March 2, 2015

CRYING WOLF: THE USE OF FALSE ACCUSATIONS OF ABUSE TO INFLUENCE CHILD CUSTODIANSHIP AND A PROPOSAL TO PROTECT THE INNOCENT

Robert W Kerns, JR, West Virginia University

Available at: https://works.bepress.com/robert_kerns/1/
CRYING WOLF: THE USE OF FALSE ACCUSATIONS OF ABUSE TO INFLUENCE CHILD CUSTODIANSHIP AND A PROPOSAL TO PROTECT THE INNOCENT

Robert W. Kerns Jr.

Abstract

I. Introduction

II. Statistical Data On The Frequency Of False Accusations Entered In Custody Proceedings

III. The Consequences of Crying Wolf

A. The Fractioning of the Child from the Accused Parent

B. Further Implications for the Innocent Parent

IV. The State Of The Law In Combatting False Allegations Of Abuse In Child Custody Disputes

A. Indirect Safeguards for the Accused

1. Broadening the Duty of Care

2. Investigatory Protections

B. Direct Sanctions Against False Accusations of Child Abuse

C. Evaluating the Effectiveness of Existing Law

1. Evaluating Effectiveness with Regards to Indirect Safeguards

2. Evaluating Effectiveness With Regards to Existing Direct Laws

a. The Barrier of Intent

b. Capping the Deterrent Effect

V. What is Necessary to Combat False Accusations of Child Abuse in Custody Disputes?

A. Strengthening the Deterrent Effect

1. Upping the Threat to Fit the Perpetration

2. Imposing a Lessened Burden of Persuasion

B. Redressing the Harm

VI. Conclusion

Abstract

A false accusation of child abuse is one of the gravest offenses one can allege against a parent. In our society there exists a bright line standard that if a child is abused, the law steps in to shield the child from the attacker; but what happens when our legal system is manipulated so as to trick a court into protecting a child from an innocent parent? The welfare of a child cannot be recognized when he or she is fractioned from a qualified parent because an opposing parent cried wolf, and knowingly made false accusations against the other of abuse to gain custody of the child. And the shadow of the allegation of one of the most heinous crimes known to man hovers over the wrongly accused parent for the rest of his or her life. This article presents the problems associated with the use of false claims of abuse to sway determinations of child custody in a societal climate where the occurrence of such an ill act may become more prevalent. It then examines the state of
the laws aimed at preventing this malfeasance\(^1\), and proposes elements that a law should have in order to better deter and redress the making of false accusations of abuse in child custody battles.

I. INTRODUCTION

Within the realm of family law, society’s judicial tenement is the best interests of the child.\(^2\) A problem arises, however, when false allegations of child abuse enter proceedings to influence custodianship of the child that hinders the recognition of the best interests of the child. In this instance, false accusations deteriorate a child’s relationship with a capable and competent parent. Some researchers suggest that major changes in attitudes and laws concerning divorce and custody over the past several years have created an environment that might make the use of abuse allegations to influence child custody more likely, pointing to the following factors.\(^3\) Divorces have increased in all age groups; many states have enacted no-divorce laws; mothers are no longer presumed the primary custodian of a child; there exists a movement towards joint custody; and with trends towards no-fault divorces and community property laws, many angry and hostile couples have nothing left to fight over except the kids.\(^4\) Once joint custody is established, one of the fail safe ways to break the arrangement is via an accusation of abuse.\(^5\) These trends lend to increases in the number of disputes over custody, and in a frantic situation in which a mother or father does not want to lose custody, time and control, of one’s child to another qualified parent, there exists the ever-present, devil on the shoulder, option: claim abuse to sway the court’s decision. The result of such an act is not only interference with recognizing the child’s best interest, but also the creation of a second victim, the wrongly accused parent, who may well be forced into a battle of guilty until proven innocent.\(^6\)

\(^1\) This Article is limited to the laws as they exist within the United States.

\(^2\) All states, along with the District of Columbia, have statutes requiring that the child’s best interests be considered whenever certain decisions are made regarding a child’s custody, placement, or other critical life issues. See Child Welfare Information Gateway, Determining the Best Interests of the Child, U. S. DEPT. OF HEALTH AND HUMAN RESOURCES CHILDREN’S BUREAU (2013), 7-34, available at https://www.childwelfare.gov/pubpdfs/best_interest.pdf.


\(^4\) Id. at 3 (citing R. Geffner and M. D. Pagelow, Mediation and Child Custody Issues in Abuse Relationships, BEHAVIORAL SCIENCES AND THE LAW 8, 151-159 (1990)).

\(^5\) Joint custody is a difficult arrangement to break, when it is believed that the best interests of a child are served by contact with both parents. Consider, for example, California’s public policy under which children must have frequent and continuing contact with both parents, with one exception being that when allegations of abuse or neglect is made by one parent, and those allegations are found to be true by a “preponderance” of the evidence. Robert Farzad, Falsely Accused of Child Abuse in a Divorce? Then Read this Immediately (October 2, 2012), http://farzadlaw.com/orange-county-child_custody_attorneys/falsely-accused-child-abuse-divorce/.

\(^6\) As one researcher found, in a typical family court proceeding, an allegation is brought by a custodial parent against a non-custodial parent following a period of visitation. In most cases, the initial and immediate response of the judicial system is to suspend any visitation between the accused parent and the child, frequently accomplished without any formal judicial process or opportunity for the accused parent to refute the charges. See C. Gordon, False Allegations of Abuse in Child Custody Disputes, 135 NEW L.J. 687, 688 (1985). The wrongly accused parent suffers the penalty of the alleged crime, loss of visitation with the child, before his guilt or innocence is even determined.
Statistics are relatively inconclusive on the prevalence of false accusations of abuse in divorce or custody proceedings, but some studies suggest the incidence of false accusation of abuse is growing, or could likely increase in occurrence particularly in child custody disputes. \(^7\) This article suggests that current laws as they exist to date are not prepared to handle this issue. While slightly more than half of the states have some law addressing this precarious scenario, the remaining have no law on the books that directly addresses this occurrence. This leaves the door open to abuse the principle of recognizing the best interests of the child. Furthermore, this article suggests, states that do currently codify penalties for making false accusations in order to influence custody are insufficient in addressing this perpetration. First, these laws do not effectively deter the act. And second, they do not provide for a means to redress the harm caused when the act of false accusations of child abuse in the context of custody proceedings occurs.

The intent of this article is not to underplay the importance of protecting an abused child. Rather, the purpose of this article is to consider the climate of the laws addressing this act, and propose a model for a law that would more effectively deter and redress false accusations of child abuse in divorce and custody proceedings. The aim of such a law would be to protect both the wrongly accused parent, and the best interests of the children involved.

The article begins with a presentation of the prevalence of knowingly false accusations introduced into child custody proceedings, and a look at the consequences associated with this act. It then turns to an evaluation of the current laws, both indirect and direct, that might help those falsely accused and that target the prohibition of making false accusations. This article includes therein a consideration of the facets of the laws that hinder them from preventing or redressing this act. Finally this article proposes that to be effective at battling the making of knowingly false accusations in child custody proceedings, a statutory law must include: a) a strong deterrent effect realized through penalties proportionate to the act, that still fits within the constraints of constitutional due process b) designation within civil code that lessens the burden of persuasion required to obtain redress, thereby weakening the inherent difficulty in proving that an accusation was both false and known to be false; and c) recovery of actual damages, and mandatory counseling requirements of which the accuser bears the burden of expense, to compensate the wrongly accused and restore his or her relationship with the involved child. As this article suggests, each piece of the above-stated proposal strengthens the plight of the falsely accused, but, it is only when all elements are combined that true effectiveness is realized.

II. STATISTICAL DATA ON THE FREQUENCY OF FALSE ACCUSATIONS ENTERED IN CUSTODY PROCEEDINGS

There exist two camps with regards to the prevalence of false accusations of child abuse in divorce and custody proceedings. On one side are those who suggest instances of false allegations of abuse in custody matters are growing, perhaps rising to the level of an epidemic. On the other, are those who find concern over the existence of false allegations of abuse in custody proceedings to be unfounded.

\(^7\) See infra Part II.
Some mental health professionals and attorneys report seeing more accusations during marital conflict in the past few years, possibly sharing a relationship with the increase in sexual abuse allegations generally over the past ten to fifteen years. One report in 2012 indicated that 40 percent of sexual abuse allegations occurred in divorce proceedings, and in three-fourths of these cases there was no determination of abuse by the legal system.

Another study attempted to determine the incidence and validity of sexual abuse allegations in custody proceedings and otherwise, through telephone interviews and mail surveys to 190 court administrators, judges, custody mediators, and child protection workers throughout the United States. The researchers then conducted 70 in-depth interviews at five sites, and finally tracked cases of sexual abuse allegations over a six-month period from eleven court systems. This yielded a pool of 160 cases of sexual abuse allegations, with estimates on false accusations occurring within this pool ranging from 20 percent to 80 percent. An unpublished study from the University of Minnesota reported similar statistics, concluding that 77 percent of divorce allegations of sexual abuse cases coming to the Human Sexuality Program turned out to be “hoax” cases.

