

**ALMOST AS DESPICABLE AS THE ACT ITSELF:**  
**DEALING WITH FALSE ALLEGATIONS OF CHILD ABUSE**  
**IN CUSTODY CASES**

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I. Introduction

In *Beekman vs. Beekman*,<sup>1</sup> a father requested that a prior order granting custody to a mother be modified based on the mother's false allegations of child abuse and the mother's interference with the father's visitation rights. The trial court granted the father's motion and the mother appealed. The court of appeals affirmed the trial court's judgment. In a concurring opinion, Presiding Judge William H. Harsha observed that the tactic of making a false allegation about child abuse, to achieve a preferential posture in a custody case, is "almost as despicable as the act itself."<sup>2</sup>

II. False Allegations of Abuse

A. False Allegations Exist

The Ohio Supreme Court has observed that adults sometimes persuade children to make false allegations of abuse.

*Not every child who says he or she has been abused has in fact been abused.* Sometimes a child can be a pawn in power games and rivalries between significant adults in the child's world. Sometimes the adults are

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<sup>1</sup> *Beekman v. Beekman* (1994), 96 Ohio App.3d 783.

<sup>2</sup> *Id.* at 792 (Harsha, J., concurring).

willing to believe the worst about their adult adversaries and encourage, consciously or subconsciously, stories of abuse when abuse has not occurred. . . .

The innocent desire of small children to please the adults they encounter makes the problem more complicated still. The child may be guided less by objective standards of truth than by the desire to say what a significant adult wants to hear. For the child, “truth” can be what pleases the adult.<sup>3</sup>

## B. False Allegations In Custody Cases

### 1. Allegations are Frequently Made in Custody Cases

Chief Justice Thomas Moyer and former Justice Herbert Brown observed that, in one study, it was found that forty-one percent of cases involving alleged sexual abuse arose in divorce and custody cases.<sup>4</sup>

### 2. Allegations in Custody Cases are Frequently False

The Sixth District Court of Appeals has been observed that:

The introduction of sexual abuse charges into bitterly contested custody actions seems to have become epidemic. Yet, as one expert in this case testified, such allegations are unsubstantiated in as many as eight of ten times.<sup>5</sup>

Similarly, the Second District Court of Appeals has observed:

[O]ther courts in this state have noted that there is a significant percentage of false allegations of sexual abuse in child custody disputes.<sup>6</sup>

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<sup>3</sup> *State v. Storch*, (1993), 66 Ohio St.3d 280, 284-285 (emphasis added).

<sup>4</sup> *State v. Boston* (1989), 46 Ohio St.3d 108, 129 (Brown, J., concurring).

<sup>5</sup> *Kohlman v. Kohlman* (Sept. 24, 1993), Ottawa App. No. 92OT046, unreported, 1993 Ohio App. LEXIS 4481, 16 (a professor of psychology testified that “between fifty and eighty percent of abuse allegations cannot be substantiated in child custody cases where a high conflict exists between the parents and there is a young child involved.”)

<sup>6</sup> *Mascorro v. Mascorro* (June 9, 2000), Montgomery App. No. 17945, unreported, 2000 Ohio App. LEXIS 2437, 10-11 (citing *Kohlman*).

### 3. Social Science Data

Various social science studies have concluded that false allegations of child abuse are frequently made in custody cases. Nancy Thoennes and Patricia Tjaden, in a study of 9,000 families involved in custody disputes, estimated that thirty-three percent of the allegations of child sexual abuse were false.<sup>7</sup> In eight percent of the cases, the good faith of the reporter was questioned.<sup>8</sup>

Kathleen Faller, in a study of 136 cases involving divorce, concluded that the allegations in approximately twenty-two percent of the cases were false or possibly false.<sup>9</sup> Faller concluded that 4.7 percent of the allegations of sexual abuse were knowingly false.<sup>10</sup>

David Jones and J. Melbourne McGraw, after reviewing 576 reported cases of suspected sexual abuse, concluded that six percent of the claims were false.<sup>11</sup>

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<sup>7</sup> Nancy Thoennes & Patricia G. Tjaden, The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes, 14 *Child Abuse & Neglect* 151 (1990).

<sup>8</sup> *Id.*

<sup>9</sup> Kathleen Coulbourn Faller *et al.*, Research on False Allegations of Sexual Abuse in Divorce, 6 *APSAC Advisor* 1 (Fall 1993); Kathleen Coulbourn Faller & Ellen DeVoe, Allegations of Sexual Abuse in Divorce, 4/4 *Journal of Child Sexual Abuse* No. 1 (1995).

