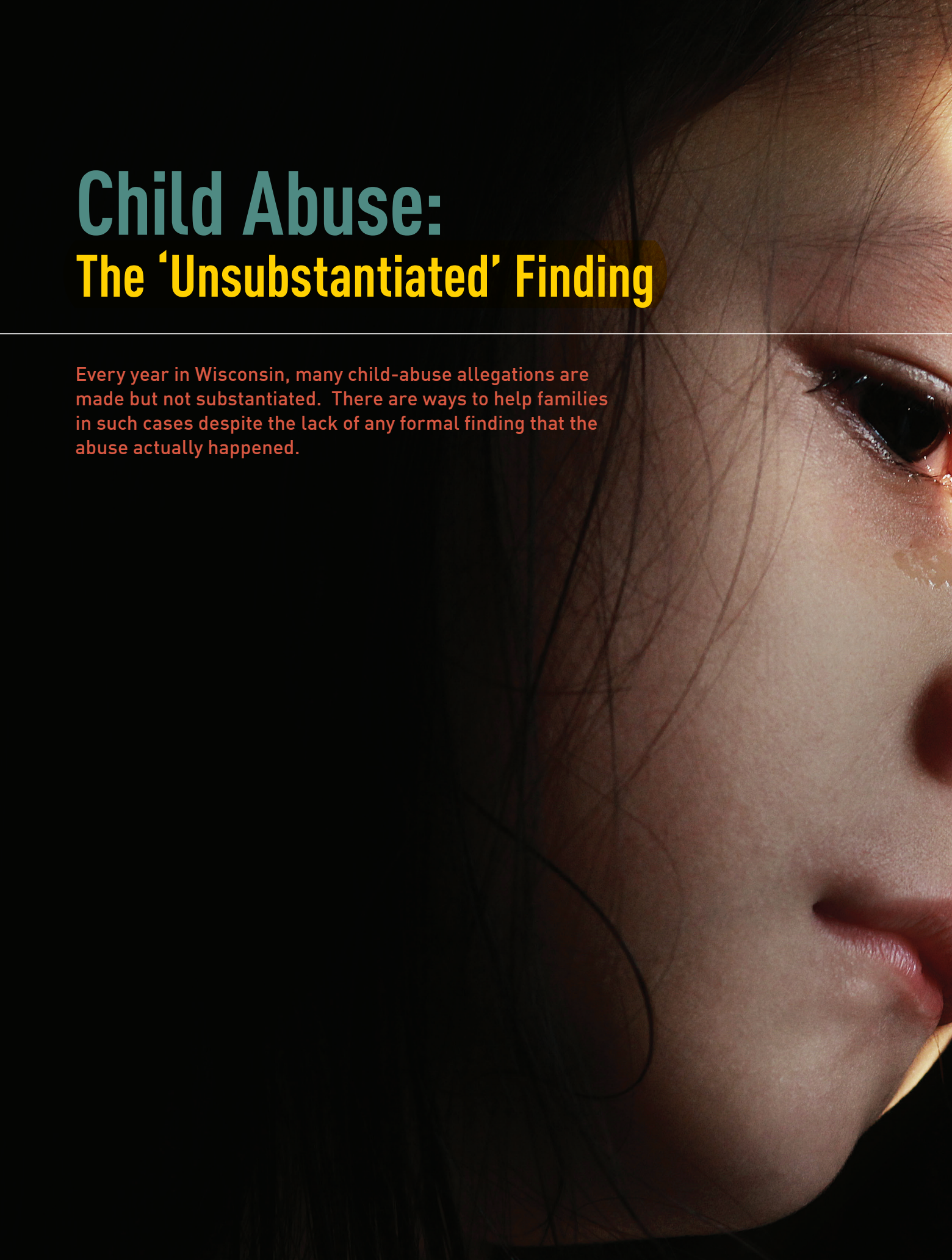


Child Abuse: The 'Unsubstantiated' Finding

Every year in Wisconsin, many child-abuse allegations are made but not substantiated. There are ways to help families in such cases despite the lack of any formal finding that the abuse actually happened.





SUMMARY

Just as a not-guilty verdict does not necessarily indicate a defendant did nothing wrong, a finding of unsubstantiated child abuse might not mean the child suffered no harm. Thus, to competently assist children and their families when abuse is alleged to have occurred, lawyers must understand the terms “substantiated” and “unsubstantiated,” including the differences between them and the statute defining “child abuse.”

