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CHILD CUSTODY CASES, INCEST ALLEGATIONS AND DOMESTIC VIOLENCE:

Expert Insights and Practical Wisdom

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In this article, I will consider incest allegations involving one parent and one or more children in the family. Child sexual abuse can arise in many other contexts, as can incest cases. The most difficult and least believed cases arise, however, in custody cases when a father is accused of sexually molesting a child in the family, whether his child or the mother's child. Courts may be hostile when incest allegations are raised against a grandparent or other relative, particularly when only one of the parents is objecting to any contact with the ostensibly offending relative. The same court response can happen when the allegations involve the other parent's spouse or lover. Although this article will focus on incest perpetrated by fathers, which is all too commonly faced by battered women in custody disputes, most of the issues discussed will be relevant to those other situations involving incest allegations. Be aware that:

- Every state has its own custody laws, court rules and case law, and knowing these laws and practices is critical to effective client representation (or if you are representing yourself).
- States vary in what standard of proof is required to prohibit an incest perpetrator or child molester from having access to his children, whether it is supervised or not. While the standard is usually "preponderance of the evidence" for other issues involving custody and visitation, as a practical matter some courts require "clear and convincing evidence" or even a criminal conviction before they will protect a child from an incest perpetrator-father. The only other types of cases where a higher standard exists to deny custody or access involve domestic violence.

When faced with this situation, consider arguing that requiring any higher standard than the usual preponderance of evidence is gender-biased, based on the assumption that women fabricate such allegations. Some states even include penalties if the court does not credit an allegation of incest.

- Even though the standard of proof in criminal cases is “beyond a reasonable doubt,” many attorneys who litigate incest cases find that it is considerably easier to convict an incest-perpetrating father than to restrict the father’s access to the children by persuading a family court to believe allegations of incest. Some custody courts have even discounted evidence of the father’s sperm found in a daughter’s vagina or his criminal conviction for the incest.
- If your client tells you of prior cases where she was a litigant, you may want to check the court records. Often case files contain information that can help (or hurt) your case. It is usually better to know what information is there. If it is helpful you can use it. If it is harmful, her opponent, a GAL or law guardian, the custody evaluator or a witness may raise it, even if it did not involve her opponent, and if you know in advance, you can better prepare to refute it or place it in a more favorable context.
- If you are able to do so, check any court records concerning the opponent, including prior divorce, paternity, custody, domestic violence and criminal cases. Check them even if they do not involve the mother or her children. Obtain copies of important documents (preferably certified copies if they are from another court) that you might want to introduce into evidence (or ask the judge to take judicial notice of, if the files are in the same court and can be accessible at trial) or use to cross-examine or impeach an opponent or other witness.

FREQUENCY OF INCEST, PARTICULARLY WHEN THERE IS DOMESTIC VIOLENCE

One study has found that some form of child abuse occurs in 30-60% of families where domestic violence is present, and that the occurrence rate is much higher when it is the father abusing the mother. The same study reports that the incidence of child abuse by a battering husband increases from 5% with one act of marital violence to nearly 100% with 50 incidents of marital violence.¹ Other studies show that 44.5% to 73% of incest perpetrators are known to be battering the children’s mother.²

HOW OFTEN ARE INCEST ALLEGATIONS MADE IN CUSTODY DISPUTES?

A study of 12 states found that incest allegations are raised in only 6% of custody cases.³ An even larger study involving 9,000 divorce cases found the rate of incest allegations to be less than 2% of divorce cases, or less than 10% of contested custody disputes.⁴ The reality is that because custody disputes are considered difficult and take up much court time, particularly when there are incest allegations, they are wrongfully assumed to happen more often than they actually do.

HOW OFTEN DO MOTHERS DELIBERATELY MAKE FALSE ALLEGATIONS OF INCEST?

Despite the assumption that virtually all allegations of incest arising in custody disputes are made falsely by mothers and for tactical gain, the reality is that fewer than half of incest allegations made during custody disputes are made by mothers against fathers (some are made against other people or made by fathers or others).⁵ An Australian study showed that false allegations are rare (no more than 9% of cases) and are no more common in divorces or custody disputes than at other times. Furthermore, most incest allegations that are not sustained are made in good faith, not deliberately falsely.⁶ Canada has found that fathers are more than 16 times as likely to make false incest allegations as mothers (21% of cases by fathers, vs. only 1.3% of cases by mothers).⁷

DO INCEST PERPETRATORS MOLEST OTHER CHILDREN, AND VICE VERSA?

Although sex offender treatment experts used to believe that fathers who perpetrate incest against their children seldom molest other children, they now realize that these men have many other types of sexual deviance, and at least a third to half of them molest other children.⁸ There are also incest perpetrators who will not molest for many years, but begin again when there is another generation of children in their family.