<sup>10</sup> *Id.*

<sup>11</sup> David P. H. Jones & J. Melbourne McGraw, Reliable and Fictitious Accounts of Sexual Abuse in Children, 2 *Journal of Interpersonal Violence* 27 (1987); *see also* Mark D. Everson & Barbara Boat, False Allegations of Sexual Abuse by Children and Adolescents, 28 *Journal of the American Academy of Adolescent & Child Psychiatry* 230 (1989) (concluding that 8% of reports of sexual abuse by adolescents were false and that 2% of reports of sexual abuse by children under 6 years old are false).

### 3. Motive for False Allegations

Judge Handwork, of the Sixth District Court of Appeals, has observed that it is “commonplace” for parents who are divorced “to use their children as tools to hurt one another, or to be spiteful.”<sup>12</sup> Judge Handwork explains:

It almost goes without saying, and sadly so, that the actions of many former spouses as they relate to one another are motivated by hatred, ill will, and a desire to hurt; and that too often children of a former marriage become the pawns with which hurt is inflicted. What better way to inflict harm on a former spouse than to wrongfully accuse him or her of having abused their child?<sup>13</sup>

Psychologist Benjamin M. Schultz has observed that a parent may make a false allegation of sexual abuse to terminate all contact between the child and the other parent.<sup>14</sup> Dr. Schultz also observes:

A false allegation of abuse in the context of a custody or visitation dispute can serve other ends. The allegation may be an attempt to curtail contact between the child and the other parent in order to change the child support arrangement. The reporting parent may also be trying to alleviate stress by removing the child as an intersection point for any relationship with the other parent. There are few other circumstances where sexual abuse allegations are so clearly tied to other outcomes that could be seen as beneficial for the reporting parent.<sup>15</sup>

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<sup>12</sup> *Hartley v. Hartley* (1988), 42 Ohio App.3d 160, 163 (Handwork, J., dissenting).

<sup>13</sup> *Id.* at 162.

<sup>14</sup> Child Custody & Visitation Law and Practice, Vol. 3, Editor Sandra Morgan Little, Matthew Bender & Co., Inc., originally published in 1984, Chapter 24A, Conducting an Evaluation in a Child Custody or Visitation Dispute: A Child Custody Evaluator’s Perspective, §24B.01[2], p. 24B-7.

Sandra Morgan Little; Child Custody & Visitation Law and Practice

<sup>15</sup> *Id.*

#### 4. False Allegations Harm Children

The Fourth District Court of Appeals has observed:

Although a court grants one parent custody and the other parent visitation, the children need to know that they are loved by both parents regardless of the antagonism the parents might feel for each other. It is the duty of each parent to foster and encourage the child's love and respect for the other parent, and the failure from that duty is as harmful to the child as is the failure to provide food, clothing, or shelter. Perhaps it is more harmful because no matter how well fed or well clothed, *a child cannot be happy if he or she feels unloved by one parent.*

When a court makes a custodial decision, it makes a presumption that the circumstances are such that the residential parent will promote both maternal and paternal affection. The residential parent implicitly agrees to foster such affection, not out of any good feeling toward the nonresidential parent, but out of the need of the child for both parents love. Where the evidence shows that after the initial decree the residential parent is not living up to the court's presumption and is attempting to poison the relationship between the ex-spouse and the child, this is a change of circumstances that warrants a modification of the prior custody decree. *Unsubstantiated allegations of abuse are the worst kind of poisoning of the relationship.*<sup>16</sup>

### III. Need For Special Care

#### A. Goals Must be Balanced

The Ohio Supreme Court has observed that, when a court considers allegations of child abuse, the court must balance competing goals. That is, the goal of maximizing the likelihood that a child abuser will be discovered and punished is not the only goal that a court must consider. Specifically, the Court has observed:

The burden . . . falls upon the courts to devise rules of evidence for child abuse cases which maximize the likelihood of convictions for the guilty and minimize the likelihood of convicting the innocent. Protecting

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<sup>16</sup> *Beekman, supra*, at 789 (emphasis added).

and helping those children who truly have been abused while detecting those children whose stories of abuse are not true or accurate.<sup>17</sup>

Similarly, the Ohio Supreme Court previously observed:

[W]e continue to strive for balance in this troublesome area of the law. . . . “[I]t is the goal of all members of the judiciary that results are reached that are equitable and fair to both society and defendants who find themselves charged with the crime of child abuse.”<sup>18</sup>

#### B. Special Care Required in Custody Cases

Chief Justice Thomas Moyer and former Justice Herbert Brown have observed that, when an accusation of child abuse is made during a “custody fight,” there is “always the underlying suspicion that the accusation was linked to the custody dispute.”<sup>19</sup>

The Ohio Supreme Court has observed that “special care must be taken to assure the accuracy of the fact-finding process” when allegations of child abuse arise during “a heated dispute over the allocation of parental rights and responsibilities – a “custody fight”.”<sup>20</sup>

#### IV. Proof of False Allegations

##### A. Rules Regarding Proof

If a party claims that a fact exists, that party has the burden of going forward with the evidence to prove that the fact exists. That is, a court will not presume that a fact exists simply because a party claims that the fact exists.

