as residence and contact cases. This article presents a unique research study, which investigated how the Family Court of Australia dealt with such cases. The study, covering all forms of child abuse, sought to discover who were the families bringing these problems to family courts, what precisely the abuse was and how the courts dealt with it.
Method: The study reviewed court records of some 200 families where child abuse allegations had been made in custody and access disputes in jurisdictions in two states, observed court proceedings and interviewed court and related services' staff.
Results: The findings showed that these cases had become a core component of the court's workload without any public or professional awareness of this change, that the abuse was real, that it was severe and serious, and that the courts and child protection services did not provide appropriate services to the families.
Conclusion: A new specialized intervention system was developed based on the research and it is now being trialed and evaluated. The new intervention system contains features derived from the research findings that may be suitable internationally for implementation. © 2000 Elsevier Science Ltd.

Key Words—Child abuse, Family courts, Family violence.

INTRODUCTION

CHILD ABUSE, WITHIN the context of legal and de facto marriage breakdown, has received little attention internationally. In fact, there is a long-standing view that child abuse within this context

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rarely exists (Schudson, 1992; Toth, 1992). Such a view argues that most of the abuse allegations made at the time of marital breakdown are not real. Instead, they should be understood as false allegations manufactured by warring partners for use as weapons in their family fight, in other words, a "gambit in the divorce wars" (Thoennes & Pearson, 1988, p. 2).

This perspective has been reinforced in the past by the denial of partnership violence within legal and de facto marriages and its role in partnership breakdown (Brown, Frederico, Hewitt, & Sheehan, 1998). Wallerstein and Kelly (1996) did note the existence of partner to partner violence in their pioneering study on marriage breakdown.

However, they did not see the violence as a significant problem in the marriage or as a cause of marital breakdown. They thought of it as something unusual, possibly a result of the deteriorating relationship. They imagined it would die when the marriage finally did (Wallerstein & Kelly, 1996). Even later researchers like Janet Johnston who did recognize the importance of partner to partner violence and its role in marital breakdown, did not extend this recognition to the possibility of child abuse either as accompanying the other violence or as a separate issue (Johnston & Campbell, 1993).

More recently, concerns about child abuse allegations have emerged from family courts as a result of their experiences with child custody and access disputes, now often termed residence and contact disputes, as is the case in Australia since 1996. Such concerns have come mostly from the USA, Australia, and New Zealand, all of which countries have lead in the development of specialized family courts to preside over marital breakdown.

These concerns have encompassed a breadth of issues, including an apparent rise in the number of such cases (Myers, 1989; Rubin & Flango, 1993), poor outcomes for the children involved (Harrison, 1989; Norris, 1993), difficulties in coordination between the courts and child protection services, between family and criminal courts, between family and children's courts and between family courts and other related services (Edwards, 1987; Rubin & Flango, 1993), problems in the legal representation of children (Myers, 1989), and more. Most often, these concerns have been expressed in relation to sexual abuse allegations; other forms of abuse have been ignored.

PRIOR RESEARCH

One substantial research study has been undertaken previously—a large USA study covering sexual abuse (Thoennes & Pearson, 1988). This study tracked all custody and access disputes involving child sexual abuse allegations for a 6-month period in 12 separate USA jurisdictions scattered across a number of USA states, generating data on 169 cases.

Conclusions were that the outcomes for the children were unsatisfactory, with a major problem being the disbelief within the court system and within the child protection services as to the reality of the allegations. Such was the disbelief that in some areas the child protection services refused to investigate any referrals from family courts. The study found that contrary to popular views the abuse allegations were not commonly false; false allegations amounted to around 14%. The problems in dealing with the abuse allegations were compounded by the extreme youth of the children and the serious nature of most of the allegations (Thoennes & Pearson, 1988).

Subsequently a study was begun by the Family Court of Australia focusing on similar issues, but it did not progress beyond an exploratory stage (Norris, 1993). Hence, when the present study team approached the Chief Justice of the Family Court of Australia, the Honorable Alastair Nicholson, to undertake research into the way the family courts managed child abuse allegations in custody and access disputes, he gave very strong support.