Other studies report far less occurrences of allegations of abuse in child custody proceedings. One study indicated that 14 percent of child abuse accusations in family law cases were possibly deliberate false reports. Still another found even less instances of false allegations of abuse entering the courtroom in custody proceedings. As reported by the American Prosecutors Research Institute, a 1990 study of 9,000 divorce cases in twelve states found that abuse allegations were made in less than 2% of contested divorces in which child custody was at issue. However, while allegations of abuse were reported in only a small percentage of divorce cases involving child custody, it was further found that of that 2%, an estimated 33% of the abuse allegations were thought to be false, suggesting that while the occurrence of abuse allegations entering custody

---

8 Wakefield, supra note 3, at 1.
11 Id.
12 Id. (emphasis added by author).
13 Wakefield, supra note 3, at 3 (emphasis added). The findings of this unpublished study may be questionable as conclusions were based on the opinion of the staff that allegations of abuse were not accurate. Id.
14 A 1998 study conducted by the Association of Family and Conciliation Courts, and reported by the California Assembly Committee on the Judiciary, indicated that of the family law cases in which both sexual abuse allegedly occurred and the child protective service worker or court worker expressed an opinion regarding the good faith nature of the report, 14 % were viewed as possibly being a deliberate false report. See CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY REP. ON AB 3546, 2 (1990).
15 American Prosecutors Research Institute, Fact Sheet: Child Sexual Abuse Allegations in Custody and Visitation Disputes, AMERICAN PROSECUTORS RESEARCH INSTITUTE TRAINING MANUAL (2005), available at Module-12_Handout-2_Fact_Sheet_Divorce_and_Allegations.pdf.
Proceedings is relatively low, the rate of falsity is high once abuse allegations come into a custody proceeding.\textsuperscript{16} Further, studies citing high incidences of false allegations of child abuse are not without critics. One critique suggests that statistics reporting occurrences of false allegations of abuse in divorce or custody proceedings may be too high, even unreliable, because they are derived from relatively small non-random samples, and conclusions are not based on sound research principles.\textsuperscript{17} Further, while researchers may be able to quantify the occurrence of abuse allegations in custody disputes, quantifying the occurrence of false allegations proves more challenging.\textsuperscript{18} Part of the problem in doing so centers on definitional dilemmas.\textsuperscript{19} Quite simply, an unsubstantiated, or unprovable, claim of abuse is not ipso facto a false claim of abuse. But, what is meant by the term “false allegation” differs across studies.\textsuperscript{20} In some studies, this term references all cases in which abuse cannot be proven, or substantiated.\textsuperscript{21} In others, this term is limited to describe cases in which the accuser is purposefully deceiving with regards to an accusation of abuse.\textsuperscript{22} Moreover, as will be discussed infra, establishing that a claim of child abuse is in fact false is a difficult task to prove, which may limit the frequency of findings in studies on the subject.\textsuperscript{23} Ultimately, it appears that what one can glean from existing studies on the occurrence of false accusations of abuse in custody disputes and critiques thereof, is that if a study on false allegations excludes just unsubstantiated cases, and includes only cases in which allegations of abuse are deliberately fabricated, there is likely to be a smaller proportion of incidences.\textsuperscript{24} However, while the current research on the prevalence of false allegations of abuse in divorce or custody matters implies that better research methods need to be developed to study the


\textsuperscript{17} Patricia L. Martin, The Sacrifice of a Parent: An Analysis of Parental Rights Related to False Allegations of Child Sexual Abuse, 7 T. M. Colley J. Prac. & Clinical L. Journal 251, 254 (2004-2005) (citing McDonald, supra note 15, at 13). Merrilyn McDonald is particularly critiquing the study conducted by the Association of Family and Conciliation Courts Research in Denver, Colorado, which examined 9,000 families involved in custody disputes, finding that in less than 2% was sexual abuse and issue, but of that 2%, an estimated 33% of the sexual abuse allegations were thought to be false. Id.

\textsuperscript{18} Wakefield, supra note 3, at 3.

\textsuperscript{19} Id.; See also Fact Sheet: Child Sexual Abuse Allegations in Custody and Visitation Disputes, American Prosecutors Research Institute Training Manual (2005), supra note 15, at 1.

\textsuperscript{20} Wakefield, supra note 3, at 4.

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} See infra Part IV. B. 2. A.

\textsuperscript{24} D. P. H. Jones and I. M. McGraw, Reliable and Fictitious Accounts of Sexual Abuse to Children, Journal of Interpersonal Violence 2, 27-45 (1987). Jones and McGraw reported that only 8% of all sexual abuse allegations, not just those made in divorce and custody proceedings, were false. Id. See also See also Fact Sheet: Child Sexual Abuse Allegations in Custody and Visitation Disputes, American Prosecutors Research Institute Training Manual (2005), supra note 15, at 1 (noting that the incidence of intentionally false reports of abuse generally appears to be in 5% to 8% of cases).
issue more empirically and effectively, reports of low statistical frequency and critical analyses of studies finding high rates of occurrence do not immediately mean the issue of false allegations in custody battles is moot. Rather, as this article will suggest, the laws as they exist today do not adequately address the problem, in fact, leaving the door open for the prevalence of the use of false accusations of abuse to influence custodianship to rise within our evolving state of child custody.\textsuperscript{25}

III. THE CONSEQUENCES OF CRYING WOLF

A. The Fractioning of the Child from the Accused Parent

The relationship between a parent and child is indescribably precious. One of the most detrimental consequences of false allegations of abuse is the severe impairment of that precious relationship that results. The welfare of the child is harmed because the child likely loses contact with the falsely accused parent who is otherwise fit and deserving of visitation. Further, not only does the child suffer lost time with the accused, he or she may be submitted to pervasive investigations that negatively influence the child’s image of the accused, regardless of veracity,\textsuperscript{26} further hindering the relationship with the accused parent.

While variation exists in degree, states have generally established powerful systems to intervene, almost immediately, to sever contact between a child and an adult of whom suspicions suspected of abuse have been raised.\textsuperscript{27} The following exemplifies such. Under Virginia law, certain qualified individuals may remove a child from custody for up to 72 hours without the approval of the parent or guardian following a complaint of abuse or neglect.\textsuperscript{28} In Minnesota, the state legislature provides that if a report alleges sexual abuse by a parent, an immediate assessment will be made by child protective services that could result in removal of the child.\textsuperscript{29} West Virginia permits a court to order that a child alleged to be abused or neglected be delivered into the custody of the state department or a responsible party found fit and proper by the court, for up to 10 days,

\textsuperscript{25} See supra Abstract. As set forth in the beginning of this article, certain factors lend to an increase in the commonness of custody battle between two parents when divorce or other separation occurs; divorces have increased in all age groups, many states have enacted no-divorce laws, and with trends towards no-fault divorces and community property laws, there is little left to fight over except custody of shared children. See Wakefield, supra note 3, at 2. Moreover, there exists a movement towards joint custody, rather than automatic primary custodianship with the mother. Id. Taken in sum, these factors together suggest an environment in which the likelihood of using false accusations of abuse to influence custody awards could likely rise, indicating a potential problem, regardless of difficulties in quantifying the occurrence. See also, Daniel Pollack, Penalties for Falsely Reporting Child Abuse, POLICY IN PRACTICE 71(1), 30 (2013), available at http://www.childlaw.us/penalties_for_falsely_reportin_1/ (last visited February 9, 2015) (arguing that in the context of divorce or custody proceedings, there is a greater chance that a baseless abuse allegation will be made).

\textsuperscript{26} After repeated questioning by a therapist or parent, a child may agree that an event happened, and even testify to such, even though the molestation of abuse never occurred. See Frances Sink, Studies of True and False Allegations: A Critical Review, Sexual Abuse Allegations in Custody and Visitation Cases: A Resources Book for Judges and Court Personnel 1, 43 (E. Bruce Nicholson with Josephine Bulkley eds., 1988).

\textsuperscript{27} Martin, supra note 17, at 251.

\textsuperscript{28} See VA CODE ANN. § 63.2-1517 (West 2002).

\textsuperscript{29} See MINN. STAT. ANN. § 626.556 Subd. 10 (a) (West 2003).
pending a preliminary hearing, if said court finds imminent danger to the well-being of the child. These laws project the heavy weight that the need to protect a child carries, as it should. The problem lies in that there is a lack of protection in place when the allegations of abuse are untrue, and the impact of false accusations of abuse on the parent-child relationship can be quite severe.

Generally speaking, once an allegation of abuse enters child custody litigation, some form of a similar process occurs. A protective services investigation takes place, possibly including an interview with the child, if they are at an age capable of interviewing. There exists the possibility that the child could be removed from the care of the accused parent, or time with the accused parent limited or supervised, pending a determination of the factuality of the allegation. The child may be referred to further, more intrusive evaluation. Police reports will may be made, and the accused parent likely must retain counsel not only for representation in custody proceedings, but also in defense of prosecution. A judge may tend to err on the side of caution, possibly suspending visitation, allowing for further alienation of the child from the accused parent.