Lawyers must also be aware of the effects on the child, family members, and the alleged abuser of a finding of unsubstantiated abuse and of opportunities for positive intervention in all situations in which abuse likely occurred, even if it was not proved.

BY LORI S. KORNBLUM &
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Tens of thousands of unsubstantiated instances of child abuse occurred in Wisconsin in 2016. But the unsubstantiated finding wasn’t the end of the story for the individuals involved. A case involving Suzanna (a pseudonym) is one recent example.

Suzanna’s Case

Suzanna¹ has two children. Brian, the older child, is her biological child but not the child of her then-husband Jon. Jenny, the younger child, is the marital child of Suzanna and Jon. Suzanna and Jon were in the midst of a divorce when Brian suddenly disclosed that Jon had been sexually abusing him since the time Suzanna and Jon moved in together. Brian gave graphic descriptions of abuse in child-like language, ranging from fondling to playing sexual games.

This was reported to the police department and the local child protective services agency (CPS). Brian was interviewed several times by law enforcement staff, the CPS social worker, therapists, and workers at a child advocacy center. Although he gave detailed descriptions of the sexual acts, he could not give dates or times. He could only say that it happened almost daily.

The CPS social worker described him as “hesitant” and not really wanting to discuss details. CPS *unsubstantiated* the case. The district attorney did not file charges. However, the CPS report stated that despite the unsubstantiation, both the police officers and the social worker found Brian credible. They just could not prove the case.

The CPS social worker did not believe that Brian was coached. When Suzanna attempted to protect Jenny, the effort was unsuccessful. The social worker

assumed that family court would protect Jenny. That assumption was wrong! The family court judge deferred to CPS's finding of unsubstantiation. The judge interpreted the allegations as false and castigated Suzanna on the record for continuing to raise these "false" allegations. The family court has continued to order unsupervised periods of placement with Jon.

Suzanna attempted to get therapy and supportive services for Brian but found a closed door at every turn. Free therapy was limited to substantiated cases. Even support groups for sexually abused children and families were limited to substantiated cases. With nowhere to turn, Suzanna paid for private therapy with a trauma-informed therapist. Brian made a full disclosure of abuse, but because the case was initially unsubstantiated, Brian's case will not be heard. Recently, Jenny started to make disclosures of sexual abuse by Jon. Based on the original unsubstantiation of the case of Brian, who is Jenny's step-brother, both CPS and the police department view Jenny's mother as a crank and the allegations as false.

Unfortunately, Suzanna's case is not exceptional. There were 35,864 cases that were unsubstantiated in Wisconsin in 2016.² (See sidebar, Total Maltreatment Allegations by Maltreatment Findings and Maltreatment Type – 2016.) The notion of equating unsubstantiation in the world of child welfare to false allegations can be very dangerous for children.

In this article, we explain why Suzanna's case should not have happened. Despite the unsubstantiation, the family court should have considered the issues affecting the family in the context of that case and made its own determinations about safety and placement. Understanding what unsubstantiation really means may provide a unique opportunity for lawyers, social workers, and judges to save a child.

The Effect of Believing that "Unsubstantiated" Means "False"

Suzanna's family court judge, and the program personnel who were supposed to help children through therapy, made a typical error in understanding unsubstantiation. They equated the CPS decision with a determination of falsity – that "nothing happened and therefore the child doesn't need protection or any type of services or therapy."

The legal parties involved often interpret a designation of unsubstantiated to mean that the child should be treated as if nothing happened. Moreover, the reporting (nonoffending) parent may be viewed as vindictive or unstable for imagining that something did happen.

In addition to failing to protect and provide services to a child who is the subject of the unsubstantiation, this fundamental error may allow a perpetrator to sense he or she has leeway to continue the maltreatment.

No major changes to the child maltreatment laws have triggered this phenomenon. Indeed, this is a longstanding and ongoing issue. The designation of *unsubstantiated* affects the lives of many clients and challenges many lawyers to provide appropriate legal assistance. Family courts may become the unwitting protector of an abuser.

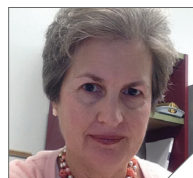
The Legal Meaning of Unsubstantiated

Understanding what unsubstantiated really means will help lawyers look at their clients holistically and not be satisfied with the literal label assigned by the CPS social worker. The Wisconsin Department of Children and Families (DCF) has guidelines defining when to use the term "unsubstantiated." Indeed, according to the DCF's guidelines, use of the term "unsubstantiated" does not equate to a conclusion that abuse is not present, just that it is not sufficiently verifiable.