SO WHY ARE COURTS RELUCTANT TO BELIEVE MOTHERS' ALLEGATIONS OF INCEST?

We have seen that father-child incest cases are quite common, but that only a small number of them are ever raised in custody disputes, and that when they are, courts can be hostile to mothers raising them, doubt that the allegations are true, fail to protect the children and often punish the mothers. Since most courts want to do the right thing by children, why do we see some being hostile and inappropriate in these cases?

1. There is a Long History of Disbelieving Women and Children

Western society has a long history of disbelieving women and children, particularly when they claim they have been sexually assaulted or raped. It has had a very difficult time even believing that child sexual abuse exists or is a real problem, repeatedly “discovering” or rediscovering the problem, only to conveniently try to bury it as a fantasy of girls. As late as the mid-1970s the child sexual abuse literature “was dominated by four themes: (a) children are responsible for their own molestation, (b) mothers are to blame, (c) child sexual abuse is rare, and (d) sexual abuse does not harm,”⁹ each of which we now know is false. Furthermore, there is a long history in the courts of believing men and taking their concerns far more seriously than those of women and children, as found by the many gender bias studies that courts have undertaken.¹⁰

2. Courts Assume Child Protection Will Have Substantiated the Abuse

Most judges assume that child protection agencies carefully investigate every allegation of child abuse. Often they do not do so, particularly if the parents are separated or going through divorce or custody litigation, or if the non-abusive parent is willing to protect the child or seek court protection.¹¹ Yet courts often wrongly assume that an agency's failure to sustain the abuse allegation means the allegation was not credible, when the agency's protocol may well have been not to even investigate when the case is in court. As an example, one Colorado court ordered a child protection agency to investigate old incest allegations that arose in contested custody cases that the agency had ignored because the cases were in court at the time of allegations. The agency substantiated the cases at virtually the same rate as child sexual abuse cases not occurring during custody disputes, even though in some instances several years had passed and some parties and evidence could no longer be found.¹²

3. Clear Evidence of Incest Seldom Exists.

Even when sexual abuse cases are investigated by forensic experts, there is often no clear evidence of the molestation. Often there was no penetration or ejaculation; even if sperm is deposited, it degenerates fairly quickly, and is seldom found after a few hours or after the child has bathed. A study of 115 cases of child sexual abuse felony cases with penetration (88 vaginal rapes and 67 oral or anal sodomy cases) had positive physical evidence in only 23% of cases that resulted in conviction.¹³ Furthermore, penile penetration does not always cause injury, either because it was slight, or because hymens, vaginas and rectums have the ability to stretch. Even when there is injury, children and especially girls heal amazingly quickly, including from tears and other injuries to their genital area, sometimes making it impossible to document the abuse. Growing and the effects of estrogen can cause the hymen to grow in a way that obscures all evidence of past injuries. Since disclosure of abuse is usually delayed in children, and medical exams, even when performed, are often delayed to put together an expert multidisciplinary team, it is unlikely that they will find any clear medical evidence.

Furthermore, many doctors use language that can mislead those not familiar with the terminology into falsely assuming that the doctor believed that child sexual abuse did occur. The phrase "history of child sexual abuse" in a medical record only means that the doctor was told that it happened, not that the doctor made any findings as to whether it occurred. The phrases "diagnostic findings consistent with sexual abuse" and "consistent with sexual abuse" mean that the findings do not rule out that sexual abuse happened, but neither do they conclusively demonstrate that it did happen.

4. No Tests Can Prove (or Disprove) That Someone Is a Child Molester.

Sex offenders almost always deny their abuse, fully or partially, or may try to offer alternate explanations. Sex offenders may claim to have trouble remembering what happened, possibly because of substance abuse. Children very commonly retract their allegations, particularly once they learn that there may be negative consequences to them (e.g. one or both parents or even siblings may be angry because the child disclosed the abuse, the child, the siblings or their father may face removal from the home, their abuser

may face imprisonment, the family may face loss of income, the abuser may threaten to retaliate against the child or mother, and other threats which the abuser predicted would happen if the child told may take place.) Children seeing their family fall apart or nobody believing them often retract their allegations in the hope that it will make things all right again. So denials and retractions are not conclusive, no matter who makes them.

Furthermore, there are no psychological tests that can demonstrate whether someone is, or is not, a sex offender, a child molester or an incest perpetrator. This is true of the MMPI-2 and other psychological tests routinely given. Likewise, no tests can determine if someone is a batterer, or which batterers are most likely to re-offend; many batterers and sex offenders test as completely normal, whereas women who are battered may appear to have some abnormalities suggesting mental illness or personality disorders. Yet those knowledgeable about domestic violence can correctly interpret battered women's scores and find that the apparent abnormalities are caused by the abuse and are likely to go away if she and her children are protected from further abuse. (Conversely, those who are not truly knowledgeable will magnify these apparent abnormalities.)

