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Commentary

Can Family Law Protect Young Children?

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When young children tell their mothers that they are being sexually abused by their father, the mother faces a dilemma; if she does nothing, state child protection services can remove her children as being in need of care and protection. If police are called, she is likely to be told to leave the family home to keep her children safe. If she does, the father is likely to turn to the federal family law system[1] to seek time with the children. If the mother seeks an order for supervised, or no further contact with the child to protect them from abuse, she may lose residence of the child and the child may be ordered to live with the abusing parent.

In the family law system mothers alleging child sexual abuse are at risk of being labelled as (a) mentally ill, delusional or suffering from borderline personality disorder by a court adviser who is often unqualified to make such a diagnosis, being neither a psychiatrist nor a clinical psychologist; (b) suffering from (the nonexistent) parent alienation syndrome — now disguised under different nomenclatures; (c) vengeful and vexatious — concocting false allegations of abuse to spite the father; or (d) emotionally abusive because she is said to be training the child to make a false report of abuse in order to deprive the father of contact (McInnes, 2011).

Legal speculation of this sort has yet to explain how one trains a 2-year-old to describe anal and oral sex acts, but in seeking protection for their children, mothers are at high risk of losing residence, being deprived of contact or being restricted to occasional, supervised contact while the children are exposed to further abuse in the care of the perpetrator.

This scenario is now so common that family lawyers and even Women's Legal Services warn mothers not to disclose child abuse or family violence in family law proceedings and to accept shared parenting. According to statements made by her uncle, that is what happened in the tragic case of 4-year-old Darcey Freeman, who was thrown from Melbourne's massive West Gate Bridge by her father in the presence of her two brothers. Relatives claimed that the father previously disclosed plans to kill all three children, but the mother was persuaded by legal advisers to agree to the father's demands at mediation. As a result, he was given unsupervised shared parenting (Smith, 2009).

It should be noted that parents of child sexual abuse victims who seek protection from the family law system are in a vastly different situation from the parents of a child victim giving evidence in a criminal court. In a criminal court, the case is presented by state prosecutors with police, assisted by social workers and other relevant professionals. Most allegations of child sexual abuse of children aged 6 or under are never prosecuted. When the child is the only witness to the abuse and there is no corroborating evidence a prosecution is unlikely to proceed because young children cannot meaningfully be cross-examined in the adversarial court system (Eastwood & Patton, 2002; Eastwood, Patton, & Stacy, 1998).

In family law, an application for orders that aim to protect the child is a private law matter. The parent must take full responsibility for proving the case in an adversarial system. The Family Law Council confirms that

> 'if one parent is allegedly abusing the child and the parents have separated, it is often left to litigation in the Family Court or Federal Magistrates Service without a State or Territory child protection authority being involved' (McDonald, 1998). Furthermore, legal aid is only available to one parent and, in such a complex adversarial system, many mothers have lost their children and their homes to pay vast legal fees.

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The family law system was never designed as a child protection service, but research has shown that child protection issues are present in many of the children's matters that proceed to litigation (Brown, Frederico, Hewitt, & Sheehan, 1998, 2001; Brown, Sheehan, Frederico, & Hewitt, 2001). Court professionals are neither trained in child development, nor the dynamics of child abuse, yet they make decisions every day about children in relation to allegations of abuse. A further complexity is the application of the 'Briginshaw standard' of testing evidence to the highest end of the balance of probabilities.[2] This means that allegations of child sexual abuse require a high standard of proof, such as admissions or a criminal conviction for the offence, in order to be accepted. As previously noted, successful criminal proceedings for child sexual abuse are not a usual outcome for reported offences.

The judicial officer in the family law system must also avoid making positive findings of a criminal nature, such as child sexual abuse, because the court is not a criminal court. Currently the family law system resolves the problem of mothers' allegations of child sexual abuse as being evidence of the mothers' pathology. In cases in which there are admissions of abusing or convictions for abuse offences, fathers are still being allowed contact with conditions which aim to 'protect' the child, such as requiring children to remain together and alert and fully clothed while they are with their father.[3] The result is that the current family law system is routinely exposing children to ongoing abuse at tremendous cost to the children, the protective parents and ultimately, society.

Endnotes

1 The family law system includes the Family Court of Australia, the Federal Magistrates Court and Family Relationship Services, which provide counselling and mediation for separated parents.

2 The 'Briginshaw standard of proof' was articulated in the High Court decision of *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('Briginshaw').

3 See, for example, the 2010 Family Court of Australia case reported as *Robins v Ruddock* (2010) FamCA 35 at the Australian Legal Information Institute http://www.austlii.edu.au/au/cases/cth/FamCA/2010/35.html

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