However a court chooses to react in a scenario in which allegations of child abuse are made against an opposing parent, the parental rights of the accused will diminish during forthcoming proceedings. Some judges will “play it safe,” at least initially, and temporarily break visitation between the child and the accused parent. If or when contact is permitted, it is usually under supervision until the court resolves the issue of abuse. Either way, the result is a strained relationship between the child and the accused parent.

One researcher describes a “parental alienation syndrome” that occurs when accusations of abuse enter the custody realm, noting that such accusations are a powerful weapon in divorce and custody disputes. The vengeful parent may exaggerate a nonexistent abusive contact and build up a case for abuse or neglect; the child, in order to ingratiate himself or herself with the accusing parent, may cooperate and elaborate such. Then ensues the concept of parental

30 See W. VA. CODE § 49-6-3 (West 2012).
32 Id.
33 Id.
34 Id.
35 Id.
37 Id.
38 Id.
39 Id.
41 Id.
alienation; the child identifies with the vilifying parent and communicates absolute hatred toward the other parent, further exacerbating the effects of the false accusations of abuse.\textsuperscript{42}

Furthermore, while investigators should assume neither the guilt nor innocence of the accused, falsely accused parties have stated that they are made to feel guilty, often having to explain every touch or contact they have had with their own child.\textsuperscript{43} In fact, while an investigation following an accusation of abuse is intended as a safeguard to the child, the process of evaluating an accusation may result in more damage to the interests of the child and the child’s primary relationships than the false act in question.\textsuperscript{44}

For example, one study followed a family of four for 2 years after a false allegation of sexual abuse was made against the father, finding that the experience destroyed the family with all members suffering depression, stress, rage, distress, hurt, and alienation.\textsuperscript{45} During the investigatory stage, the father was separated from his family for approximately three months before a determination of the accuracy of the claims of abuse was made.\textsuperscript{46} His children were related terrible things about their father including unsubstantiated claims of incest with his sister, promulgating the image in the children’s’ mind that their father was an abusive caregiver.\textsuperscript{47} The study concluded that the effects on the relationship between the children and the wrongly accused parent were long-lasting and nearly irreversible.\textsuperscript{48}

To put it quite simply, it appears undeniable that after a false allegation of abuse is made against an otherwise qualified parent, the effects upon the relationship between the child and accused parent are significant and severe. If the claim ends up being unsubstantiated, the accuser has lost out on little, while the child and accused parent have suffered intrusive investigations and a deteriorated connection. Both the child and the falsely accused parent lose precious time with each other, and the image of the accused parent may become tainted in an impressionable child’s mind. The accused faces the penalty of the alleged crime before any determination of guilt or innocence has even been made. Within the atmosphere of a custody battle in which a false allegation of abuse has been entered to influence the proceedings, neither the welfare of the child, nor the innocence of the accused, can be realized.

\textbf{B. Further Implications for the Innocent Parent}

\textsuperscript{42} Id.


\textsuperscript{44} Wakefield, \textit{supra} note 3, at 4 (citing Gardner, \textit{supra} note 40).

\textsuperscript{45} Darrell W. Richardson, \textit{The Effects of a False Allegation of Child Sexual Abuse on an Intact Middle Class Family}, IPT Journal, 1 (1990), available at http://www.ipt-forensics.com/journal/volume2/j2_4_7.htm. While in this case study, allegations of abuse were promulgated by a child rather than an opposing parent, the effects parallel that which happens within the context of a parent accusing an opposing parent in child custody litigation.

\textsuperscript{46} Id. at 15.

\textsuperscript{47} Id. at 19.

\textsuperscript{48} Id. at 19.
Coupled with the loss of the child, an innocent parent wrongly accused of the horrific crime of abuse also faces heavy financial burdens, and loss of reputation. The accused must cover the costs of retaining representation for both custody litigation and possibly also criminal prosecution. And even once he or she has fought to clear his or her name of the allegation, the accused remains inflicted with the social stigma that attaches to a mere accusation of child abuse that lingers long after a finding of innocence, for within our current society, there exists a climate wherein allegations alone are quickly raised to the status of evidence signifying abuse.

A New York family court iterated the plight of the wrongly accused when it chastised a mother for lodging a false allegation of sexual abuse against her child’s father, stating:

Karen B. has sought to destroy the reputation of her former friend and lover by accusing him of one of the most heinous crimes known to man. The aura of the allegation, irrespective of its falsehood, may stand over him and affect him for the rest of his life.

Such costs have been documented by those who have suffered them. One mother wrongfully accused of child abuse estimated the costs of recovering her children, clearing her name, and paying all medical bills associated with the incidence exceeded $15,000.00. And this report of $15,000.00 in financial costs is on the low end of the spectrum. ABC World News Tonight once reported the story of a father who spent upwards from $40,000.00 to clear his name after false allegations of sexual abuse of a child were brought against him. Further, one woman’s false accusation that her ex-husband molested their daughter cost the estranged husband $100,000.00 in legal fees and lost wages. Another falsely accused, a clinical psychologist, reported spending $50,000.00 defending a bogus claim of child abuse, losing his practice in the process. Still another spent $35,000.00 in his defense, and criminal charges were never even filed. One more sufferer, Jacob Zamstein, faced a public arrest and was forced to defend himself

---

49 Patterson, supra note 36, at 925.


52 Steven R. Churm, Abused; Mother Whose Children Were Taken from her Says her Family is a Victim of “The Red Scare of the 80’s,” L. A. Times, pt. IX, at 1, 4 (Long Beach ed., September 22, 1985).


54 Id, at 894 (citing Falsely Accused of Child Abuse, Victims Demand Legal Reform, CHI. TRIB., 2 (January 23, 1987)).

55 Richardson, supra note 45, at 1.

56 Id.
in a three month long trial after his wife, sometime after initiating divorce proceedings, made knowingly false accusations that he sexually abusing the couple’s two children.\textsuperscript{57}

These reports of expenses incurred in defending oneself against a false claim of child abuse provide concrete evidence that the burden on the accused is severe, even if the accused is not found guilty, or is in fact found innocent. Any law that hopes to deter the costs of false allegations of abuse in custody disputes must counter the financial weight felt by the accused by giving the knowingly deceitful accuser a steep financial burden of his or her own.

IV. THE STATE OF THE LAW IN COMBATTING FALSE ALLEGATIONS OF ABUSE IN CHILD CUSTODY DISPUTES

A. Indirect Safeguards for the Accused

1. Broadening the Duty of Care

Some states, through their common law, have broadened the duty of care owed from a physician or counselor to a patient, in this case being an allegedly abused child, to reach the accused parent.\textsuperscript{58} While this extension of the duty of care does not directly address the act of promulgating false accusations of abuse to influence custody, it does provide some protection to the falsely accused parent. By expanding the duty of care a physician or other qualified individual examining a supposedly abused child also owes the accused parent a duty to exercise due care. Some courts are recognizing the large consequences a falsely accused parent can face and, to some measure, are looking out for the interests of the falsely accused.

In the Colorado case of \textit{Montoya v. Bebensee}, a father moved for damages against the defendant psychologist following the defendant’s actions in proceedings to revoke the father’s visitation rights to his minor children.\textsuperscript{59} In this case, after the dissolution of their marriage, a mother alleged that the father sexually molested their children, seemingly in an attempt to affect his visitation rights with regards to the children.\textsuperscript{60} The mother enlisted the defendant to counsel the children for the purpose of rendering an opinion as to whether the father sexually abused them.\textsuperscript{61} Despite findings from both a social worker and alternate psychologist that there were serious doubts regarding the children’s recount of abuse and that it did not appear the children were sexually molested, the defendant reported to county officials that one of the children claimed the father sexually abused them; advised the mother to restrict the father’s right of visitation with the two children; and later testified as an expert witness on the mother’s behalf in a hearing considering

---

\textsuperscript{57} Jacob Zamstein v. Jamshid Marvasti, 240 Conn. 549, 551 (Conn. 1997) (emphasis added).

\textsuperscript{58} In this context, the duty of care refers to a duty to refrain from action that may foreseeably result in injury to another. See \textit{Montoya v. Bebensee}, 761 P.2d 285, 288 (Colo. Ct. App. 1988).

\textsuperscript{59} \textit{Id.} at 286.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.}
the father’s visitation rights. The Court of Appeals weighed the risk, foreseeability, and likelihood of harm and determined that there is a severe risk of harm to a parent who is falsely accused of abuse. In turn, the Court held that “a psychologist who was evaluating and treating a child for suspected child abuse owed a duty to the accused parent to exercise due care.”