Generally, after CPS receives a referral for child abuse or neglect, it decides whether to investigate based on legal

criteria. For the cases it investigates, CPS must make a determination whether to substantiate or unsubstantiate the report. When CPS substantiates a case, the decision's meaning is fairly clear. CPS must find that the abuse or neglect occurred by a preponderance of the evidence. The DCF explains that if the abuse or neglect is substantiated, it "decides that you did abuse or neglect a child."³ As the Child and Family Service's Reviews Information Portal explains, "A finding of *substantiated* (sometimes referred to as *founded*) typically means that the child protective services (CPS) agency believes that an incident of child abuse or neglect, as defined by State law, has happened."⁴

As in Suzanna's case, many people – including many lawyers and judges – come to the seemingly logical conclusion that if "substantiation" means that abuse or neglect occurred, "unsubstantiation" must mean that abuse or neglect did not occur. This conclusion is incorrect. As the DCF guidelines explain, unsubstantiated is not the opposite of substantiated.



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Total Maltreatment Allegations by Maltreatment Findings and Maltreatment Type – 2016*

Maltreatment Type	Substantiated	Unsubstantiated	Not able to locate source	Total
Neglect	3,419	21,118	885	25,422
Physical Abuse	831	9,573	240	10,644
Sexual Abuse	1,026	4,234	209	5,469
Emotional Damage/Abuse	24	939	24	987
TOTAL	5,300	35,864	1,358	42,522

* The total number of maltreatment findings presented above does not include the 6,134 maltreatment findings of “services needed” and “services not needed” associated with alternative response assessments.

Even states that interchange the words “unsubstantiated” and “unfounded”⁵ have the same results, because “unfounded” does not mean “did not occur.”⁶

The reason is that the decision to unsubstantiate can rest on any of a number of factors that do not determine that abuse or neglect did *not* occur. According to the DCF’s *Child Protective Services Access and Initial Assessment Standards* (the *Standards*),⁷ CPS must make the decision to substantiate or unsubstantiate within 60 days.⁸

The *Standards* state that the determination to unsubstantiate is different from a determination that a report of child maltreatment is “clearly wrong.”⁹ According to the *Standards*, “Occasionally, CPS receives a report which, upon assessment, is found to be clearly wrong. This is different than a report that is found to be unsubstantiated. These are cases where there is no ambiguity.”¹⁰ In these types of cases, CPS may make an exception to following the *Standards*. The following is an example of “clearly wrong”:

A child care center reports that a two-year-old child who has just started coming to the center appears to have bruising on the buttocks. The

CPS caseworker sees the child and interviews the mother, who informs the caseworker that the child has a condition characterized by pigmented birthmarks that resemble bruises. This is verified by the family’s pediatrician. The child is observed by the caseworker and by child care staff to be happy and developmentally on target. In addition, the mother is clearly attached to the child, enjoys being a parent, is very aware of her child’s needs, communicates well, appears to manage her home and her work responsibilities well, reasonably describes her family as new to the community but adjusting well, and so on.¹¹

In addition to the “clearly wrong” category of unsubstantiation, the DCF has several categories that may or may not mean that child abuse or neglect did not occur. One category is “failure to locate source.”¹² CPS uses this category when “the agency was unable to access critical sources of information; therefore, the agency cannot determine that there is a preponderance of the evidence that abuse or neglect occurred.”¹³ This lack of ability to locate a source can include the inability to interview the parent

or child.¹⁴ For example, if the parent refuses access to the child, this may result in unsubstantiation, but it is not “clearly wrong.”¹⁵

Other types of unsubstantiation decisions may seem at odds with the statute defining child abuse.¹⁶ For example, in a case of suspected sexual abuse, the CPS worker might conclude that the behavior occurred but decide to unsubstantiate based on the conclusion that the behavior was “within the range of normal sexual behavior for the child’s age or development.”¹⁷ A CPS investigator might decide to unsubstantiate a case of physical abuse that clearly occurred, even though a child has nonaccidental injuries that are “the result of impulsive, inappropriate or violent behavior on the part of the parent,” but that, in the eyes of the CPS worker, are “still not serious enough to meet the statutory definition of physical abuse ... [because they do not] seriously endanger the physical health of the child.”¹⁸

In contrast, the statute defining physical abuse does not distinguish between “seriously endangering the physical health of the child” and other types of nonaccidental injury.¹⁹ “Physical abuse,” according to the statute, is