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<sup>17</sup> *Storch, supra*, at 285.

<sup>18</sup> *State v. Dever* (1992), 64 Ohio St.3d 401, at 404 (quoting *State v. Boston* (1989), 46 Ohio St.3d 108, at 113.)

<sup>19</sup> *Boston, supra*, at 130 (Brown, J., concurring).

<sup>20</sup> *Storch, supra*, at 287.

In a civil case, the party asserting the existence of a fact has the burden of proving that fact.<sup>21</sup> The burden of proof never shifts.<sup>22</sup>

In a civil case, if a party submits sufficient evidence to permit a reasonable mind to find that the burden of proof has been satisfied, it is said that the party has made a *prima facie* case regarding that fact. If the proponent of a fact does not establish a *prima facie* case, then a court may not find that the fact has been established. If the proponent of a fact does establish a *prima facie* case, the court may conclude that the fact has been established or the court may conclude that the fact has not been established.

If a party establishes a *prima facie* case, it is said that the burden of going forward shifts to the other party.<sup>23</sup>

In most civil cases, the burden of proof must be established by a preponderance of the evidence.<sup>24</sup> A preponderance of the evidence is the greater weight of the evidence.<sup>25</sup> If the evidence presented establishes that the existence and the nonexistence of a fact are equal possibilities, then the fact has not been established by a preponderance of the evidence.<sup>26</sup>

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<sup>21</sup> *N.W. Graham & Co. v. W. H. Davis & Co.* (1854), 4 Ohio St. 362.

<sup>22</sup> *Ohio Fuel Supply Co. v. Shilling* (1920), 101 Ohio St. 106.

<sup>23</sup> *Klunk v. Hocking Valley Ry. Co.* (1906), 74 Ohio St. 125.

<sup>24</sup> *In re Walker's Estate* (1954), 161 Ohio St. 564.

<sup>25</sup> *Travelers' Ins. Co. v. Gath* (1928), 118 Ohio St. 257.

<sup>26</sup> *Gedra v. Dallmer Co.* (1950), 153 Ohio St. 258.

## B. Counsel's Role

### 1. Use the Rules

Counsel representing an alleged abuser must use the above-discussed rules of proof. Because child abuse is such a horrible act, and because judges desire to protect children, judges may be tempted to “bend the rules” to help a child. Counsel must not let this occur.

Counsel must remind the court that the accusing party has the burden of proof and that the burden of proof can only be met by a preponderance of the evidence. Counsel must remind the court that the alleged abuser does not have any burden to prove that child abuse did not occur. Similarly, counsel must remind the court that the alleged abuser does not have any duty to prove that the accusing party is making a false allegation.

### 2. Embrace the Issue

Generally, if one party asserts that the other party has abused a child, the abuse issue will become the single most important issue in the case. Counsel representing the alleged abuser must embrace this fact and deal with the issue directly.

Counsel for the alleged abuser can recast this issue in one of three ways. First, the accusing party made intentional false allegations of child abuse. Second, the accusing party made reckless or negligent false allegations of child abuse. Third, the accusing party made incorrect, but good faith, false allegations of child abuse. To the extent that the evidence indicates that the accusing party intentionally, recklessly, or negligently



made false allegations of child abuse, counsel for the alleged abuser should stress that such conduct itself constitutes child abuse.

C. The Importance of Context

Context is critical in a case involving false allegations of child abuse. A parent who is willing to make false allegations of child abuse has frequently engaged in other types of inappropriate behavior. In determining whether child abuse occurred, it appears that courts are frequently highly influenced by the statements and conduct of the accusing party.

In *Mascorro*,<sup>27</sup> the father filed a contempt motion claiming the mother violated his visitation rights. The mother filed a motion requesting supervised visitation for the father. The trial court found the mother in contempt and denied her motion for supervised visitation.

At the trial, the mother's psychologist testified that the child had informed her that the child's father had sexually abused her and that she believed that the child had been sexually abused. The mother appealed the trial court's finding of contempt. The mother claimed that she had reasonably relied upon the psychologist's conclusion that the child had been sexually abused by the father.

