

# SUMMARY

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## **Between Bad or Worse: allegations of child sexual abuse during parental separation and subsequent court proceedings regarding the children**

### **Introduction**

In this PhD study I have investigated responses to allegations of child sexual abuse put forward in the context of parental separation<sup>44</sup> or subsequent civil disputes regarding the children. Even though the majority of separations is handled in a harmonious manner, i.e., parents are capable of making suitable and practicable arrangements for their children, an apparently growing part of separating couples are not able to do so. This study focuses on those cases in which one parent during a child-related family law procedure accuses the other parent of sexually abusing the child or children.

Child sexual abuse has been receiving increased attention for the past decades, and consequently knowledge and awareness of its harmfulness to the victims has grown. The harmful effect is even greater for the child if the abuse is committed by a parent rather than by an unrelated person. Not only is the child subjected to sexual abuse, but the abuser is also the very person that the child supposed to be able to trust.

Generally speaking willingness amongst victims to report sexual abuse is low, whether they report to the police or as part of victim surveys. These kinds of crime often cause feelings of shame: victims do not want to re-live the crime, they can be afraid of the abuser or of what such a revelation might bring about, and the abuser can put pressure on the victim not to come forward with their story. The fact that the chance of proving the crime is slim also contributes to the lack of inclination to report sexual abuse. Abuse committed by a parent to a child is notoriously hard to prove because it is generally perpetrated behind closed doors in a one-

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<sup>44</sup> The term 'separation' is used here for both a legal divorce and a separation of couples who were not formally married.

to-one setting. Additionally, young children might not recognise sexually-tinted behaviour as abuse and will not report it as such to a third party. Finally, children are difficult to question because of their lack of ability to express themselves verbally in a reliable manner.

Separation can provide an opportunity for mothers to come forward and report the abuse of their children. This reporting does not necessarily mean that abuse has certainly taken place. Some of the children will actually be victims of sexual abuse, but part of the allegations of abuse might be unfounded. It has been suggested that 'in the heat of the battle' of a separation an unfounded allegation of child sexual abuse might be used as an extreme weapon in the fight about the children. In such cases allegations may be consciously fabricated, for instance out of jealousy over a new partner of the father, or with the intention to get back at him because of his infidelity or to keep him away from the children for other reasons. However, it is important to point out that unfounded allegations of abuse are far from always consciously false. A mother can misinterpret a child's behaviour such as bedwetting, nightmares and unwillingness to see the father as signs of sexual abuse, whereas this behaviour could also result from stress caused by the parental separation itself.

It is difficult to determine whether the sexual child abuse has really taken place or has not. In many cases it is quite unclear what has really happened: is the allegation grounded or – consciously or unconsciously – unfounded. While it is mostly unclear whether the allegation is founded or not a civil judge has to decide on parental responsibility, child-residence and contact knowing that there is a risk of the child being, or have been, sexually abused by the other parent. At first sight this need not be an issue, because an allegation of a criminal act can be dealt with in a criminal investigation, resulting in either a conviction or an acquittal. When deciding on child-related matters in post-separation civil cases the civil judge could simply follow the result of the criminal proceeding. However, there is an essential difference between criminal law, in which the accused is presumed to be innocent until proven guilty, and family law, where the protection and best interest of the child is a paramount consideration. There are strict requirements for the evidence in a criminal proceeding: for the accused to be convicted there has to be virtually no doubt in his or her guilt. In contrast, in child-related family law proceedings the decisions are made with the child's safety in mind. This means that if there is a chance of the child being or having been sexually abused, the civil judge can and perhaps even should take all possible measures to protect the child. Thereby,

the civil judge is not bound by the strict requirements for the evidence used by the criminal judge. The civil judge could base his or her decision merely on the assessment of the risks for the child.

Wrong decisions by civil judges can have far-reaching implications. If a judge does not recognise an allegation as based on fact, the child may be exposed to more abuse. On the other hand, if a judge takes an unfounded allegation too seriously the relationship between father and child could be unnecessarily damaged. Thus, it is not an easy task for the civil judge to deal with an allegation of child sexual abuse in a family law proceeding.

Only limited research has so far been done on the decision-making process of civil judges in these types of cases, the role of any advice from the Child Care and Protection Board in this process, the characteristics of the court proceedings and the families involved, and the interference between civil and criminal trajectories. It is also unclear what the scope of this problem is: there is neither information on the prevalence nor on the ratio of founded versus unfounded allegations. More knowledge on this topic is vital in light of the growing awareness of the harmful consequences of parental separation and conflicts in which these allegations are expressed, and in light of the possibly serious consequences of child sexual abuse.