“physical injury inflicted on a child by other than accidental means.”²⁰ The statute further defines several categories of physical abuse.²¹ Only child neglect in the child protection statutes incorporates the factor that the child’s physical health was seriously endangered.²²

Thus, a case of suspected physical child abuse may meet the legal definition of physical abuse of a child for purposes of both criminal and child protection statutes²³ but still be unsubstantiated. The *Standards* acknowledge that a person can be convicted in criminal court, but CPS may still unsubstantiate the case.²⁴

These nuanced distinctions can have dramatic, detrimental effects on children and families. In the family law context, when abuse and neglect allegations arise, the family court judge might mirror Suzanna’s case and make placement and custody decisions as if a child had not raised the allegations, or worse, might believe that the parent raising the allegations is coaching the child or just causing problems. These types of allegations do not arise in every custody case, but when they do, lawyers and judges need to know how to handle the circumstances behind the allegations.

In addition, the lawyer might need to help the client access services. In some counties, services may be free for children with substantiated decisions but unavailable for children with unsubstantiated decisions. The abuse or neglect, however, may be very real, and the children and the nonoffending parent may need services. CPS can and should nonetheless decide to provide services or have services provided by another community agency to the child and family.

Lawyers and judges should also be aware that even when CPS substantiates a case, failure to name the perpetrator can lead to anomalous results.²⁵ As a matter of policy, when a juvenile is suspected to be the person who abused or neglected the child, CPS will not name

Sources for More Information

• The Incidence of Abuse and Neglect in Wisconsin:

Wisconsin Department of Children and Families, *Wisconsin Child Abuse and Neglect Report – Annual Report for Calendar Year 2016 to the Governor and Legislature s. 48.47(8)*, *Wis. Stats.* at 2.7 (Dec. 2017), <https://dcf.wisconsin.gov/files/cwportal/reports/pdf/can.pdf>.

• How Social Workers in Wisconsin Make Decisions to “Substantiate” or “Unsubstantiate” a Referral:

Wisconsin Department of Children and Families, *Child Protective Services Access and Initial Assessment Standards* (eff. May 2017), <https://dcf.wisconsin.gov/files/cwportal/policy/pdf/access-ia-standards.pdf>

• Definition of Child Abuse:

Wis. Stat. § 48.02(1)

• Child Protection Statutes:

Wis. Stat. § 48.13(10) (Neglect)

Wis. Stat. § 48.13(10m) (Risk of Neglect)

Wis. Stat. § 48.13(3) (Abuse)

Wis. Stat. § 48.13(3m) (Risk of Abuse)

• Criminal Statutes Regarding Protection of Children:

Wisconsin Statutes Chapter 948: Crimes Against Children

Wis. Stat. § 948.03 (Physical Child Abuse)

Wis. Stat. § 948.02 (Child Sexual Abuse)

Wis. Stat. § 948.21 (Child Neglect) **WL**

Resources for Abused Children

• Safe Harbor Child Advocacy Center

1457 E. Washington Ave., Suite 102
Madison, WI 53703
Phone: (608) 661-9787
Fax: (608) 441-8793
Email: info@safeharborhelpskids.org

• Child Advocacy Centers of Wisconsin

P.O. Box 3396
Madison, WI 53704
Phone: (608) 347-5559
Email: cacsofwi@gmail.com

For a map with a list of local centers, go to <http://cacsofwi.org/local-centers/find-a-local-center/>

• Wisconsin Department of Children and Families

<https://dcf.wisconsin.gov/>
201 E. Washington Ave., Second Floor
P.O. Box 8916
Madison, WI 53703-8916
Main Contact Phone: (608) 422-7000

Fax: (608) 266-6836

Email: dcfweb@wisconsin.gov

To report child abuse or neglect, go to this page: <https://dcf.wisconsin.gov/reportabuse>

• Wisconsin Child Abuse & Neglect Prevention Board

<https://preventionboard.wi.gov/Pages/Homepage.aspx>
110 E. Main St., Suite 810
Madison, WI 53703
Phone: (608) 266-6871

• Prevent Child Abuse Wisconsin

<https://www.chw.org/childrens-and-the-community/child-abuse-prevention/prevent-child-abuse-wisconsin>
Phone: (920) 969-7925
Toll-free Phone: (800) CHILDREN
Email: pcaw@chw.org **WL**

the juvenile, based on the DCF's policy that "[t]he juvenile justice system is the appropriate system for determining whether a child is held accountable for abusing another child."²⁶

In these situations, a casual or uninformed observer may think that CPS does not know the identity of the person who engaged in the maltreatment, when in reality, CPS is shielding a juvenile. This lack of information may be critical in situations when a child's safety in a placement may depend on being kept away from a juvenile. Believing that the juvenile, because not named, has not engaged in maltreatment can endanger a young child.