New York applied similar reasoning in broadening the scope of duty of care to reach persons falsely accused of child abuse. In Caryl S. v. Child Y Adolescent Treatment Servs., Inc., a New York court was asked to consider this issue of first impression in the state; does a psychiatrist or other counselor examining a child for alleged abuse owe a duty of care to the accused party? The court reasoned that the law should fix the orbit of duty to limit the legal consequences of wrong to a controllable degree, and, in this context, the matter of foreseeability of harm is significant. There is the potential for severe harm to the child from a professional misdiagnosis of abuse, and the potential harm to the alleged abuser is equally great. Being labeled a child abuser is one of the “most loathsome labels in society,” to which stark physical and psychological ramifications that attach to defending and dealing with such accusations. Once made, such charges are difficult to escape, even if proven innocent. Branding one as a child abuser certainly calls into question one’s good name, reputation, honor or integrity. Thus, the court held that where the determination of sexual abuse is made by a professional treating a child, with subsequent actions taken based upon that determination and aimed at shaping not only the conduct and well-being of the child, but also the conduct of the suspected abuser, or the relationship between the child and accused, a duty of care is owed not only to the child but also the alleged abuser.

So too did a Texas court broaden the scope of duty of care to shelter a falsely accused parent. The Court of Appeals of Texas found that the attempted termination of a parent’s custody rights, and the institution of criminal proceedings, are reasonably foreseeable harms to a negligent diagnosis of child abuse. To prevent these foreseeable harms, a duty of care from a psychologist reviewing a child for the purpose of diagnosing abuse extends to the accused parent.

62 Id. at 286-87.  
63 Id. at 288-89.  
64 Id. at 289.  
66 Id.  
67 Id. at 571.  
68 Id. at 572 (citing Rossignol v. Silvernail, 185 A.D.2d 497, 499 and 586 (N.Y.A.D. 3 2000)).  
69 Id.  
70 Id. (citing Valmonte v. Bane, 18 F.3d 992 (N.Y.A.D 3 Dept. 1995)).  
71 Id.  
72 W.C.W. v. Esther Bird and Kenneth Wetcher, M.D., 840 S.W.2d 50, 55 (Tex 1st Dist. 1994) (distinguishing from Dominiguez v. Kelly, 786 S.W.2d 749, 750 (Tex. App. 1990), in which the court held there is no such duty of care, on the basis that the court’s finding of no duty of care was in dicta).  
73 Id.
In Pennsylvania, the district court extended the scope of duty of care such that a therapist owes a duty of care to parents accused of child abuse, but such expansion was conditional upon a four-step test. The court held that a duty of care was owed if:

1. the therapist specifically undertook to treat the child for the parents;
2. the parents relied on the therapist;
3. the therapist was aware of the parents’ reliance; and
4. it was reasonably foreseeable that the parents would be harmed by the therapists’ conduct.

Thus, some courts have implemented a common law protection to parents wrongly accused of child abuse. In doing so, these courts have recognized and acknowledged the severe negative impact a false allegation of abuse can have on both the child involved and the accused parent. The child loses time with the accused parent and suffers from the traumas involved in the investigation of abuse claims, while the innocent parent is branded a child abuser, an ugly and low form of criminal, just by the mere accusations. The foreseeable harms dictated by these courts warrant reform of the statutory laws to strengthen the deterrence of making false allegations of child abuse.

2. Investigatory Protections

After a false allegation of abuse is made, one particular problem area for the accused parent lies at the investigatory stage where, as advocated by one researcher, investigations are performed on the assumption that abuse has occurred. As witnessed by Brock, author and certified social

---

75 Courts are not unanimous in finding that a therapist, psychologist, or other professional owes a duty of care to the abused parent in cases of alleged child abuse, and for many states this remains an issue of first impression yet to be determined. For instance, the Arkansas Supreme Court explicitly denied this extension of due care in a case in which a father filed a malpractice suit against a psychologist for misdiagnosing his child as abused. Martin, supra note 17, at 277 (citing Chatman v. Millis, 517 S.W.2d 504 (Ark. 1975)). In this case, the Court’s holding was based on the lack of a physician-patient relationship between the father and the psychologist. Id. The Connecticut Supreme Court also rejected such an extension of due care. See Zamstein v. Marvasti, 692 A.2d 781 (Conn. 1997). While the court recognized the detriment to a falsely accused parent that could result from negligent review or diagnosis of the involved child, the court reasoned that the interest of protecting a potentially abused child outweighed the interests of the falsely charged person. Id. at 789.
76 As was true with regards to the broadening of the duty of care to reach parents accused of child abuse, discussed supra, the law discussed herein with regards to investigatory protections provided a parent accused of child abuse is not true of all states. It is the intent of the article here to simply point to some of those states which have enacted certain procedural protections and provide examples of the existing laws that in effect help or protect a falsely accused parent.
worker, this can lead those involved in evaluating an allegedly abused child to believe and act as if they are a part of a prosecutory team against the accused.\textsuperscript{78} The bleak plight of the accused at this stage is further compounded by a system that lacks consistent protocol for interviewing victims across private and public sectors.\textsuperscript{79}

The expansion of duty of care, discussed prior, provides some protection at the investigatory stage, because it protects the accused parent from negligence, or even malfeasance, on the part of those evaluating a child for abuse. However, some states have also enacted codified provisions that direct how an investigation proceeds following allegations of child abuse. Such provisions establish procedural protections for the accused parent once an investigation of abuse is set in motion.

For example, to assist in handling false reports, effective July 1, 2012, the Florida Legislature amended s. 39.205(8) to permit investigators to discontinue investigative activities when it is determined that an investigation was the result of a false report.\textsuperscript{80} The law in fact went so far as to require authorized personnel, when investigating claims of child abuse, to report findings of false reports to local law enforcement agencies for prosecution, with the consent of the alleged perpetrator.\textsuperscript{81}

Other laws impart time requirements on initial reports which could shorten the time both the child and accused are submitted to the intrusion of an investigation if no indication of abuse is found during the initial reporting phase. For instance, Indiana requires an initial report be filed within forty-eight hours from the start of the investigation.\textsuperscript{82} Or consider Virginia law, which requires authorized investigators to determine within 45 days, or 60 days where an extension is warranted, if a report of abuse or neglected is founded or unfounded and transmit such to the state department and the person under investigation.\textsuperscript{83}

Still other states provide procedural protection to the accused via requirements of notification or judicial review before an allegedly abused child is removed from the care of the accused. For example, many states are similar to Washington, wherein the law provides that if a child is taken into custody or otherwise removed from a parent, a Child Protective Services worker, or other authorized personnel, shall take reasonable steps to notify the parent immediately,

\textsuperscript{e.g.} IND. CODE ANN. 31-33-6-3 (West 1999) (stating that a person making a report that a child may be a victim of child abuse or neglect or assisting in any requirement of this article is presumed to have acted in good faith).

\textsuperscript{78} \textit{Id.} The opinion expressed by Brock regarding investigators and their tendency to behave as part of the prosecutor team was based upon his own experience as a social worker and statements made by personnel involved in the investigatory stage that indicated they considered themselves to be a part of the prosecution.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} FL. ST. s. 39.205(8) (2014). \textit{See also False Reports of Child Abuse, Neglect or Abandonment Referred to Law Enforcement, ANNUAL REPORT TO THE LEGISLATURE (2012-2013), available at AnnualReportFalseReports_FY2012-2013.pdf.}

\textsuperscript{81} FL. ST. s. 39.205(8) (2014).

\textsuperscript{82} IND. CODE ANN. 31-33-7-4 (West 2014).

\textsuperscript{83} VA. CODE ANN. § 63.2-1505(5) (West 2014).
regardless of the time of day, that the child has been taken, the reasons why the child was taken, and general information about the child’s placement.\textsuperscript{84} And the New Hampshire legislature requires a Child Protective Services worker, or otherwise, to contact a judge or the court before a child is removed.\textsuperscript{85}

Laws like these alleviate some of the problems noted by Brock in the investigations of child abuse that could negatively impact a wrongly accused parent. They provide at least some protocol on which an accused parent may rely. Laws such as those aforementioned ensure the affected parent is made aware of what is happening, thereby allowing him or her to seek necessary counsel or take necessary action to protect oneself and his or her child. They might also combat any bias on the part of the investigator that the abuse has occurred by introducing judicial review into the investigation before immediate action is taken. Thus, while such laws are not direct criminalization of the act of falsely accusing an opposing parent of child abuse, they do create safeguards for the accused once an investigation has been initiated by a false accusation.

B. Direct Sanctions Against False Accusations of Child Abuse

To date, approximately thirty states carry penalties, either civil or criminal, in their statutory child protection laws for persons who willfully or intentionally make a report of child abuse that is known to be false.\textsuperscript{86} This means that almost half of the states do not explicitly penalize the act of knowingly falsely accusing another of child abuse at all.\textsuperscript{87} Further, of those jurisdictions that do impart penalties, the strength of such law varies greatly.

Among the states that do statutorily penalize false accusations of child abuse, one finds great disparity in the consequences faced of this act. Nineteen states impart misdemeanor penalties.\textsuperscript{88} Generally speaking, misdemeanor penalties carry smaller fines of typically no more than $2,500.00, and/or unlikely brief jail time of not more than a year.\textsuperscript{89} Classifying the act of

\textsuperscript{84} Martin, supra note 17, at 268 (citing WASH. REV. CODE. ANN. § 26.44.115 (West 2014)).

\textsuperscript{85} Id. at 267 (citing N.H. REV. STAT. ANN. § 169-C:6(V) (West 2014)).