The court of appeals rejected the mother's argument. The court concluded that the overall "circumstances" of the case demonstrated a "clear pattern" of the mother

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<sup>27</sup> *Mascorro, supra.*

attempting to deny the father's visitation rights.<sup>28</sup> The court noted that the mother had made several attempts to deny the father's visitation rights before the psychologist expressed any concern.<sup>29</sup> The court noted that the mother had filed an unsuccessful motion in the past that attempted to limit the father's visitation rights.<sup>30</sup> The court noted that the mother had been found in contempt in the past for denying the father's visitation rights.<sup>31</sup> The court observed that the mother did not raise the allegation of sexual abuse until minutes before the trial on the father's contempt motion and the mother's motion to for supervised visitation.<sup>32</sup> The court noted that the mother had filed a domestic violence action against the father which was unsubstantiated.<sup>33</sup> The court observed that, if this were a case where the mother had denied the father's visitation rights simply on the basis of the child's statement and the psychologist's opinion, then the results of the case probably would have been different.<sup>34</sup>

In *Barton*,<sup>35</sup> the father filed a motion requesting that the mother be found in contempt for violating his visitation rights and a motion requesting that custody be modified. The trial court granted the father's motion to modify and granted sole custody of the children to the father. The trial court ordered that the mother's visitation would be

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<sup>28</sup> *Id.* at 17.

<sup>29</sup> *Id.* at 14.

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 3, 16-17.

<sup>33</sup> *Id.* at 14-15.

<sup>34</sup> *Id.* at 17.

<sup>35</sup> *Barton v. Barton* (Feb. 20, 1990), Madison App. No. CA89-08-013, unreported, 1990 Ohio App. LEXIS 585.

supervised. The mother argued that there was insufficient evidence to grant a change of custody and that the change of custody was not in the best interest of the children.

The court of appeals rejected the mother's arguments. The court noted that the mother's allegations of sexual abuse had never been substantiated.<sup>36</sup> The court noted that the prosecutor's office had declined to file charges against the father based on the mother's allegations.<sup>37</sup> The court noted that the mother had made other unsubstantiated allegations against another individual.<sup>38</sup> The court noted that, even though the mother had never been held in contempt, she had "repeatedly denied" the father's visitation rights.<sup>39</sup> The court concluded that the mother had "used the unsubstantiated allegations of sexual abuse to wrongfully deprive [the father] of visitation."<sup>40</sup>

Finally, in *Beekman*,<sup>41</sup> the father filed a motion to modify custody. The mother claimed that the father had sexually abused one of the children. The trial court granted the father's motion and awarded sole custody to the father. The mother argued that there was insufficient evidence to support the trial court's decision and that the order was not in the best interest of the children.

The court of appeals rejected the mother's arguments. The court observed that the mother had continually refused to allow the father to exercise his visitation rights.<sup>42</sup> The

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<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 5.

<sup>41</sup> *Beekman, supra.*

<sup>42</sup> *Id.* at 785.

court noted that the mother had been held in contempt for denying the father's visitation rights.<sup>43</sup> The court observed that, to the mother, "a false accusation of sexual abuse is ... only a tactic to be used in visitation disputes."<sup>44</sup>

## V. Legal Significance of False Allegations

The existence of false allegations of child abuse is significant regarding many legal issues.

### A. Custody – Best Interest Factor

The fact that a parent makes false allegations of child abuse regarding the other parent is evidence that it would not be in the best interest of the child if custody was granted to the parent who made the false allegation.

#### 1. Custody Statute

The custody statute<sup>45</sup> does not expressly state that a court shall consider false allegations of child abuse in determining the best interest of a child. However, the statute states that a court shall consider "all relevant factors."<sup>46</sup>

The custody statute also states that a court must consider two factors that are frequently related to false allegations of child abuse. First, a court must consider whether a parent "has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court."<sup>47</sup> Second, a court must consider which parent

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 788.

<sup>45</sup> R.C. 3109.04.

<sup>46</sup> R.C. 3109.04(F)(1).

<sup>47</sup> R.C. 3109.04(F)(1)(i).

is “more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights.”<sup>48</sup>

A court views the same factors in determining the best interest of a child in an original custody determination and in a modification determination.<sup>49</sup>

## 2. Case Law

Many Ohio courts have observed that a court may consider false allegations of child abuse in determining the best interest of a child.<sup>50</sup> Similarly, courts in other states have held that a court may consider false allegations of child abuse in determining the best interest of a child.<sup>51</sup>

### B. Custody – Change in Circumstances

Generally, a court may not modify a prior custody decree unless the court first determines that a change in circumstances has occurred.<sup>52</sup> A court may consider a parent’s false allegations of child abuse in determining if a change in circumstances has occurred.