## **Research question**

The goal of this PhD study was to answer the following main question:

What is the prevalence, nature, familial and legal context of allegations of child sexual abuse expressed by one parent against the other within the framework of parental separation or a subsequent family proceeding regarding parental responsibility, child-residence, division of care and education tasks or contact; and how does such an allegation affect the decision-making process of civil judges in these proceedings?

This question is divided into five subquestions.

### **Subquestion 1:**

What are the family law and criminal law contexts in which allegations of child sexual abuse during family court proceedings occur?

### **Subquestion 2:**

What has national and international research shown about the prevalence and validity of allegations of child sexual abuse made during separation proceedings, and the responses of civil judges thereto?

### **Subquestion 3:**

In the Netherlands, what is the nature and the family context of allegations of child sexual abuse, made during a separation procedure or subsequent family law procedure, and how are these allegations handled by the civil judge?

### **Subquestion 4:**

What is the decision-making process of civil judges in these types of cases?

### **Subquestion 5:**

What are the procedures followed by the police and the Public Prosecution Service when dealing with a report of child sexual abuse by a parent, made by the other parent in the context of parental separation or following family law proceedings?

## **Research Design**

This dissertation is an example of *empirical legal studies* research based on a multidisciplinary mixed-methods research design. The main research question and subquestions were approached from two different perspectives: the legal and the empirical. This way law in action is brought into picture and analysed. The study was more empirical than normative (*law in the books*). It is important to note that a normative civil procedural analysis of relevant separation cases falls outside the scope of this this PhD research.

The multidisciplinary design and the variety of the data required a combination of different research methods. Every subquestion deals with a certain aspect of the topic, and to answer each subquestion different kinds of data and combinations of methods were used.

### **Literature studies**

The first two subquestions were answered through literature studies. To answer the first subquestion, two separate literature studies were conducted. These studies were aimed at finding relevant national literature from the fields of family law and criminal law. While dealing with the second subquestion the search was expanded

to include all relevant international literature from various fields of research. Thereby relevant sources have been searched using a combination of methods used in the field of both behavioural and legal research.

### **Files from the Child Care and Protection Board, court orders, and criminal records**

To answer the third subquestion, the data from a sample of parental responsibility and contact investigations conducted by the Child Care and Protection Board (CCPB). Next, the cases were matched to the corresponding court orders and possible criminal records of the accused parents. This made it possible to describe the characteristics of the separation and/or subsequent court proceedings regarding parental responsibility, child-residence, division of care and education tasks or contact; and made it also possible to trace the outcomes of any criminal proceedings. The reports of the CCPB are rather extensive and contain much information relevant to this study, such as data on characteristics of parents and children, family situation, the nature and context of the allegation, the legal consequences of the allegation and the outcome of a possible criminal proceeding. All three sources yielded both qualitative and quantitative data; consequently, mixed methods were used, combining descriptive statistics with qualitative methods.

### **Focus group and interviews with civil judges and lawyers**

To answer the fourth subquestion information was used from the interviews with civil judges and lawyers and from a focus group. The interviews were semi-structured: a prearranged topic list was discussed with the respondents.

### **Literature study and interviews with police officers of the department of sex crimes and employees of the Public Prosecution Service**

To answer the last subquestion literature on relevant criminal (procedures) law was consulted, together with internal documents from the department of sex crimes, the *Aanwijzing Zeden* from the Public Prosecution Service, publicly accessible reports and other training documents from the department of sex crimes. Additionally, interviews were held with an expert in the investigation of sex crimes and a public prosecutor.

## Conclusions

With this study I have tried to capture a difficult and to a certain extent evasive problem. The explorative study of relevant national and international literature has clearly shown that when during a separation cases or subsequent proceedings about the children one parent accuses the other of child sexual abuse to, it makes it rather difficult for a civil judge to make child-related decisions. However, there is surprisingly little recent international or Dutch research on this topic, and there are also no best practices, evaluated methods or guidelines for dealing with such cases

The findings for each successive subquestion addressed in the normative and empirical chapters will now be discussed in relation to each other.

Within a criminal law procedure, reports of sexual abuse are supposed to be handled according to a standard procedure, irrespective of the context of a high-conflict separation: informative interview – official charge – action plan – investigation. After concluding the investigation, the Public Prosecution Service decides whether or not the case will be prosecuted. This consideration also takes place at other stages of the procedure. The context of the allegation of sexual abuse, which can be different for each report, is taken into account. A parental separation is one of those context elements. There are no specific guidelines for this situation, but the police and the Public Prosecution Service are clearly aware of the fact that a parental separation makes the case more complex. Criminal investigators are taught to think in terms of alternative scenarios for allegations to be brought, one of which may be a consciously fabricated statement of a mother made in the framework of separation. Because of the strict requirements for evidence in criminal procedures, many reports do not lead to a prosecution; if they do the case is often dismissed for lack of evidence.