THE FAMILY COURT OF AUSTRALIA

The Family Court of Australia was established through federal marriage and divorce legislation as a federal court just over 20 years ago. It was one of the first such court systems set up internationally to preside over the dissolution of marriages and consequent decisions about property and child custody and access. Ultimately, like some family courts in other countries, it has assumed responsibility for custody and access matters for children whose parents are not legally married. It has been a pioneering court implementing no fault divorce, informal court procedures, conciliation and mediation procedures, counseling services fully incorporated into every registry of the court, and do it yourself divorce kits (Nicholson, 1994).

It is a stand-alone court similar to family courts in countries like New Zealand, Singapore, some states of the USA, and some provinces of Canada. Consequently, with child protection services and the wider child welfare services being provided by other authorities, mostly by state government departments, protocols have been devised to promote coordination between the family court and child protection services. Once the court is informed or discovers itself that child abuse may be involved, it refers the allegation to the state child protection service for investigation. The family court delays proceedings until the child protection services investigates and formally respond. Then the family court resumes dealing with the case.

THE STUDY QUESTIONS

The study sought to answer four questions:

- who were the families who brought these problems to the court?
- what were the problems of child abuse they presented?
- what did the court do with these problems? and
- what happened to the children during the process?

THE STUDY DESIGN

Given the absence of similar research and the paucity of prior knowledge, the study was designed as an exploratory one (Grinnell, 1997). In addition, the questions posed had some descriptive elements and, ultimately, the descriptive data was used to provide some evaluation of the court's interventions. The study was anxious to include all types of child abuse, believing in a possible interrelationship between the various forms of abuse as demonstrated in child abuse studies in other contexts (Hiller & Goddard, 1989). While being aware of the Australian national data base categorization of all child abuse into the commonly used four categories of physical, sexual, emotional abuse and neglect, the study decided to use categorizations that flowed from the data in the court files, so as to better capture the reality presented to the court.

The study used three data collection approaches. First, the study analyzed the records of active custody and access disputes of cases where child abuse allegations had been made in two court registries, each one in a different states, for an 18-month period. Second, the study observed cases as they proceeded through the courts; this included a special sub-study of cases at Pre-Hearing Conferences modeled on the study conducted by Professor Christine Hallett on the Scottish Children's Hearings System (Hallett, Murray, with Jamieson & Veitch, 1998). Third, staff from the court, the state child protection services, legal practitioners and others from related services were interviewed.

Cases were chosen through a random selection process at the Melbourne, Victoria, Registry; they totaled 149, one third of the total such cases presented at that Registry. All cases were included at

the Canberra, Australian Capital Territory, Registry because they totaled only 38 during the study period.

THE FINDINGS

The study was a large one and the findings presented here are chosen to show the contradictions between the myths and the reality of child abuse in the context of marital and other partnership breakdown, the major findings of the study and the reasons for the study's recommendations of a new specialized intervention system for the court's management of child abuse cases. A full report (Brown et al., 1998), has been published.

SIGNIFICANCE AND INCIDENCE OF CHILD ABUSE CASES IN THE FAMILY COURT

While the study found that the incidence of child abuse cases was rising, as indicated in the US literature, doubling during the period 1993–1997, the proportion of child abuse cases was only 5% of the total children's matters cases presented to the court in any 1 year. However, the cases involving child abuse allegations did not resolve as other cases did. By the potential halfway point of court proceedings, the Pre-Hearing Conference, these cases had grown to 50% of the total children's matters cases. By the potential end point, the Trial, they were 30%. At the same time, if one compared the numbers of cases of physical and sexual abuse at the Melbourne Registry of the Family Court, with the cases of physical and sexual abuse proceeding through the Melbourne Children's Court, there was little difference in the number being presented in each court (Sheehan, 1997).

Therefore, without public or professional awareness, child abuse had become a core element of the workload of the Family Court. Furthermore, the Family Court, conceived for matrimonial dissolution purposes, had become a significant part of the child protection system, almost as significant as the state Children's Court.

