

'Lingering Doubt' Does this justify total Denial of Access?

MRA has received a comprehensive study, conducted by a Family Court associate, questioning the legitimacy of the application of the "lingering doubt" premise that was relied on during two landmark cases during the late 1980's. The result of these decisions totally denied access to the fathers even after it was shown there was no evidence of child sexual abuse. The writer of the report is resolute in condemning; the ineptitude, inexperience and unprofessional conduct exhibited by the child sexual abuse investigators that are employed by Government agencies; the failure of the judiciary to deal with those who make false allegations and those child sexual abuse professionals who support their claims.

We quote from the report as follows:

"In more than 99% of cases coming before the Family court, there has been no finding of inappropriate behaviour of a sexual nature against the accused - yet most of these innocent men have been either denied further access to their children or were subjected to demeaning access regimes. It is also a fact, that in all Family Court matters of this nature, the allegation of child sexual abuse is never the cause for the parties break up and separation.

This fact invited criticism and points strongly to the fact that most sexual abuse allegations coming before the Family Court are manufactured and being used as a means to gain unfair advantage in bitterly contested custody and access disputes.

It is also true that separated parents are being alerted to the spectre of sexual abuse by crudely placed suggestions from inept social workers. This is evident where a child of tender years, when suddenly deprived of day to day contact with a significant parent, displays no more than expected behavioral patterns. Such patterns can be evidenced by bed wetting, fretting, depression, naughtiness - to name a few. this behaviour is invariably cited and embellished by inept welfare workers as the manifestation of alleged sexual abuse indicators.

*It is also true, that the alleged display of 'sexualised' behaviour, claimed by the sexual abuse workers, arguably **never manifests itself when the child is with professionals independent of the accusing parent and these self proclaimed child sexual assault detectives - viz: Family Court Counsellors, Court appointed clinical psychologists or Court appointed legal representatives.***

It is also true that over 98% of cases, alleging child sexual abuse, involve children of tender years - up to five or six years of age.

There is strong evidence to suggest that the Community Services and sexual assault units have been discouraged by the bureaucracy from making audio or video-taped interviews when dealing with these young children. The dramatic 'drying up' of such evidence, especially video-tapes, coincided with a 1987 Appeal to the Full Court of the Family Court by the SA Community Welfare Department.

It was due to this Department's unsolicited intervention, involving false claims of child sexual abuse against the non-custodial father, that resulted in the Department paying the bulk of the costs of a 15 day access hearing at the Family Court in Adelaide - 13 days of which involved disproving the sexual abuse claims. The overturning of the Department's appeal against these costs, was made possible through the successful rebuttal of the Welfare Department's video-taped evidence of interviews between the sexual assault workers and the alleged victim. The flawed interviewing technique, used by these self proclaimed experts in child sexual abuse detection, was judged as being unprofessional and fanciful - and not considered as evidence indicating sexual abuse of the subject child.

*It is a fact, in recent times, that the Family Court Chief Justice has called, **in vain**, to have video-taped interviews by the sexual abuse units re-instated, together with the involvement of a more professional level of expertise at the initial stages of all sexual abuse investigations.*

It is also accepted by many practitioners in the legal profession, that the mere allegation of child sexual abuse by the custodial parents, will gain the accusing parent a distinct advantage in custody and access matters. This unfortunate trend surfaced in both the cases of 1988 M&M and 1988 B&B, and persists today.

Background:

This case was among the first 'wave' of applications alleging child sexual abuse to come before the Family Court in the mid to late eighties, and coincided with the much heralded Children's Rights Legislation that brought with it the best and worst of child protection programs.

The significance of the trial judge's findings in the 1988 M&M, was that they were responsible for a High Court landmark decision, now used as a precedence by the Family Court. Decisions, which since have had serious repercussions on the lives of thousands of ordinary Australians. Part of the High Court rulings upheld the rights of a trial judge, after all the evidence had been adduced, to deny access to an accused parent in cases where "lingering doubts" still exist in the trial judge's mind as to the future safety and welfare of the child. It is my opinion, that this new standard of proof (lingering doubts) is based on what could only be described as a trial judge's personal preference (having no legal basis), and that it therefore can reflect poorly on the ability of that judge to discharge his/her duty of office. The premise of lingering doubts could only be seen as right and proper, provided that all the facts and findings adduced by the trial judge at the time were themselves 'right and proper'. It is my firm opinion that this was not the case in M&M. 1988 M&M

How the trial judge in M&M came to his conclusions and finding is a cause for concern and, in my opinion, compromised the findings of the Full court. It is also my opinion, that the sequence of events and evidentiary material in this matter were unnecessarily 'confused' by the trial judge. The timing of this case draws a suspicion of a concerted effort by the Adelaide Family Court Judiciary to alleviate the mounting pressures placed on other Family Court judges since Australian bureaucrats adopted a discredited American based program of Child Sexual Abuse Detection. This CSA detection strategy, as evident in this case, was producing alleged evidence of child sexual abuse that was found to be, in most cases, unprofessional, crass and untrue."