In the central issue of this study two legal fields come together: family law and criminal law. Family law does not provide specific guidelines for civil judges on how to deal with these kinds of allegation, expressed during a separation or a subsequent proceeding regarding the children. Criminal law does not offer the civil judge a solution either. Most of the criminal procedures end up without a verdict of a criminal court. Even if there is a verdict in the criminal procedure, this often does not come in time to be taken into account in the decision-making process in the family court. A civil judge cannot wait for it because civil orders on child-related matters setting have to be delivered without endless delay. This explains why the

backdrop to the cases central to this research is in fact family law. During a family law procedure, the civil judge has to make decision against the background of the inherent uncertainty regarding whether an allegation is founded or unfounded.

The literature has shown that current family law, under which equal parenting after separation is the norm (a positive development from a normative and emancipatory viewpoint), may trigger the conflicts. To a certain extent parents are stuck with each other because of their equal position regarding the children after a separation. Given this equal starting position, it 'pays off' to fight with each other. At worst, this could mean that demonising the other parent goes so far that one parent falsely accuses the other of child sexual abuse, as a last resort in the battle over the children.

It is generally assumed that allegations of child sexual abuse mainly emerge during high-conflict divorces. However, this is only partly the case: our study has shown that on average parents have been already separated for two years when the mother comes forward with the allegations. This indicates that an allegation does not always coincide with the moment of separation but can emerge long after the parents separate, during (new) conflicts about their children.

Very little is known about the prevalence of this type of allegation because it is difficult to make reliable estimates. Most of the judges interviewed thought the number of allegations is higher than the literature suggests. Even though they were reluctant to give absolute numbers, they noted that they see these allegations on a regular basis. This view was shared by other professionals such as lawyers, representing parents in divorce and post-divorce cases and CCPB workers. All in all, it can be concluded that these allegations form a small but manifestly noticeable problem.

The nature of the alleged abuse as described in the CCPB files is in general serious. The children were relatively young (under seven years old) and in most cases the alleged abuse concerned hands-on abuse, which means that physical contact had taken place between perpetrator and victim. Quite often the alleged abuse involved penetration.

Even though it is possible to say beforehand that not all of the alleged abuse actually took place, this study has shown that it is almost impossible to give a percentage for this. In the interviews the judges said they believed that more often than not the allegations were unfounded but commented that this does not imply that the

mother was consciously lying. In only very few of the allegations from our sample a criminal investigation has led to a conviction of the father. Only one father in this study actually confessed to the abuse. This leaves a large grey area, so that civil judges will often have to make their decisions in the face of uncertainty.

Allegations of child sexual abuse seem to emerge in complex family situations where, in addition to the allegation, the family has more issues such as psychiatric problems with the parents, financial problems, and a history of issues about the children. In only 25%/a quarter of cases was the allegation made during the CCPB investigation; in the other cases it was made to a social worker or organisation and/or the police prior to the investigation.

Study of the files has shown that the CCPB often expressed concerns about the consequences of the allegation rather than about the risk of the abuse itself. More specifically, loyalty problems for the child were mentioned, as well as the lack of contact between father and child, with the danger of a deteriorating relationship. The allegation was also supposed to have negative effects on the child's development as he/she would then grow up with a negative picture of the father. The judges generally agreed with these concerns. Thus, such an allegation is both a potential sign of and the source of a threat to the child's safety and best interests.

Judges recognize that they have to make important decisions about children under difficult circumstances, without any guidelines or instruments to confirm or disprove allegations of child sexual abuse. Some judges emphasise that this is not their job. At the same time, they frequently ask the CCPB to advise in these types of cases. The CCPB often recommends holding off on definitive decisions about the children, pending for instance social work or supervision, and judges almost always follow this advice. However, the judges interviewed also said that they prefer not to stop the contact between father and child during the CCPB investigation. They would rather let the contact continue, if necessary under supervision, to avoid unnecessarily damaging the relationship.

Some judges say they do not even venture to assess the risk of abuse, and that therefore such an assessment does not play a part in their decisions. However, it seems that many judges do make such an assessment, on the basis of facts and circumstances gleaned from files received prior to the court proceeding and conversations with the parents during the proceeding. Clues for abuse appear mostly through contextual information, for instance if the mother has reported the alleged abuse to the police. Several judges also indicated that the timing of the

allegation is important: rehashing old allegations or expressing a new one in the midst of a battle about the children are elements that compromise the credibility of the allegation. According to the judges, mothers who persist in their allegations and/or have cooperated with custody or access arrangements form a reason to take the allegation in question seriously.