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<sup>48</sup> R.C. 3109.04(F)(1)(f).

<sup>49</sup> R.C. 3109.04(F)(1).

<sup>50</sup> *Beekman, supra*; *Wheeler v. Wheeler* (Oct. 20, 2000), Greene App. No. 2000 CA 27, unreported, 2000 Ohio App. LEXIS 4857; *Kohlman, supra*; and *Barton, supra*.

<sup>51</sup> *Pallay v. Pallay* (Fla. Dist. Ct. App. 1992), 605 Os.2d 582; *In re the marriage of Nelson* (May 19, 1992), Minn. App. No. C4-912152, unpublished; *In re DA* (Neb. 1991), 239 Neb. 264, 475 NW2d 511; *Schwartz v. Schwartz* (Nev. App. 1991), 107 Nev. 378, 812 P.2d 1268, 1273 n. 6; and *Peterson v. Peterson* (Utah App. 1991), 818 P.2d 1305, 1307.

<sup>52</sup> R.C. 3109.04(E)(1)(a).

## 1. Overall Test

In determining if a change in circumstances has occurred, a court must view the totality of the circumstances.<sup>53</sup> A parent's false allegations of child abuse are one factor for a court to consider. The presence of a false allegation of child abuse does not, *per se* establish a change in circumstances.<sup>54</sup>

If a parent makes a false allegation regarding child abuse, but the false allegation was based on a good faith belief that child abuse had occurred, a court may conclude that the false allegation is not sufficient to establish a change in circumstances.<sup>55</sup>

## 2. Harmful Effect

Some courts require that the change in circumstances have some harmful effect on a child. Several courts have held that a court may infer that false allegations of child abuse have a harmful effect on children.<sup>56</sup> In *Russell*, the Fourth District Court of Appeals observed “[W]e do not believe it requires any great leap in logic to find that a false accusation of sexual abuse by one parent against the other *always* has a detrimental impact.”<sup>57</sup> The *Russell* court also observed that it was unnecessary to present expert testimony to establish that false allegations of abuse had a detrimental impact on a

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<sup>53</sup> *Beekman, supra*, 791 (Harsha, P.J., concurring) and 792 (Stephenson, J., concurring); *Stover v. Plumley* (1996), 113 Ohio App. 3d 839, 843; *In re Russell* (Aug. 4, 1999) Vinton App. No. 98 CA 525, unreported, 1999 Ohio App. LEXIS 3744, 16.

<sup>54</sup> *Stover, supra*, at 834; *Beekman, supra*, 791 (Harsha, P.J., concurring) and 792 (Stephenson, J., concurring); *Russell, supra*, at 20-21.

<sup>55</sup> *Wilburn v. Wilburn* (2001), 144 Ohio App. 3d 279, at 287 (court found that the mother's allegation was “unsubstantiated” but that the mother's suspicions were “not unfounded.”)

<sup>56</sup> *Wheeler, supra*, at 4-5; *Russell, supra*, at 14.

<sup>57</sup> *Russell, supra*, at 14.

child.<sup>58</sup>

### C. Visitation

When a court makes a visitation order, the court may place conditions upon a parent's exercise of visitation rights.<sup>59</sup> If a parent has made false allegations of child abuse about the other parent, and if the court has awarded custody to the other parent, the court may order supervised visitation for the parent who made the false allegations of child abuse.<sup>60</sup> In *Barton*, the court observed that supervised visitation was appropriate because the mother had "contrived baseless charges of sexual abuse" and had "programmed" the children.<sup>61</sup> A court may also order that a parent who has made false allegations of child abuse must obtain counseling before any visitation rights will be granted.

### D. Classes and Counseling

In any action involving custody or visitation, prior to the entry of a final decision, a court may require a parent to attend classes concerning parenting or other related issues.<sup>62</sup> Similarly, a court may require a parent to obtain counseling.<sup>63</sup> A court may also require the parents' children to attend the classes or the counseling sessions with the parent or parents.<sup>64</sup>

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<sup>58</sup> *Id.* at 15.

<sup>59</sup> R.C. 3109.051(A).

<sup>60</sup> *Bodine v. Bodine* (1988), 38 Ohio App. 3d 173, 175; *Barton, supra*, at 6.

<sup>61</sup> *Id.* at 7.

<sup>62</sup> R.C. 3109.053.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*