

Family Court or Not?

Raising Child Abuse Allegations Against a Parent

In cases involving child abuse allegations against a parent, lawyers must decide whether to bring an action in children's court or family court. There are procedural and substantive advantages and disadvantages to filing for a child abuse injunction first versus raising the allegations as part of an active family law matter.



Lawyers have a longstanding tradition of forum shopping, the practice of choosing the most favorable jurisdiction or court in which a claim might be heard. The explanation is straightforward: There are numerous procedural and substantive advantages offered. As well, there are benefits to litigating in a forum that is well known to the lawyer – in sports vernacular, the “home court advantage.” The lawyer may also know the tendencies of particular courts to decide certain issues. This tendency can stem from knowing the predilections of a certain judge when she or he oversees specific proceedings.

Cases involving child abuse allegations against a parent are no different than other cases. There are procedural and substantive advantages and disadvantages to filing for a child abuse injunction first so that the Children’s Code, Wis. Stat. chapter 48, applies, versus raising the allegations as part of an active family law matter, to which Wis. Stat. chapter 767 applies.

Considerations are the need for immediate protection, any need for confidentiality, the need for time to investigate further, and whether the child’s main disclosures have been to one parent. Immediate protection, time for further investigation, and a parent being the only source for hearsay disclosures all mitigate in favor of filing a child abuse injunction first, followed by filing for dissolution of the marriage. If the children do not need immediate protection – for example in a case in which the alleged perpetrator does not have access to the children and immediate appointment of a guardian ad litem (GAL) is not necessary – then filing the divorce action would be a wise choice.

Jurisdiction – Children’s Court and Family Court

In Wisconsin, two sets of courts potentially have jurisdiction over children and families. Family courts exercise jurisdiction under Wis. Stat. chapter 767.¹ Family courts have jurisdiction over paternity, child support, divorce, placement pursuant to family actions, and related matters.

However, family courts are not the only courts that can take jurisdiction over children. Under Wis. Stat. chapter 48, children’s courts

have exclusive jurisdiction over children in several types of matters, including children who are alleged to be in need of protection or services, termination of parental rights, adoptions, and proceedings under Wis. Stat. section 813.122, which covers child abuse injunctions.² Children’s court jurisdiction is “paramount” in all matters that Wis. Stat. section 48.14 covers, including child abuse injunctions.³

Armed with this information, a lawyer whose client alleges child abuse by the other spouse or someone from whom the other spouse fails to protect the child has choices about jurisdiction.

Here is a hypothetical example: Client Janet comes to you in tears. She wants a divorce from her husband, Ralph. She says that last week, their 8-year-old daughter, Maria, confided in her on the way to school that Ralph has been touching Maria inappropriately while helping Maria shower. Janet reported this to the police, who, along with child protective services (CPS) staff, now are investigating. Ralph has agreed to stay away from Maria for “awhile.”

You attempt to get information from both the police and CPS and learn that the investigation has not concluded and that CPS staff do not know if they can keep Ralph from having contact with Maria, supervised or unsupervised, because this is just a voluntary agreement. You see an immediate need for court action.

Forum Assessment – Children’s Court or Family Court

In Wisconsin, your choices are to file for a child abuse injunction in children’s court⁴ or start the case in family court and file for protection there. Regardless of the initial forum chosen, neither forum precludes filing in the other forum and bringing the cases together when that is appropriate. In addition, you are not duplicating work for yourself or the other party. The same core of factual information is necessary for either approach. Regardless of the statutory provisions that apply, these types of cases are extremely labor intensive:

“Child sexual abuse cases are among the most difficult to prove. To assess whether to take a case, I recommend carefully examining the

SUMMARY

Lawyers with clients who allege that their child has been abused by the other parent must decide how to handle the allegations.

If the client is mainly focused on immediately protecting the child from abuse and has not yet decided whether to end a marriage or do a trial separation, or wants time for an investigation to take place, filing a child abuse injunction is a sound choice.

There also can be substantive advantages to seeking a child abuse injunction instead of bringing up the allegations in a pending marital-dissolution or child-custody action.

evidence. That is the core of factual information that you would be able to present to a judge or jury. Evidence consists of three parts: physical evidence, testimonial evidence, and circumstantial evidence. Physical evidence consists of facts that someone can see, touch, or feel, whether tangibly or through reports. Examples include DNA evidence (for example, in a case involving alleged oral-genital contact, a perpetrator's saliva is found in a child's underwear), as well as medical evidence of injury.

"However, physical evidence is missing from 94-95 percent of child sexual abuse cases, even when reported immediately. Why is this? In many cases, the sexual abuse is touch, which does not leave injuries. In other cases, even intercourse, the perpetrator has groomed the victim to accept the contact so the intrusion does not leave injury. The most powerful evidence in child sexual abuse cases is testimonial combined with circumstantial. Testimonial evidence is the child's account of what happened. In most cases of sexual abuse, the only two witnesses are

the child and the perpetrator. Because the perpetrator is unlikely to tell what happened, only the child remains."⁵

Confidentiality Considerations in Each Forum

One important consideration for the client is confidentiality. Generally, all cases brought under the Children's Code (Wis. Stat. ch. 48) and the Juvenile Justice Code (Wis. Stat. ch. 938) are confidential, subject to certain statutory exceptions.⁶ The general public cannot attend hearings. On the other hand, cases brought under Wis. Stat. chapter 767 ("Actions affecting the family") are public cases, not confidential, unless a party specifically requests a closed hearing or sealed records.