The study's findings contradicted beliefs about child abuse in the context of partnership breakdown. Child abuse allegations in the Family Court were found to be false no more frequently than child abuse allegations made in other circumstances; some 9% were found to be false. Coincidentally, a similar finding was reported by a separate study conducted at the same time in another state (Hume, 1997). Moreover, child abuse in the Family Court cases was not mild and exaggerated abuse, but the more severe abuse with physical and or sexual abuse being found in some 70% of cases. Once again, the profile of the type of abuse was much the same as that proceeding through the state Children's Court. (For a full account of child abuse cases in the Victorian Children's Court see Sheehan, 1997.) Nor were most of the families already known to the child protection authorities, only 22.5% had been previously known to them.

FAMILIES WITH PROBLEMS

While the families were similar in many respects to the families in the regions surrounding the registries, in social class, ethnicity, race and physical and mental health, they did have a number of atypical serious social problems that probably contributed to the partnership breakdown and to the difficulties in confronting the challenges of separation and parenting in new circumstances.

Table 1. Percentage Unemployment and Non-employment among Families at Melbourne and Canberra Registries

Non-employment/Unemployment	Males Melbourne (n = 144)	Males Canberra (n = 37)	Males Melbourne (n = 144)	Females Canberra (n = 37)
Unemployed	32.9	20	8.8	nil
Pension	9.1	nil	nil	nil
Non-employed	1.8	nil	61.9	51
Total	43.8	20	70.7	51

Unemployment

More of the parents were unemployed or non-employed than in the general population of the registries' regions. This was worse in Melbourne than in Canberra. Table 1 shows the details.

What role unemployment played in the families' difficulties is not clear. Some research suggests that the unemployment leads to family breakdown and other research suggests family breakdown leads to unemployment, particularly for men. For example, Gregory (1996) has documented the severe permanent losses in jobs for males with dependent children over the last two decades. These males, the fathers in this study, were found to have the greatest job losses of all groups in the population. Several other studies have shown that whatever the role unemployment played in leading to family breakdown, it is a consequence afterwards. One study (Gerson, 1993) showed that working class men loose job attachment following partnership breakdown. Another (Jordan, 1996) showed that men of all classes suffered long periods of unemployment after divorce. Literature from fathers' rights groups speaks of a loss of work motivation after separation and divorce, that the groups attribute to the unfairness of the child support and family court systems (Kaye & Tolmie, 1998).

Criminal Convictions

The parents had high rates of criminal convictions, as can be seen in Table 2. The range of convictions for males was wide; it included property, alcohol and drug offences and offences against persons. Half of these men had convictions for more than one offence; commonly, an assault conviction accompanied other types. Women had convictions for a narrower range of offences, drugs and social security offences. Women's convictions against persons was limited to child abuse, whereas men's included a variety of such offences, including child abuse.

Substance Abuse

As can be seen from the preceding findings, the parents' rate of substance abuse was high. Taking both registries, the average incidence of male substance abuse was 41.6%, with one half including both drugs and alcohol. The average incidence of female substance abuse was 26.4%, with one third including both drugs and alcohol.

Table 2. Percentage Incidence of Criminal Convictions among Families at Melbourne and Canberra Registries

	Males Melbourne (n = 144)	Males Canberra (n = 37)	Females Melbourne (n = 144)	Females Canberra (n = 37)
Convictions	23.5	48	9.7	12.5

Table 3. Percentage Incidence of Partner to Partner Violence among Families at Melbourne and Canberra Registries

Violence	Males Melbourne (n = 144)	Males Canberra (n = 37)	Females Melbourne (n = 144)	Females Canberra (n = 37)
Allegations Against	47	Not known	9.3	Not known
DVO's Against	40	33	7.3	7

Partner to Partner Violence

Partner to partner violence was high, as presented in Table 3. Partner to partner violence was indicated both by allegations of violence as well as domestic violence orders taken out. Such orders, which are termed intervention or restraining orders in some jurisdictions, are granted in the lower court by a presiding magistrate. They are granted only if the application is supported by evidence additional to the statement of the alleged victim; they prevent the perpetrator from having contact with the victim for a fixed period of time.