In addition, there is no psychological test that can determine if the child has been sexually abused. The only legitimate reason for testing adults and children is to give the professional basic information about the personality style and functioning of those tested. It is a mistake to assess for sexual abuse by "interactional assessment," namely by "watch[ing] the father interact with his daughter, looking for signs of bonding or, conversely, fear. [Evaluators] believe if he abused her, she will be afraid of him; if she loves him, he is innocent. Of course there is no research and no good theory to support this approach [since] sex offenders are notorious for bonding with a child and using that relationship to manipulate the child into having sex with them."¹⁴

The sad reality is that not enough therapists or custody evaluators are knowledgeable about domestic violence or able to identify it even when clearly presented to them. These same individuals probably are even less knowledgeable about child molestation and incest, including how to diagnose it or how to properly treat it. Many custody evaluators are trained in a family systems dynamic that sees both parents as contributing to any problems, and improving communication as the solution. Yet incest, domestic violence and other forms of abuse are crimes perpetrated by one individual, and are not the result of a breakdown in communication. Unfortunately few courts are aware how poorly informed most custody evaluators are, and assume they have great wisdom in this regard. Furthermore, the more judges are informed by these well-intentioned, but misguided experts, the more confused and ill-informed the judges become, as do most of the other players operating in the court system, e.g., mediators, law guardians, guardians ad litem, and attorneys.

In addition, many professionals (including custody evaluators, therapists and judges) may subconsciously try to protect themselves from vicarious traumatization by denying that the abuse ever occurred, or by blaming the victim or the victim's mother for the abuse, rather than the offender. Those who were previously abused in their own

lifetimes are at much greater risk of vicarious traumatization. Child sexual abuse, and particularly incest, is known to be one of the most damaging traumas, making these cases among the most toxic and likely to result in self-protection, rather than finding that the abuse happened and then responding protectively to the child victim and other non-offending members of the family. One common misbelief, sometimes held in an attempt to protect from vicarious traumatization, is that children are very suggestible and will fabricate incest allegations. If children were so suggestible, toilet training would be very easy.

5. Allegations are Often Made During Custody Disputes

Courts and other professionals seem particularly suspicious of allegations made during custody disputes. Even though, as we have seen, they are raised in far fewer cases than those connected with the courts assume, it is not uncommon for the allegations to first surface during custody disputes. Court players regard this as suspicious. It is hardly surprising that allegations first arise during custody disputes, since often children do not feel safe enough to disclose until after the parents have separated. Furthermore, in some cases the incest only begins or is exacerbated after the separation, particularly in cases where the father wants to punish the mother for leaving and does so through the child. In other cases the perpetrator feels entitled to a sex partner, and if his wife is not available, then he will use the child.

WHAT HELPS VICTIMS AND OTHER NON-OFFENDING FAMILY MEMBERS IN INCEST CASES?

It is always a crisis for a parent to learn that the other parent is sexually abusing their child. Incest cases are far more devastating than most other traumas and even worse when the child is not treated, resulting in huge economic costs which are borne by all of society. Parent-child rapes are five times as likely to result in a major injury to the victim than all rapes (25% vs. 5%).¹⁵ Denying that the abuse even happened only exacerbates the toll on the abused victim, and undoubtedly the cost to society.

What helps victims most to heal is having a strong relationship with their non-abusive parent, and protection from the abuser. Asking the non-protective parent what will best help them is beneficial. Because the aftermath of discovery of the abuse so often precipitates a crisis, the non-abusive parent may need all kinds of assistance, from scheduling appointments, babysitting, negotiating with employers for time off, and other logistics to meet the many demands they are likely to encounter. These should be handled in a way least likely to disrupt her life.

It is always helpful to plan to refute parental alienation charges that most often follow incest allegations. (These often arise using other language, e.g., estrangement, parental alienation syndrome, unfriendly behavior.) The reality is that there is no scientific basis for parental alienation syndrome,¹⁶ and calling it by other names does not legitimate it.

Various court orders are always inappropriate in families where there is high conflict, domestic violence, incest or child abuse, and these include: mediation, couples counseling, parent education programs, and joint or shared custody (whether physical or legal custody). When courts fail to protect women and children, they encourage abusers to escalate their abuse, and this often leaves victims with no option but to flee or protect themselves, further risking an increase in the violence and the bias that the courts feel against women and child victims.

If judges really want to help children, and even save lives of women and children, they could insure that:

1. they do not rely on unproven, gender biased theories like Parental Alienation
2. any incest allegations are competently and impartially investigated,
3. women's and children's fears and safety needs are reflected in court orders,
4. they foster children's relationships with their mothers, and
5. they expedite cases and discourage endless delays.

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