\textsuperscript{87} In those states without laws directly sanctioning false reports of child abuse, damages could still be recovered by the falsely accused under alternate theories like malicious prosecution or slander. Further, false accusations of abuse in child custody proceedings could be sanctioned as perjury.

\textsuperscript{88} Id. These states include Arizona, Arkansas, Colorado, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Missouri, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Caroline, Virginia, Washington, and Wyoming. Id.

\textsuperscript{89} See e.g., COLO. REV. STAT. § 19-3-304(3.5), (4) (2014) (Any person who knowingly makes a false report of abuse or neglect to a law enforcement agency commits a Class 3 misdemeanor, punishable by up to 6 months in
falsely accusing an opposing parent of child abuse ranks the act with lesser crimes such as underage drinking or possession of marijuana or drug paraphernalia.\textsuperscript{90}

Four states, being Florida, Illinois, Tennessee, and Texas, deem false reporting a felony,\textsuperscript{91} and in Arkansas, Illinois, Indiana, Missouri, and Virginia, second or subsequent offenses can be upgraded to a felony.\textsuperscript{92} Florida is most severe in its criminal penalty; in addition to a court sentence of 5 years and up to $5,000.00, the Department of Children and Family Services may fine the reported up to $10,000.00.\textsuperscript{93} A felony designation seems far more appropriate for the act of falsely accusing another of child abuse when the harm stemming from the act can be so severe, but so few states impart such a designation.

Other states do not classify the act, but rather specify the penalty to be suffered, essentially placing a cap on the monetary sanction or otherwise the accuser may face. For example, Massachusetts law directs that whoever knowingly and willfully files a frivolous report of child abuse or neglect shall be punished by a fine of not more than $2,000.00 for the first offense; imprisonment of no more than 6 months and a fine of no more than $2,000.00 for the second offense; and imprisonment of no more than 2 1/2 years and a fine of no more than $2,000.00 for the third and subsequent offenses.\textsuperscript{94} Or, in Oklahoma, if a court determines that an accusation of child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose a fine, not to exceed $5,000.00, plus reasonable attorney’s fees incurred in recovering the sanctions, against the person making the accusation.\textsuperscript{95}

Still other states inflict civil sanctions upon the perpetrator proportionate to the monetary costs incurred by the accused party, without designating the maximum amount that may be recovered against the accuser. California and West Virginia provide prime examples of laws in which false accusations of abuse within child custody disputes are directly targeted, and punishable

\begin{itemize}
\item jail, a fine of up to $750, or both, in accordance with COLO. REV. STAT. § 18-1.3-501; KAN. STAT. ANN. § 38-2223(e) (West 2014) (Any person who willfully and knowingly makes a false report or makes a report that such person knows lacks factual foundation is guilty of a Class B misdemeanor, punishable by up to six months in jail and a fine of up to $1,000.00 pursuant to KAN. STAT. ANN. §§ 21-6602, 21-6611); and MISS. ANN. STAT. § 210.165(2)-(3) (West 2014) (Any person who intentionally files a false report of child abuse shall be guilty of a Class A misdemeanor, punishable by up to one year in jail or a fine of up to $1,000.00 or both).


\item Child Welfare Information Gateway, supra note 86, at 2; ARK. ANN. CODE § 12-18-203 (West 2014); ILL. COMP. STAT. CH. 325 § 5/4 (2014); IND. ANN. CODE § 31-33-22-3(a)-(b) (West 2014); MISS. ANN. STAT. § 210.165(2)-(3) (West 2014); and VA. ANN. CODE § 63.2-1513(A) (West 2014).

\item Child Welfare Information Gateway, supra note 86, at 3; FL. ST. s.39.205(9) and s.39.206(1) (2014).

\item Child Welfare Information Gateway, supra note 86, at 3; MASS. GEN. LAWS CH. 119 § 51A (2014).

\item OK ANN. STAT. TIT. 10A, § 1-2-101(D) (West 2014).
\end{itemize}
by an award of money damages equal to the costs incurred by the accused parent in defending against the wrongful claim. Under California Family Code § 3027.1:

If a court determines, based on the investigation described in Second 3027 or other evidence presented to it, that an accusation of child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and reasonable attorney’s fees incurred in recovering the sanctions, against the person making the accusation. For the purpose of this section, “person” includes a witness, a party, or a party’s attorney.96

Similarly, West Virginia’s pertinent statute reads:

If the court determines, based on the investigation described in part three of this article or other evidence presented to it, that an accusation of child abuse, neglect, or domestic violence made during a child custody proceeding is false and the parent making the accusation knew it to be false at the time the accusation was made, the court may order reimbursement to be paid by the person making the accusations of costs resulting from defending against the accusations. Such reimbursement may not exceed the actual reasonable costs incurred by the accused party as a result of defending against the accusation and reasonably attorneys fees incurred.97

Laws like that found in California and West Virginia leave more room for judicial adjustment in the sanction imparted on the accuser that might more readily fit the crime. Essentially, the greater the financial harm suffered by the wrongly accused, the greater the penalty will be. However, to date there has been no judicial interpretation of the California and West Virginia law as to the scope of costs that fall under the umbrella of “reasonable costs” incurred in defending the accusation. Therefore, it is unclear how broad the scope of “reasonable costs” might be, i.e. whether this might include things like lost wages, loss of reputation, or even pain and suffering.

It should be further noted that while the classification of the act and degree of penalty may differ amongst existing laws that sanction the act of falsely accusing another of child abuse, all such laws require proof of the element of intent before sanctions may be imposed, whether criminal

96 CAL. FAM. CODE § 3027.1(a) (2014).
or civil. Generally speaking, to constitute a violation of law, a false accusation of child abuse must be made knowingly, willfully, and/or intentionally. 98

C. Evaluating the Effectiveness of Existing Law

1. Evaluating Effectiveness with Regards to Indirect Safeguards

As discussed, by broadening the duty of care, a qualified individual evaluating a child for indications of abuse owes a duty of care to the accused parent. This provides the accused with some means of protection against negligence or malfeasance once claims of abuse have been brought. 99 Imposing this additional duty of care upon those evaluating children in possible abuse situations provides the accused with a safeguard in that he or she is provided some assurance that evaluations will be proper and unbiased. In such a climate, supposedly the truth should be discovered and the wrongly accused’s innocence would prevail.

Likewise, procedural directives geared towards standardizing and strengthening the effectiveness of investigations of child abuse should presumably assure that false accusations of abuse would be gleaned from cases where a child is truly in danger. Guaranteeing notification, requiring judicial review before action is taken, and timeliness requirements aimed at squashing unfounded investigations, all help the falsely accused parent’s predicament once abuse investigations are instituted. These safeguards might help an accused parent return a child who has been temporarily taken due to an accusation of abuse, or, for non-custodial parents, aid the accused parent in regaining visitation with said child. By limiting the length of an investigation, they might limit the intrusiveness of such. And by requiring notification to the accused parent, they could alleviate some stress and emotional turmoil resting on the shoulders of the accused.

The problem with these indirect safeguards is that they do not effectively prevent the pertinent harms caused by making false accusations of abuse to influence child custody, because they do not stop the commission of the act. These protections are implemented after the accusation has been made, and once a false accusation of abuse is made, the damage is done. Following the accusation, for the protection of the child at least a minimal form of an investigation must ensue. 100 Despite length, both the child and accused parent are submitted to the embarrassment and intrusiveness associated with the investigation, and even a brief investigation may alienate the child from the parent. Moreover, the accused must still face off against the label of child abuser that stems from the accusation alone. 101 And once alleged, false accusations are difficult to decipher from legitimate claims, which can lead to protracted and difficult legal battles. 102 While

98 CAL. FAM. CODE § 3027.1(a) (2014); W. VA. CODE § 48-9-209(d) (2014); See also Child Welfare Information Gateway, supra note 86, at 4-22.

99 See supra Part III.A.1.

100 Pollack, supra note 25, at 2.

101 To reiterate, one New York court recognized that being labeled a child abuser is one of the “most loathsome labels in society,” to which stark physical and psychological ramifications attach to defending and dealing with such accusations. See Rossignol, 185 A.D.2d at 586.

102 Id.
the indirect safeguards discussed herein may help the wrongly accused parent get out of the nightmare, they do not prevent the swarm of devastation that can attach to a false accusation of abuse.

2. Evaluating Effectiveness With Regards to Existing Direct Laws

a. The Barrier of Intent

The element of intent found in all existing laws combatting false accusations of child abuse stands as a barrier to recognizing the effectiveness these laws. This is true whether the act is penalized through civil sanctions or criminal punishments. The inherent challenge of proving malicious intent, in any matter, coupled with the fact that the alleged victim is a child, can inhibit the effectiveness of laws sanctioning the act of falsely accusing an opposing parent of child abuse. Further, requiring a showing of intent disallows the law from preventing the harms caused by the accusation, because making a case of intent lends to an investigation of abuse which, as discussed supra,\textsuperscript{103} rifts the relationship between the child and the accused parent. However, for the general welfare of children the element of intent is a necessary evil.