Considering the picture provided by Table 3, it was not surprising that the most common single cause given for the partnership breakdown was partner to partner violence. Such a reason is not commonly reported in other partnership breakdown studies (Wallerstein & Kelly, 1996).

An attempt was made to categorize the partner to partner violence using the Johnston and Campbell typology of family violence (Johnston & Campbell, 1993). However, most of the violence could not be categorized in this way, except that some 30% did fit the category of episodic male battering, the most severe of the violence categories available.

Child Abuse

The nature of the abuse allegations were serious, more serious in some regards than the profile of abuse allegations notified to the state child protection authorities. There, the most common form of abuse alleged is neglect, whereas little neglect was alleged among the family court cases. The most common form alleged in the Family Court was multiple forms of abuse, particularly physical abuse and or sexual abuse and witnessing violence. The Family Court profile of abuse was similar to the profile of abuse that the state child protection authorities move on to the Children's Court (Sheehan, 1997). Table 4 details the abuse allegations.

FAMILY COURT PROCEDURES

Many problems were found with the way the court proceeded. The cases took a long time, an average of 17.5 months, from the time of the allegation to the time of resolution. The time taken increased as the age of the child decreased. Each case had many hearings, an average of five. The adversarial nature of the dispute resolution and the rights of the parents to bring the case back to the court repeatedly, regardless of the situation of the child, assisted in prolonging the proceedings.

Coordination with Child Protection Services

Many of the delays had their origins in the problems of coordination between the state child protection authorities and the Family Court. The problems of coordination between the various child protection agencies has been examined over many years, most recently in an exhaustive UK study (Hallett, 1995). The obstacles to coordination identified in the UK study were found to exist for the Court in its dealings with all eight of the child protection services. There were differences

Table 4. Percentage Frequency of Types of Abuse Alleged among Children From the Melbourne and Canberra Registries

Type of Abuse	Melbourne (n = 282)	Canberra (n = 75)
Physical Abuse	18.2	36.1
Sexual Abuse	12.1	48.6
Emotional Abuse	nil	nil
Witnessing Violence	6.1	nil
Neglect	3.0	5.3
Failure to Protect	3.0	nil
Risk of Harm	3.0	nil
Physical and Sexual	8.1	nil
Physical and Witnessing Violence	13.1	nil
Physical and Neglect	2.0	nil
Neglect and Risk of Harm	5.1	nil
Sexual and Witnessing Violence	4.0	nil
Sexual and Neglect	2.0	nil
Physical and Sexual and Other	6.0	10
More Than Three Forms	4.3	nil
Total	100	100

in legislation, levels of government, organizational goals and procedures, clientele, the staff's prior professional training and their on the job training, staff gender and the prestige accorded the two major professional groups. Justice Faulks has detailed the differences between what he calls the helping group, (the welfare services), and the deciding group, (the legal services). He has shown how the differences are embodied in their language, implying that even basic communication between them is fraught with misunderstanding (Faulks, 1997).

The coordination problems were found to start at the beginning, at the point of notification of the abuse, with the state child protection deciding to investigate only half of the notifications (Armytage, 1997). Little information returned to the Court, because the format of the state child protection response was very cryptic. All responses were returned within one of four categories. These were:

1. State services to take action themselves in the Children's Court, or
2. State services to be a party to the Family Court action, or
3. State services to take no action but possess information available to the Court on the production of a subpoena, or
4. State services to take no action.

Most of the responses fell into the last category, some 77.6%, leaving the court in the position of having to begin the investigation again.

Considering that the state service did not substantiate many notifications, 22.5% in Melbourne, they took a long time to handle the matter. The shortest was one day, the longest 180 days, and the average 42 days. The delay was of concern given the fact that the children were very young, with most being 4 or 5. Substantiation rates were found to vary greatly between states, another matter for concern. A final issue was not just the difference in definitions of child abuse between the Family Court and the state services but the further difference in definitions between each state service. A compounding complication emerging currently with the trend to joint child protection/police investigations will be the difference in definitions between police and state child protection services.

Since the Family Court took its definitions from the description of abuse presented to it, rather than from pre-existing categories of the state child protection services, the court's profile of abuse

may reflect more accurately the reality of the abuse presented to it than is the case for the state child protection services. Certainly, its approach permitted the recognition of the interrelationship between various forms of abuse in these children's cases.