The judges and lawyers interviewed pointed out that the father is in fact in the weaker position. Other than in criminal law, the initiative for a court proceeding in a civil case lies with both parties involved. The mother can essentially take a 'passive' position by not honouring the agreed-upon arrangements about the children. Consequently, if he is to hold the mother to the arrangements the father has to take action, which will cost him time and money. He will have to defend himself against the mother's allegations, and often his innocence is not believed. This apparently gives the mother a powerful weapon in the fight, but it is a heavy burden for her to carry. Coming forward with her suspicions of abuse can have many consequences for the children, such as being subjected to an intensive criminal investigation and/or an investigation by the CCPB, and less or no contact with the father. As soon as an allegation of child sexual abuse arises in a family law proceeding, it is not just the parents but more importantly the child who suffers the consequences. The mere fact of the allegation will in any case leave its mark regardless of whether or not the abuse has actually taken place. This is what the title of this dissertation refers to: the 'bad' is the allegation, not just the abuse or even the risk of it, and the 'worse' refers to all the consequences that entails. Thus, in light of the low conviction rate the focal point of the problem becomes not only the risk of alleged abuse, but definitely also the presence of the allegation itself, and the question of how the consequences of this presence could be limited. Our research has shown that professionals such as judges and lawyers consider this presence almost as damaging as the actual risk of abuse. Taking measures to minimize the disruption caused by the allegation, and therefore keeping options open to repair the relationship between father and child, certainly is one of the responsibilities of the civil judge.

### **Suggestions for future research and policy recommendations**

This PhD study is the first in the Netherlands in which the multifaceted issue of allegations of child sexual abuse during a separation or family law proceeding has been empirically researched. The problem concerned is so complex, with so many different aspects, that future research is needed, especially in light of the growing knowledge about the severe consequences of both sexual abuse and parental separation for the children. In order to provide an overview of the size of the problem more research is needed on the prevalence of child sexual abuse in this

context. Another suggestion for future research would be to speak to the children involved in these cases. As this study has shown, it will in many cases remain unclear whether or not the abuse has actually taken place. However, it is generally acknowledged that the mere presence of the allegation is already problematic and could be harmful for the children. Talking to them will make it possible to gain insight into the possible impact of these allegations on the children and the relationship with their parents.

Besides these suggestions for future research various policy recommendations can be proposed, such as appointing one single, more interventionist judge for all civil court proceedings of one family (*regierechter*). Another step towards better coordination and bringing together the criminal and civil sides of the problem, is the *Handreiking Samenwerken bij Strafbare Kindermishandeling* (Guideline for collaboration in cases of criminal child abuse). If a *regierechter* could be involved in this collaboration the goal of better coordination and quicker results may be even more easily achieved.

What started as an investigation aimed at developing evidence-based guidelines for civil judges confronted with this kind of allegations in a family law proceeding, has gradually resulted in the insight that it is not only the judges but also the organisations they depend on that need more support. The ultimate goal in this type of cases is to create the most favourable and safe situation for the child. Our study has shown that to a certain extent judges have a double role: although it is explicitly not their aim to find out whether or not an allegation is based on fact, they do make a risk assessment. The CCPB files also show that the Board does give its view on the validity of the allegation. However, there is no uniform approach to reaching this view. Some kind of framework for fact finding would be useful here.

One way to provide such a framework when it comes to allegations of child sexual abuse is to apply the *Scenario Analyse Model* (SAM) drawn up by the *Landelijke Expertisegroep Bijzondere Zedenzaken*. This model is used by the police department of sex crimes to determine the validity of an allegation in cases in case of doubt about the veracity of the report. The analytical model lists factors that can influence the emergence of an unfounded allegation. Central to the model is the question if there are other, *alternative* scenarios for a suspicion besides actual abuse. In civil law the SAM could be used by organisations tasked with researching a family situation and reporting back to the civil judge. For a correct interpretation of the information provided by these organisations it would be useful if the judge was also familiar with the model, but applying it would logically fall to the CCPB during an

investigation, or a certified social worker during a court-mandated supervision. Reports to *Veilig Thuis* (Safe at Home) would also offer a good occasion to apply the model. The model would offer the uniform framework and would serve as a tool to better assess the risk for the child.

One of the conclusions of this PhD study is that expressing an allegation of child sexual abuse alone is a cause of tension between the parents and the child, and a sign of problems within the family. One could argue that this makes it unnecessary for civil judges and other professionals within the scope of family law -- such as the CCPB and social workers from *Veilig Thuis* - to have the option of estimating the risk of an unfounded allegation. However, if civil law approaches an allegation differently, tensions within a family and pressure on the relationship between parents a child may be diminished. The SAM or a version of it could still be implemented, so that the allegation itself will hardly affect the family. In this way, the discrepancy between the burden of proof within a criminal proceeding and the fact finding done by civil law organisations is circumvented. Put differently, by focussing not only on the question of the validity of the allegation but also on how and why it was expressed, the impact of the allegation on child and family can/may be diminished.