Intent is an element that is difficult to establish in any act. In the context of false accusations of abuse, this hardship is compounded by a touchy area wherein courts may be likely to err on the side of caution for protection of the child. With the exception of rare instances in which an accuser admits that an accusation is deliberately fictitious, courts are unlikely to frequently find both that an accusation of abuse was false \textit{and} that the accuser knew of such.\textsuperscript{104} Even if a false accusation occurs, courts may be reluctant to conclude that an allegation was both false \textit{and} known to be false by the accuser, because there are so many uncertainties in child molestation.\textsuperscript{105} The lines of evidence available to prove intent in this context are, quite simply, very limited.

One limitation with regards to establishing that an accuser knew of the falsity of an allegation of abuse lies in the fact that the alleged victim of abuse is a child, and testimony from a child can be problematic. Several researchers have concluded that children are good observers, particularly for simple events; however, researchers have also discovered that many factors may influence a child’s ability to remember observations including age, race, environment, sex, and familiarity.\textsuperscript{106} A younger child may lack the ability to process multiple stimuli which may inhibit

\textsuperscript{103} \textit{See supra} Part III.A.

\textsuperscript{104} Loewy, \textit{supra} note 53, at 893 (citing \textit{Child Abuse and Neglect in America: The Problem and the Response; Hearing Before the Select Committee on Children, Youth and Families: House of Representatives}, 100th Cong., 1st Sess. 33 (1987)).

\textsuperscript{105} \textit{Id.} at 899 (citing \textit{In re Marriage of Lewin}, 186 Cal. App. 3d 1482, 1489 (Cal. App. 1986) (charactering accusations of child abuse as “unfounded” and “outrageous” rather than false).

his or hers ability to recall an event accurately.\textsuperscript{107} Fantasy is another source of mistaken impression for a child.\textsuperscript{108} Preschool age children engage in magical thinking and have a limited concept of cause and effect leading to disclosures of memories that appear congruent and impossible.\textsuperscript{109} Moreover, children are susceptible to coaching. There are situations in which the child, after repeated questioning by a therapist or parent, agrees that an event happened and will testify to that effect even though the molestation or abuse never occurred, to gain closure or please the accusing parent or otherwise.\textsuperscript{110} Thus, the fact that a child’s testimony is a source of evidence, and quite possibly a prime source of evidence, complicates a case of intent. In fact, a child’s testimony might work against establishing a case of intent for the accused if the child tends toward inaccurate recollections of abuse.\textsuperscript{111}

One Florida study depicts the effect that the challenges of proving intent can have on the effectiveness of laws penalizing false accusations of abuse.\textsuperscript{112} As previously mentioned, in Florida it is a criminal act to knowingly and willfully make a false report of child abuse, punishable by a court sentence of 5 years, and up to $5,000.00.\textsuperscript{113} Of 108 investigations initially identifying suspected false reports of child abuse, only 2 (one pending in Circuit 6 and one pending in Circuit 7) actually resulted in charges against the individual for filing a false report.\textsuperscript{114} This result is attributed in significant part to the barrier of intent, which applies to both law enforcement's criminal investigation and the likelihood of a subsequent, successful prosecution by the state attorney’s office.\textsuperscript{115}

Yet, despite the inherent challenges caused by including the element of intent in a law penalizing false accusations of child abuse, whether it be “knowingly,” “willfully,” “intentionally,”

\textsuperscript{107} Rozell, \textit{supra} note 106, at 822 (citing Melton, \textit{Children’s Competency to Testify} 5:1 L. & HUM. BEHAV. 73, 77 (1981)).

\textsuperscript{108} Rozell, \textit{supra} note 106, at 822.


\textsuperscript{111} The problems associated with child testimony, however, may decrease in severity with increases in the child’s age. As one study found, children from ages 6 to 12 are no more likely than adults to confuse what they had imagined with what they had perceived. Johonson & Foley, \textit{Differentiating Fact from Fantasy}, 40:2 J. OF SOC. ISSUES 33, 38 (1984).

\textsuperscript{112} \textit{False Reports of Child Abuse, Neglect or Abandonment Referred to Law Enforcement}, \textit{supra} note 80, at 4-5.

\textsuperscript{113} Child Welfare Information Gateway, \textit{supra} note 86, at 3; Fl. Str. s.39.205(9) and s.39.206(1) (2014).

\textsuperscript{114} \textit{False Reports of Child Abuse, Neglect or Abandonment Referred to Law Enforcement}, \textit{supra} note 80, at 4-5.

\textsuperscript{115} \textit{Id.} at 1.
or otherwise, the element is necessary for the law to serve the interests of our children. If the requirement of intent was eliminated such that a court could sanction or penalize a person for making a claim of abuse that, after investigations, proved untrue or unsubstantiated, this elimination could effectively quash good-faith claims of abuse. If a parent truly believes his or her child is being or has been abused by the other, but has no proof of such, he or she would be deterred from bringing the claim for fear that the lack of proof would wind them with a criminal record or monetary fines. Deterrence of good-faith claims thus keeps the potentially abused child victim in harm’s way. This consideration would likely outweigh the burden of establishing intent.

Moreover, though difficult, intent is not impossible to prove, and, in fact, there is a growing body of literature which members of the justice and legal system can reference in proceeding against false accusations that might aid in building a case that establishes the accusation was knowingly untrue. While allegations can occur at any stage in a divorce, it has been found that they are especially common in disputes about child custody after the divorce has been granted, and centering around issues of visitation. If it can be determined that the divorce occurs as a result of the abuse disclosures, the alleged abuse is more likely to be true. As one researcher notes, in real abuse, the accusing parent is upset, secretive, and often embarrassed, whereas in false cases, her or she displays a need to tell everyone and express no shame. Further, it has been noted that in cases involving false allegations of sexual abuse, the allegations are usually vague and not easily amenable to being verified or refuted. While these tenements may lean on the side of circumstantial evidence, they can provide a foundation for both recognizing false claims from true or good faith ones, and discovering more direct evidence of known falsity.

Thus, establishing that one parent accused an opposing parent of child abuse knowing such accusation to be untrue is clearly not an easy task. But the fact that proving intent is not impossible, combined with the deterrence of good faith claims that would result from its elimination as a legal

---

116 Wakefield, supra note 3, at 12 (citing E. P. Benedek & D. H. Schetky, Allegations of Sexual Abuse in Child Custody and Visitation Disputes, EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW, 145-156 (1985)).

117 Id. (citing E. A. Sirles & C. E. Lofberg, Factors Associated with Divorce and Intrafamily Child Sexual Abuse Cases, Child Abuse and Neglect 14, 165-70 (1990)).

118 Id. (citing R. A. Gardner, Sex Abuse Legitimacy Scale, CREATIVE THERAPEUTICS (1987)).

119 Id. (citing M. Shaefer & M. Guyer, Allegations of Sexual Abuse in Custody and Visitation Disputes: A Legal and Clinical Challenge, paper presented at the 96th Annual Convention of the American Psychological Association (1988)).

120 Circumstantial evidence is generally testimony of witnesses as to the existence of certain facts, or evidence by exhibits as to certain facts, or the happening of other events, from which a jury may logically conclude that the event in question did happen. It requires the drawing of an inference. See Hon. David M. Borden, Hon. David P. Gold, & Leonard Orland, Circumstantial and Direct Evidence, 5 CONN. PRAC. CRIMINAL JURY INSTRUCTIONS § 3.1 (4th ed.).

121 The American Prosecutors Research Institute has set forth guidelines parallel to that which has been discussed with regards to the characteristics of non-fabricating accusers versus suspect accusers. See American Prosecutors Research Institute, supra note 15, at 3. Identified characteristics of a suspect accuser include expressing little or no remorse for the child, only vindictiveness towards the ex-spouse; an unwillingness to consider any other explanation of a child’s statements, behavior, or symptoms; prompting the child when he or she is questioned about the abuse; and an unwillingness to let go of the investigatory process despite finding of no abuse. Id. at 3-4.
requirement, lends to the conclusion that intent is a necessary element of laws penalizing false claims of child abuse.

b. Capping the Deterrent Effect

Of those states with existing laws sanctioning false reports of child abuse, the strongest are those that do not limit the penalty, particularly the monetary fine, which will burden the accuser. By designating a maximum amount that may be recovered, either through criminal sanctions or civil damages, the law effectively limits the deterrent effect it might have. This is particularly true for those states that designate intentional false reports of child abuse as a misdemeanor, thereby limiting the penalty to brief jail time or a minimal monetary recoveries.122

Falsely accusing a parent of child abuse is a highly damaging act that harms both the accused parent and the involved child. The weight of the harm should be reflected in the penalty recognized by the law. Those laws which reduce the recovery or penalty to a small monetary fine provide the false accuser with a mere slap on the wrist. When combined with the unlikelihood of establishing intent, or proving that the accusation of child abuse was made with known falsity, such light penalties create little to no deterrence of the act. Laws carrying light sanctions effectively tell a parent that he or she can take the risk of accusing the opposing parent of child abuse in order to sway a custody determination, because the odds are in the accuser’s favor. It would be difficult to prove the allegation was false, and even if you could, the penalty is not too severe; but the reward is great when the outcome could be that the accuser gets primary or full custodianship of the child over an otherwise qualified parent.