OUTCOMES FOR THE CHILDREN

No explicit assessment of the direct outcomes for the children was undertaken. However, the study findings implied difficulties for them. The process took a long time. The average length of time of 18 months was particularly worrying given the children's modal ages of 4 to 5 years. Moreover, the process involved many hearings. Each hearing would cause general tension in the family followed by a major disturbance if there was a change in custody or access. Most children had a number of court ordered changes in custody and access following a hearing; residence changed in 37.2% of cases at each hearing and contact in almost all.

The children were found to be suffering high levels of distress, some 29% had confirmed emotional problems. Whether this is higher or lower than the incidence of emotional problems for the children of all separating parents is not known. For, the intensity and incidence of children's distress, post separation, remains contentious and the research findings contradictory (Lamb, Sternberg, & Thompson, 1997). Yet the descriptions of the problems of these children seemed to indicate a higher intensity of distress than noted previously. The children were not merely suffering from anxiety and depression, as reported previously, but from feelings of severe depression, sometimes suicidal depression, and also from feelings of great anger. In addition, the children who were among the most affected showed continuing deterioration over the time of the dispute. The longer the dispute took the greater was the child's deterioration.

SUCCESSFUL COURT INTERVENTIONS

Despite the court's difficulties, it had devised some strategies which did resolve the cases. These could best be described as the court taking the initiative and the responsibility for problem resolution on behalf of the child, that is the court being proactive in a child focused way. Such strategies included the reports from the state child protection services clearly substantiating the abuse; when the state services did this some 86% of cases with those reports, or 18% of total cases, were resolved. They included, also, reports from Court Counseling; when a Court Counseling completed a Family Welfare Report, the report resolved the dispute in 39% of the cases where such reports were made, that is in 17% of the total cases, immediately.

Family Welfare Reports were cited by the judge at trial as being a reason for the judicial decision in almost all of the cases that went to trial, that is in 30% of the total cases.

Taking another approach to resolution strategies, it was noted that the multidisciplinary Pre-hearing Conferences when combined with a Court ordered Family Welfare Report and the appointment of a separate legal representative for the child resolved 50% of the cases at this point.

IMPLICATIONS FOR A NEW INTERVENTIVE SYSTEM

In summary, the study revealed a number of conclusions that pointed the way to changes in the current system. It showed that cases involving child abuse allegations had become part of the court's core business in children's matters. These cases were no longer an extra or unusual part of the workload, but rather an integral part of it.

Furthermore, this pattern in the workload was likely to become more firmly entrenched as the

numbers of these cases continued to increase over time. Therefore the court needed to confront the issues these cases presented.

The first issue the cases presented was one of family violence. The abuse identified was not mild abuse, but similar to the profile of abuse dealt with by the state Children's Court. Nor were the allegations mostly false allegations; the incidence of false allegations was found to be the same as in notifications to the state child protection services. In addition, other family violence was often present and was often the cause of the partnership breakdown. It was primarily male partner to female partner violence, of which the most common type was episodic male battering. This is the most serious of the categories of violence in typologies of family violence and it is not easily explicable as a response to provocation as is argued in the Father's Rights literature (Kaye & Tolmie, 1998).

The second issue was that the families had serious difficulties, namely unemployment, violence, substance abuse, and criminal convictions. These were not families who were likely to be able to easily resolve the problems accompanying their marriage and partnership breakdown.

The third issue was that the legal process did not explicitly focus on the child although the children were the supposed basis of the legal application. When the legal process did focus on the child, through state child protection reports, family court Family Welfare Reports and the appointment of separate legal representatives for the child, the likelihood of a resolution increased.

The fourth issue was that the process involved many expensive legal hearings, with each hearing raising the possibility of substantial change for the children; furthermore the process took a very long time, too long when one considered the very young age of the children, who proved to be seriously affected by these experiences. Some of the delay stemmed from the problems of a system that involved separate and different state and federal legal and administrative components and the consequential coordinating problems and variable outcomes.