Social Service and CPS Involvement Despite a Finding of Unsubstantiated

Lawyers should look at the facts and circumstances underlying the allegations of abuse, not just take the label unsubstantiated at face value. One can compare this with a "not guilty" finding of someone who has been accused of another type of crime that could affect children. For example, even if someone accused of driving while intoxicated is found not guilty, would other people feel comfortable hiring the person to drive children?

Despite a disposition of unsubstantiated, a robust discussion with a client may lead the lawyer to conclude that continued social service involvement may indeed be beneficial. A finding of substantiation is not a predicate for social services or CPS intervention. Ironically, a finding of unsubstantiated, whether correct or incorrect, may allow the alleged perpetrator to process the events that led to CPS involvement without the stigma of having been labeled a perpetrator. Social service intervention for the accused, the family, and the child may include such things as assessing impending danger, looking in depth at how well each child is functioning, assessing how and when a child may be vulnerable, working on global parenting and disciplinary issues, and reviewing the overall dynamics of how the family is functioning.

Any social service involvement must look foremost at immediate and imminent child safety issues. This means focusing on family perceptions, intentions, motives, and behavior, especially during stressful times. The principal purpose is not to "fix" an individual or a family but to ensure that a sufficiently safe environment exists for each child in the family. To

this end, behavior therapy or cognitive behavior therapy may aid a person to change their way of thinking, feeling, and acting regarding present-day situations. These therapies help to concentrate a person's efforts less on their past and their personality traits and more on gaining control over their present actions. Other interventions are child behavioral management programs, parent-child interaction therapies, peer-support groups, home-visitation programs, and parent-training programs.

Identification of at-risk individuals and families and offering targeted interventions can nurture the relationship between a provider and the family. Establishing a trusting relationship allows for a continuing dialogue that may allow social service professionals to discern behaviors that are indicative of future child safety concerns.

Conclusion

Cases like Suzanna's should not constantly recur. Lawyers and judges should take the opportunity to look beyond the label of unsubstantiated to help provide real service to a child who may be traumatized and hurting. **WL**

ENDNOTES

¹This is a real client, but names have been changed to protect the individuals' identities.

²Wis. DCF, *Wisconsin Child Abuse and Neglect Report - Annual Report for Calendar Year 2016 to the Governor and Legislature* s. 48.47(8), *Wis. Stats.* at 2.7 (Dec. 2017), <https://dcf.wisconsin.gov/files/cwportal/reports/pdf/can.pdf>.

³Wis. DCF, *Child Protective Services Appeal Process*, <https://dcf.wisconsin.gov/cps/appeal> (last visited Aug. 5, 2018).

⁴HHS.gov, Child & Family Services Reviews Information Portal (hereinafter HHS.Gov-CFS Portal), *Substantiated*, <https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/3013> (last visited Aug. 5, 2018).

⁵HHS.gov-CFS Portal, *Unsubstantiated*, <https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/3014> (last visited Aug. 5, 2018).

⁶*Id.*

⁷Wis. DCF, *Child Protective Services Access and Initial Assessment Standards* (eff. May 2017) (hereinafter *Standards*), <https://dcf.wisconsin.gov/files/cwportal/policy/pdf/access-ia-standards.pdf> (last visited Aug. 5, 2018).

⁸*Id.* at 60.

⁹*Id.* at 63.

¹⁰*Id.*

¹¹*Id.* at 64.

¹²*Id.*

¹³*Id.* at 61.

¹⁴*Id.*

¹⁵*Id.* at 64.

¹⁶Wis. Stat. § 48.02.

¹⁷*Standards*, *supra* note 7, at 91.

¹⁸*Id.* at 95.

¹⁹Wis. Stat. § 48.02(1)(a).

²⁰Wis. Stat. § 48.02(1)(a).

²¹Wis. Stat. § 48.02(1)(a)-(gm).

²²Wis. Stat. § 48.13(10).

²³Wis. Stat. §§ 48.02(1)(a), 948.03.

²⁴*Standards*, *supra* note 7, at 114.

²⁵*Id.*

²⁶*Id.* at 62. **WL**