V. WHAT IS NECESSARY TO COMBAT FALSE ACCUSATIONS OF CHILD ABUSE IN CUSTODY DISPUTES?

While the laws as they exist have some strengths, they remain plagued by deficiencies that limit or prevent their effectiveness. Indirect safeguards aid the wrongly accused parent in his or her uphill battle defending against a false allegations of abuse, but they do not prevent or cure the greater damages caused by the accusation itself and subsequent investigations. Direct laws sanctioning false reports of child abuse provide some deterrence to prevent false accusations from occurring by criminalizing or otherwise penalizing the act, but the level of deterrence varies, with most states enforcing only weak monetary fines that provide little threat to the false accuser. Furthermore, all direct laws require some showing of intent, i.e. that the report was made

122 See e.g. ARIZ. REV. STAT. § 13-3620.01 (West 2014) (a person who knowingly and intentionally makes a false report of child abuse or neglect is guilty of a Class 1 misdemeanor, punishable by up to 6 months in jail and a fine of up to $2,500.00 pursuant to ARIZ. REV. STAT. §§ 13-707 and 13-802); COLO. REV. STAT. § 19-3-304(3.5), (4) (2014) (Any person who knowingly makes a false report of abuse or neglect to a law enforcement agency commits a Class 3 misdemeanor, punishable by up to 6 months in jail, a fine of up to $750, or both, in accordance with COLO. REV. STAT. § 18-1.3-501); KAN. STAT. ANN. § 38-2223(e) (West 2014) (Any person who willfully and knowingly makes a false report or makes a report that such person knows lack factual foundation is guilty of a Class B misdemeanor, punishable by up to six months in jail and a fine of up to $1,000.00 pursuant to KAN. STAT. ANN. §§ 21-6602, 21-6611); and MISS. ANN. STAT. § 210.165(2)-(3) (West 2014) (Any person who intentionally files a false report of child abuse shall be guilty of a Class A misdemeanor, punishable by upon to one year in jail or a fine of up to $1,000.00 or both).
knowingly false. Such a provision is necessary to ensure the courthouse doors are left open to good faith claims. Yet, this necessary element of intent also deteriorates the deterrent effect of existing laws because of the inherent difficulty, and even unlikelihood, of proving the accuser knew of the falsity of an allegation of abuse, especially beyond a reasonable doubt. Thus, as they stand to date, the laws are ill prepared to battle false accusations of child abuse in a legal arena wherein false accusations of abuse may become more common to sway child custody decisions.¹²³

No one addition or deletion from the existing laws will resolve the statutory weakness in addressing this problem. Rather, what is required is a multifaceted statutory approach that deters a parent from entering outrageous false accusations against another to begin with, aids the predicament of the accused in establishing intent if a false allegation gets through, and redresses the harms suffered by the child and the accused once the falsity of the claim is resolved. This article proposes that a prime law for striking down false allegations of child abuse, made to influence custodianship, will include the following elements: a) a strong deterrent effect recognized through penalties proportionate to the damages caused by the accusation; b) an allowance for recovery of damages under a lessened standard of proof to reduce the burden in establishing intent; c) a requirement that indications in investigations of false accusations be reported to law enforcement to preserve evidence; and d) a remedy for the alienation between the child and accused parent that can result from the making of false allegations of abuse.

A. Strengthening the Deterrent Effect

1. Upping the Threat to Fit the Perpetration

One of the key pitfalls in direct laws against false reports of child abuse is that the penalties are not conformed to the crime, and, therefore, the act is not deterred. Deterrence is particularly important in the context of false allegations of child abuse in custody disputes because of the immense harm that is created just from the accusation alone.¹²⁴ The innocent accused feels the effects of the perpetration almost immediately. As illustrated prior, penalties for falsely reporting child abuse range from light monetary sanctions and brief jail time as a misdemeanor crime, to slightly greater fines and imprisonment with felony designations or otherwise.¹²⁵ Of those states that designate a maximum penalty, Florida is the most severe, threatening up to five years imprisonment and a $5,000.00, with the additional potential for a $10,000.00 fine from the Department of Children and Family Services.¹²⁶ Yes, $5,000.00 is a lot of money, for some, and 5 years in prison is a lot of time, for most; but when coupled with the high improbability of establishing intent, is that enough? Probably not.

The model law to battle false accusations of child abuse to influence custodianship is one which deters through the threat of taking away the one thing the false accuser was trying to gain: primary custodianship of the child. Tackling false accusations of child abuse in custody disputes

¹²³ See, supra note 25.
¹²⁴ See supra Part III. A., B.
¹²⁵ See, supra Part IV.B.
¹²⁶ FL. ANN. STAT. §§ 39.205(9) and 39.296(1) (West 2014).
cannot be recognized through laws against false reports of child abuse generally. Rather, this requires inclusion of specific components in civil child protection or family laws that designate the making of false accusations of child abuse to be a determining factor when awarding primary custody. Essentially, a state should codify an authorization for the family court stating that it mark the making of a false accusation of abuse as a strike against the accuser. However, this authorization must be tempered by considerations of due process, and as such, the law should not automatically remove a child from the accuser on the basis of the accusation alone.

Automatic removal of a child from the knowingly false accuser, because of the false accusation of abuse alone, would crumble under the weight of due process. The government interest in protecting the child from the false accuser who is an otherwise qualified parent would simply not outweigh that parent’s right to the child. Parents have an established fundamental liberty to parent their child. As stated by the United States Supreme Court in *Santosky v. Kramer*, there exists a “fundamental liberty interest of natural parents in the care, custody, and management of their child that does not evaporate simply because they have not been model parents […]”\(^\text{127}\) This interest, however, is not absolute. It is limited by the compelling government interest in protecting children, particularly where the children require protection from their own parents.\(^\text{128}\)

A state’s action in removing a child from the custody of the natural parent is measured against the standard of whether or not the deprivation of the parent’s right “shocks the conscience.” One particular federal court case sets forth an analysis when considering the removal of a child under due process. In *In re Scott County Master Docket*, children were removed to the state from the custody of their parents who were placed under arrest during investigations involving a Minnesota sex-ring.\(^\text{129}\) The parents filed suit, alleging the state violated their due process rights.\(^\text{130}\) The court held that while the actions taken to remove the children were inarguably disruptive to the family units of the various plaintiffs, the state’s action was motivated by compassion for the children, and in no way indicative of an abuse of official power that “shocks the conscience,” and thus did not rise to the level of a violation of substantive due process.\(^\text{131}\) Additionally, the court held that in the context of loss of child custody, a parent’s procedural due process rights are recognized so long as the aggrieved parent is provided with an opportunity to be heard at a meaningful time and in a meaningful manner.\(^\text{132}\) Thus, to survive complaints of due process, a law reaching one’s custody over a child must not rise to a level where the outcome would “shock the conscience,” and must provide the parent with an outlet to be heard before the parent’s right to the child is infringed upon.


\(^{128}\) *Croft v. Westmoreland County Children & Youth Servs.* 103 F.3d 1123, 1125 (3d Circ. 1997).

\(^{129}\) *In re Scott County Master Docket*, 672 F. Supp. 1152, 1167 (D. Minn. 1987).

\(^{130}\) Id.

\(^{131}\) Id. at 1164.

\(^{132}\) Id. at 1169 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (asserting that an evaluation of due process begs the question of was the violation of personal rights so severe, so disproportionate to the need presented and so inspired by malice or sadism rather than a merely careless to unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience)).
Infringement of the due process rights of the accuser in removing a child because of the false accusation would be an issue of first impression for the courts. In light of the analysis in In re Scott, it seems likely that the need to protect a child would not be so great as to warrant removal of the child on the basis that a parent made a false accusation of abuse alone. Such automatic removal would likely “shock the conscience,” because, clearly, falsely accusing an opposing parent of abuse does not explicitly place the child in immediate harm’s way. Still, when a parent alleges a false accusation of abuse against another, he or she does threaten, to some extent, the child’s well-being. The child suffers the effects of subsequent investigations and loss of relationship with the accused parent that stems from the false accusation. This potential harm warrants a law that designates the making of a false accusation as a consideration when awarding custody, so long as the law does not automatically remove the child from the accuser on this consideration alone. Moreover, the custody proceedings themselves would provide the accuser with an outlet in which to be heard before any determination of custody was made.

The model law would exist alongside existing and applicable criminal sanctions. It would put the accuser on notice that if you make a false allegation of abuse to sway a custody determination it is likely that the wrongly accused, if he or she be an otherwise equally qualified and capable parent, is going to get primary custody. The accuser will not lose all rights to the child, but will effectively lose primary custodianship. Explicitly threatening the loss of the one thing motivating the making of a false accusation in a custody proceeding, to take custody of the child over an opposing parent, is the strongest deterrent to the false accusations in this context that the law can provide.