Overcoming these would be possible with a unified family court, a truly family court, that combined the state child protection services, the state Children's Courts and the state Legal Aid Commissions with the federal family court. Unfortunately that is not feasible within the current political climate. It remains a future dream. Nevertheless, some improvements might be possible through improved coordination mechanisms.

A New System—A Specialized Interventive System

Thus the research team recommended a new specialized interventive system which would be court lead and court managed very tightly. The system would be child focused, have short time lines and new mechanisms for coordination. It would comprise a three hearing plan, with 6 weeks between each hearing, a court staff member from the Counseling staff as manager for each case, a legal representative for each child, a notification to state child protection investigation for each child followed by a Family Welfare Report and a multi-disciplinary judicial/counseling staff team at all hearings with the same team staying with the family throughout the legal process.

CONCLUSIONS AND NEW BEGINNINGS

By the time the study's findings were presented to the Chief Justice, two other related reports (Australian Law Reform Commission, 1997; Family Court of Australia, 1997) had been released. Both of these reports supported the concerns raised in this study. Thus, the Chief Justice established a committee of court staff and representatives from the relevant services to develop new case management procedures in child abuse cases. In 1998 the Committee commenced a trial of a new intervention based on this research. It is to be evaluated by this research team and should finish in 2000. It represents the court's new awareness of its role in child protection. Hopefully, it will

provide a more appropriate service for the children and the families involved in family court proceedings.

The research has relevance beyond Australia. It indicates that child abuse within de facto and legal marriage breakdown is real, that it is abuse of a serious kind, that child abuse is a major aspect of family courts' workload, that family courts do not deal well with the children, but that they can improve by using certain court lead child centered and well coordinated practices, using relevantly educated and experienced multidisciplinary teams. The research provides directions for family courts, internationally, in their future development.

Family courts in some countries may not agree with the recommendations of this research. Some may not recognize their role in child protection. Some may not accept it once they become aware of it. Some may find certain elements of the new system being trialed opposed to their principles of justice. Not all countries would accept the specialized nature of the service; it contradicts the notion of equal treatment for all under the law. Not all countries would accept counseling staff working as partners with the judiciary in the legal process. Not all countries would accept the use of experts in the legal decision making process. Not all countries would accept any separate legal representation for children in family law proceedings, let alone separate legal representation for all of children involved in child abuse allegations. For those countries with an interest in the improved functioning of family courts, such as the UK is showing at the moment (Department of Health, 1998), the research shows the need to keep children's interests to the fore in family conflicts and the need to be ever vigilant in the protection of children from family violence.

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RÉSUMÉ

Objectif: Au niveau international, la question des mauvais traitements des enfants dans le contexte des ruptures de mariage a peu fait l'objet d'études. Il existe plutôt une croyance que les mauvais traitements n'existnet pas ou bien qu'ils sont des fausses accusations dans la guerre entre les partis. Récemment, on remarque que dans plusieurs pays, les cours familiales s'inquiètent de la façon dont on dispose des allégations de mauvais traitements par rapport à la garde des enfants et aux droits de visite. Cet article décrit une étude unique, laquelle a examiné comment la cour familiale en Australie compose devant ces situations. L'étude a voulu identifier tous les types de mauvais traitements, leur nature, quelles sont les familles qui se présentent à la cour avec ce type de problème, et comment la cour dispose de ces situations.
Méthode: L'étude a passé en revue, dans deux états australiens, les dossiers judiciaires de 200 familles qui se disputaient la garde des enfants et où il existait des allégatons de mauvais traitements.
Résultats: On a découvert que ces types de cas représentaient une portion importante du travail de la cour, sans que, pour autant, le grand public ou les intervenants soient conscients de cette situation. Ceci représentant devant la cour. On a noté aussi que les mauvais traitements étaient véritablement présents, qu'ils étaient graves et tragiques et que ni la cour ni les services de protection de l'enfance furnissaient des services convenables aux familles en question.
Conclusions: On a éloboré un nouveau projet d'interventions basé sur la recherche, lequel est en essai et sera évalué. Il est fort probable que ce projet pourrait s'appliquer dans plusieurs pays.