The writer also expresses concern that "as a result of the ineptness of such overzealous investigators, claiming expertise in child sexual abuse detection, thousands of young children have been subjected to unnecessary trauma and sexually orientated interviews by the very people who claim to be protecting children's best interests and welfare."

To summarize the M&M case briefly, and this will strike a chord with many fathers who have been similarly accused, the mother accused the father of sexually abusing their young child whilst contesting custody in the Family Court. Two days after separation (28/11/86) the mother files a custody application in which she sought the inclusion of a supervised access provision for the father. No reasons were given at that time for this request. Seven days later, (5/12/86) at the first return date hearing, the father cross applies for custody and includes the condition of supervised access imposed on the mother. At the same hearing the father applies for access - **unsupervised** access is granted. There is again no mention of the reason for the mother's request for supervised access, neither did the mother advise the court of a pre-booked appointment for 11/12/86 with a sexual assault centre.

Five weeks later, (15/1/87) at the interim hearing of both applications the mother is granted interim custody and the father continuing **unsupervised** access.

Less than 2 weeks later (27/1/87) the mother applied for suspension or discharge of the existing access order alleging their daughter had been sexually abused by the father and on 11/3/87 the father's **unsupervised** access order was changed to that of **supervised access**. At the Final hearing, later in 1987 the mother was awarded custody and father's access order discontinued. The father's appeal to the Full Bench of the Family Court was dismissed, although one dissenting judge did want to send the case back to the original trial judge, because he considered the trial judge "**had not applied the correct test**". The dissenting judge was of the opinion that "**an**

order for access should not be refused because there was a mere possibility that access would expose the child to sexual abuse. He considered that 'there must be a real or substantial risk of such abuse occurring as a matter of practical reality'.

The father then took the case to the High Court and his application to dismiss the trial judge's orders, which included a reinstatement of access were dismissed.

The report points to the timing of events in this case as being crucial to the outcome, and the writer has provided a chronological listing in support of his premise. According to the writer, the mother after talking to two women at a refuge shelter had already made an appointment to take the child to a sexual assault referral centre on 11/12/86. The interviewer noted "the situation does not warrant referral as the child made no disclosure. A doctor performed a genital inspection of the child and reported no abnormalities. However he did explain to the mother the signs to look for in sexual abuse cases. On 13/1/87 the mother again took the child to the sexual assault centre and the child was interviewed for a second time. There was no record of this interview, but the child was referred to a Government Community Welfare Department. No mention of these interviews was made at the hearing on 15/1/87. 20/1/87 the mother took the child to a Medical Centre and on 21/1/87 she took the child to the Accident and Emergency Clinic. The child was admitted until 26/1/87. The child was interviewed by a constable and a psychologist and no "disclosures" were obtained, yet the child was once again submitted to a genital examination that according to the trial judge disclosed a somewhat enlarged vaginal entrance but "was otherwise inconclusive". During this time, 23/1/86 the mother swore an affidavit alleging sexual abuse of the child by the father, which was filed on 27/1/87.

Two days after filing her application 29/1/87 the mother tape recorded an interview with her child during which, according to the transcript of the Full Court *"the wife tried very hard by asking leading questions and by applying pressure to the child in order to elicit from the child information concerning the alleged sexual abuse. In the end result the child said very little which might have implicated the husband in any inappropriate sexual behaviour."*

The police constable again interviewed the child on 2/2/87 and the child was further interviewed by the original psychologist on 18/2/87 after a briefing from the police officer. The interview elicited a scenario of sexual abuse that according to the Report *"should have been given an 'R rated' classification."*

Not satisfied with her efforts on 18th Feb, the psychologist had the child in again on the 10 Mar 1987 - one day before the court appearance during which the father's orders for unsupervised access were changed to that of supervised access.

Our writer asks the question - ***"How is it that the police constable and the mother never unilaterally ended the father's access to the child there and then!"***

The answer is clear. Their failure to stop the father's access immediately confirms the unthinkable - these people were callously using this child in a conspiracy to denigrate the father. The child has been used as a 'guinea pig' in a reprehensible attempt to create evidence unfavorable to the father.

It is also painfully obvious that these people never considered that the child was in any danger whatsoever, physically or morally, while she was in the father's care/ This fact is proved as the child enjoyed further unsupervised access occasions with her father up to the March 11 hearing, when he was subjected to the humiliating supervised access.

*One can now see that this whole case was a quickly convened witch hunt and fishing expedition, by the trio the constable, the psychologist and the mother. Their crude and hasty efforts in 'creating evidence' to bolster the mother's application filed on the 27 Jan 1987, **required them, as a result of the unsuccessful 'hospital incident' to allow the father to have continued uninterrupted access to the child. This was necessary if any disclosures of sexual abuse allegations were to be a feasible proposition.***

The Report consists of 40 pages. We are not able to put the whole report on the 'net' but will supply copies on request. Postage and photocopying cost would be appreciated.

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