2. Imposing a Lessened Burden of Persuasion

As mentioned, one of the facets limiting the deterrent effect of existing laws is the intent requirement. An accuser is not afraid of the law, because they are not likely to face the consequence of the law where the intent element is so difficult to prove. But because the element of intent is

---

133 New Hampshire House Bill 506 provides a model for the proposition herein that the ideal law threaten loss of custody to the accused parent, in addition to applicable criminal prosecution, to deter false accusations of abuse in custody proceedings. Said bill proposed the following:

If the court finds by a preponderance of the evidence that a parent has knowingly made false statements of child abuse [...] against the other parent to the department of health and human services, to the court, to any law enforcement agency [...] then the accusing parent shall not be awarded primary residential custody of the children. This provision shall apply so long as the accused parent:

(a) Has never been convicted of any crime perpetrated against a child; (b) Has no criminal convictions in the past 5 years for either alcohol abuse or the abuse of a controlled substance; and (c) Has no criminal convictions for the trafficking of a controlled substance. NH H.B. 506, 162 SESS. GEN. CT. (2011).

Furthermore, though not a pertinent argument to this article which is examining the strength of the deterrence effect of the law more so than financial feasibility, it should be noted that adding this element to civil codes relating to determinations of custody and/or parental rights would not detrimentally increase court costs and efficiency. It would not likely increase the number of cases in the courts, but rather only add contentious issues to existing cases which might only increase hearing times. Id. (fiscal note).
necessary, a model law shaped to combat false allegations of child abuse in custody disputes must counteract the difficulties in establishing intent rather than eliminate this requirement all together.

Reducing the difficulty of proving intent can be realized by lessening the burden of persuasion placed upon the accused parent to establish that the accusation was made knowingly false. This is effectuated by bringing recovery for the accused into civil child and family laws that address divorce and custody. Criminal sanctions for false reporting child abuse generally could and should still exist; but bringing provisions that address false accusations of abuse in custody disputes, particularly, within the civil realm lowers the standard of proof that must be satisfied for the accuser to face the consequences of his or her false accusation.

Criminal penalties generally carry with them an inherent requirement that the criminal act be proven beyond a reasonable doubt before conviction. However, in most civil litigation a mere “preponderance of the evidence” suffices, or, at most, a standard of clear, convincing, and unequivocal proof. As such, those laws which cover false allegations of abuse in custody disputes under criminal sanctions of false reports of child abuse impose a heightened burden of persuasion for conviction. This limits the deterrent effect because, in regards to establishing that a parent knew an accusation of abuse was false when made, the standard is unlikely, if not impossible, to be met. For this reason, penalties for entering false allegations of child abuse in custody disputes would be stronger provisions for such were in place in civil code, wherein a reduced standard of proof would apply, in addition to criminal code sanctions. While intent would remain difficult to prove, the probability of proof might be greater under a lessened burden of persuasion, thereby strengthening the effect of the law in preventing false accusations of child abuse in custody disputes before they are made.

Thus, the ultimate deterrent effect with regards to preventing false accusations of child abuse in custody proceedings is recognized by a law enacted in civil code that, in addition to criminal prosecution, authorizes a court to use the making of a false accusation as a determinant in awarding custody. The threat of loss of primary custodianship, coupled with the increased likelihood that the burden of establishing malice can be satisfied, might expectantly stop a parent from falsely accusing another of child abuse in divorce and custody disputes more readily than existing laws that criminalize or otherwise sanction false reports of child abuse.

B. Redressing the Harm

---

134 As discussed, any law penalizing false reports of child abuse in custody proceedings must require that to be sanctionable, the accuser must have known the accusation to be false at the time of making. Otherwise, good faith claims of abuse will be deterred out of fear that penalty will result if no evidence is found to report the claim, even though it is true or believed to be true.

135 In re Winship, 397 U.S. 358, 364 (1970) (Deciding that the “reasonable doubt” standard is an implicit component of due process, required to be applied by factfinders in criminal cases in both federal and state courts).

136 David H. Kaye, Statistical Significance and the Burden of Persuasion, 26:4 Law and Contemporary Problems 13, 15 (1983). The more stringent standard of “clear, convincing, and unequivocal proof” is applied in some “quasi-criminal” matters. Id. Quasi-criminal matters are those like fraud in which the interests at stake are deemed to be more substantial than mere loss of money. Addington v. Texas, 441 U.S. 418, 421 (1978).
Any law fit to address false allegations of abuse in custody disputes should allow for some cure of the harm inflicted by the accusation; harms that are suffered despite discovery that the allegation is false. Additionally, a law that provides for a cure of the harms caused by false allegations of abuse also secondarily increases the deterrent effect of said law.

To effectively redress the harm, the model law should direct that if it be established that an accusation of abuse is found to be both false and known to be false, in addition to a loss of custodianship, the accused may recover all actual damages from the accuser.\textsuperscript{137} This would encompass any loss suffered the accused including a monetary value for loss of reputation suffered as a consequence of the accusation. It is important here that the damage award not be capped, but rather the limit remain open so as to fully recognize the harm suffered by the accused, which can be great.\textsuperscript{138} Moreover, recovery of all actual damages rather than a pre-designated fine more accurately redresses the harm because one cannot predict the detriment the accused will suffer. The loss here depends on factors such as the accused’s occupation that can vary his or her loss.\textsuperscript{139}

Redressing the harm also means curing the relationship defects between the accused parent and involved child caused by promulgation of the false accusation of abuse. This can be realized through counseling by a court approved individual or agency. Thus, the model law would direct that once the accusation of abuse is proven to be made knowingly false, all involved parties must complete counseling at the expense of the accuser. Here too, the accuser must bear the burden of all costs related to said counseling, including any lost wages the accused might encounter as a result of this requirement.

Not only do the above-stated cures mend the injuries inflicted upon the accused, as well as the child, the model law also increases the deterrent effect on alleging a false accusation. In addition to losing primary custody over the child, the accuser now stands against liability for money damages that could be immense. Such a combination would arguably quash even thoughts of entering a false allegation into a dispute to influence child custody.

\textbf{VI. CONCLUSION}

\textsuperscript{137} Actual damages herein being the sum of money that will fairly and justly compensate the accused for any injury he or she actually sustained as a direct consequence of the conduct of the accuser. \textit{See} New York Practice Series. West Virginia and California laws provide examples of statutes allowing for recovery of damages that are not capped at a pre-determined amount. California provides that the court may impose reasonable money sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and reasonable attorney’s fees incurred in recovering the sanctions. \textit{See} \textit{CAL. FAM. CODE} § 3027.1(a) (2014). West Virginia allows for reimbursement of costs incurred by the accused party as a result of defending the accusation and reasonable attorney’s fees incurred. \textit{See} \textit{W.VA. CODE} § 48-9-209(d) (2014). However, because these laws have not been judicially interpreted, it is unclear what damages would fall within the scope of recovery, and, therefore, the effectiveness of these laws remains in question, should a court limit recovery thereby limiting deterrence.

\textsuperscript{138} \textit{See supra} Part III.

\textsuperscript{139} For instance, if an accused loses wages because of the accusation and defending the accusation, his or her damages with regards to lost wages might be greater if his or her occupation was a doctor versus an elementary school teacher.
Once a person alleges a false accusation of child abuse against another to influence a custody determination, the damage is done. The mere accusation in and of itself has the capability to destroy the relationship between the child and accused parent. It elicits an investigation that intrudes upon both the accused and the child, and even where no abuse occurred, the investigation alone can bring on embarrassment and shame. It sends detrimental thoughts into the mind of the impressionable child, and it shatters the life of the accused who is sent into a tailspin of defending against an allegation of bringing harm to one’s own child. The welfare of the child can be lost in the battle. Not to mention, the burden of defending against the untrue contention can dissipate the accused’s finances. And because the veracity of an abuse allegation is difficult to disprove, the shadow of the allegation, which may be deemed “unsubstantiated” but not necessarily “untrue” will lurk behind the accused even if he is not charged or found guilty of the fallacious claim.

These harms ensue immediately upon the making of the false accusation, which warrants a law that can bite back. When such is at stake, the law must deter the damage before it is brought upon the accused and the involved child. It must challenge the false accuser with penalties great enough to stop them from promulgating the false accusation in the first place, and temper the destruction when the false accusations still slip through. The model law should threaten an eye for eye, but do so within the bounds of our constitutional rights to parent our children. It should direct the applicable court to consider the propagation of a false accusation of abuse when making a determination of custody, for all intents and purposes notifying parents that a false allegation of abuse could cost them primary custody of their children. Legislatures should bring this direction into civil child and family code pertaining to custody and divorce, thereby allowing a lessened burden of persuasion than that applied to criminal laws to be the gatekeeper to enforcement. And should a false accusation of abuse still creep into a child custody dispute, the law should allow recovery of all actual damages suffered by the accused and mandate counseling at the expense of the accuser, in order to subdue the financial and emotional hurt imposed on the accused, and the child. When woven together, these provisions might provide a pre-emptive attack on the occurrence of false accusations of child abuse in custody disputes, and signal false accusers to stop crying wolf.