Speed of Relief in Each Forum

Each forum has advantages and disadvantages. The primary consideration is the speed with which a lawyer can get relief for the client. A child abuse injunction⁷ case is governed by the same procedures and deadlines as an injunction case. First, the lawyer must file a petition for a temporary restraining order (TRO), which is an ex parte proceeding. The lawyer must ensure that the facts are sufficient to fall within the requirements for granting a child abuse injunction, which is the same definition of *child abuse* as in Wis. Stat. chapter 48.⁸ The basis for the court's decision is finding "reasonable grounds to believe" that the respondent has engaged in the behaviors alleged in the petition.⁹ This is a very low standard to meet as a threshold and can provide immediate relief for the client and the child. The court will then set a hearing on the injunction within 14 days. If the court does not issue a TRO, the court will set a hearing on the petition, upon motion of either party, at which both parties may appear.¹⁰

The process in family court may take longer. The family court action starts with a petition and summons, following the rules of civil procedure.¹¹ The court can make temporary orders.¹² In family law cases, the court may require mediation before issuing orders.¹³ In practice,

judges presiding over family courts are not equipped for an immediate response similar to a judge in children's court hearing a child abuse injunction.

Appointment of the GAL in Each Forum

If the children's court judge issues a TRO, then the court is required to appoint a GAL immediately if the respondent is the child's parent.¹⁴ In many counties, the county pays for the GAL. However, in some counties, the court shifts the cost to the petitioner, the respondent, or both.¹⁵ The cost of GALs in children's court cases appears to be a matter of local policy. On the other hand, the judge in a family court action has discretion regarding whether to appoint a GAL at all,¹⁶ and the parties generally must share the costs of payment for the GAL.¹⁷

Protecting a Child While Considering Other Permanent Options

Filing first under Wis. Stat. chapter 48 means that initially the client and the lawyer may defer family court action. In a case in which the client is mainly focused on immediately protecting the child from abuse and has not yet decided whether to end a marriage or do a trial separation, or wants time for an investigation to take place, filing a child abuse injunction is a sound choice to gain time in which to gather information and make a more informed decision about permanent legal action regarding the marriage. This is not an unusual choice, and under the circumstances may be the best thing to do. If the children's court judge issues a TRO, the petitioner has at least 14 days before the injunction hearing. That time may be sufficient for CPS or law enforcement staff to complete an investigation. Depending on the outcome of the investigation, the petitioner may decide to move forward or reconsider his or her initial position.

If the court grants an injunction, and the injunction has the typical duration (up to two years), the petitioner has additional time in which to consider longer term options. If the petitioner later files an action under Wis. Stat. chapter 767 to



Lori S. Kornblum, Berkeley Law 1982, is an adjunct faculty member at Marquette University Law School and Northeastern University Law School and an instructor at Milwaukee Area Technical College (Paralegal Department) and has a private practice in Mequon. She is a former Milwaukee County assistant district attorney, focusing on child abuse and neglect. She has trained lawyers, law enforcement workers, social workers, and educators statewide on child abuse and neglect issues.

lorikornblum.law@gmail.com

Daniel Pollack, MSSA (MSW), Cleveland Marshall College of Law, is a professor at the School of Social Work, Yeshiva University, New York City. He has been retained as an expert witness in more than 25 states on topics including child abuse and foster care. He was recently appointed to Game Over: Commission to Protect Youth Athletes, an independent blue-ribbon commission created to examine the institutional responses to sexual grooming and abuse by former USA Gymnastics physician Larry Nassar.

change the marital relationship, depending on the procedural posture of the children's court case, the petitioner may end up with two cases going at the same time, involving two lawyers representing the respondent.¹⁸ However, the courts have flexibility to consolidate the cases so a single court can make placement and custody determinations.

Children's Court Expertise in Child Abuse Matters

Another consideration is the expertise of the court hearing the case. Judges with experience in children's court typically have expertise in child abuse cases, because those types of cases are common. Judges with experience in family court might not have this type of expertise, because family court jurisdiction is broader. The comparative specialization affects the way different judges hear the cases and make decisions.

Although both children's court and family court focus on the best interests of the child, in practice, judges may perceive cases in different ways. Because cases brought under Wis. Stat. chapter 767 typically involve adversarial proceedings between the parents, the children's best interests may appear subordinated to the litigation.

In practice, judges hearing family law claims are generally highly suspicious of maternal reports of child abuse when the alleged abuser is the father. This bias has been a matter of colloquial discussion for many years. However, the general bias of family court judges against women who allege the father has committed child abuse is now documented in a recent study.¹⁹

Professor Joan Meier, of George Washington University Law School, looked at this issue and recently published a study based on her review of thousands of custody cases in the United States. In cases in which the mother alleged child abuse by the father, the mother lost custody 25 percent of the time. If the father countered with an allegation of "parental alienation" by the mother, the mother lost custody 50 percent of the time. The threat

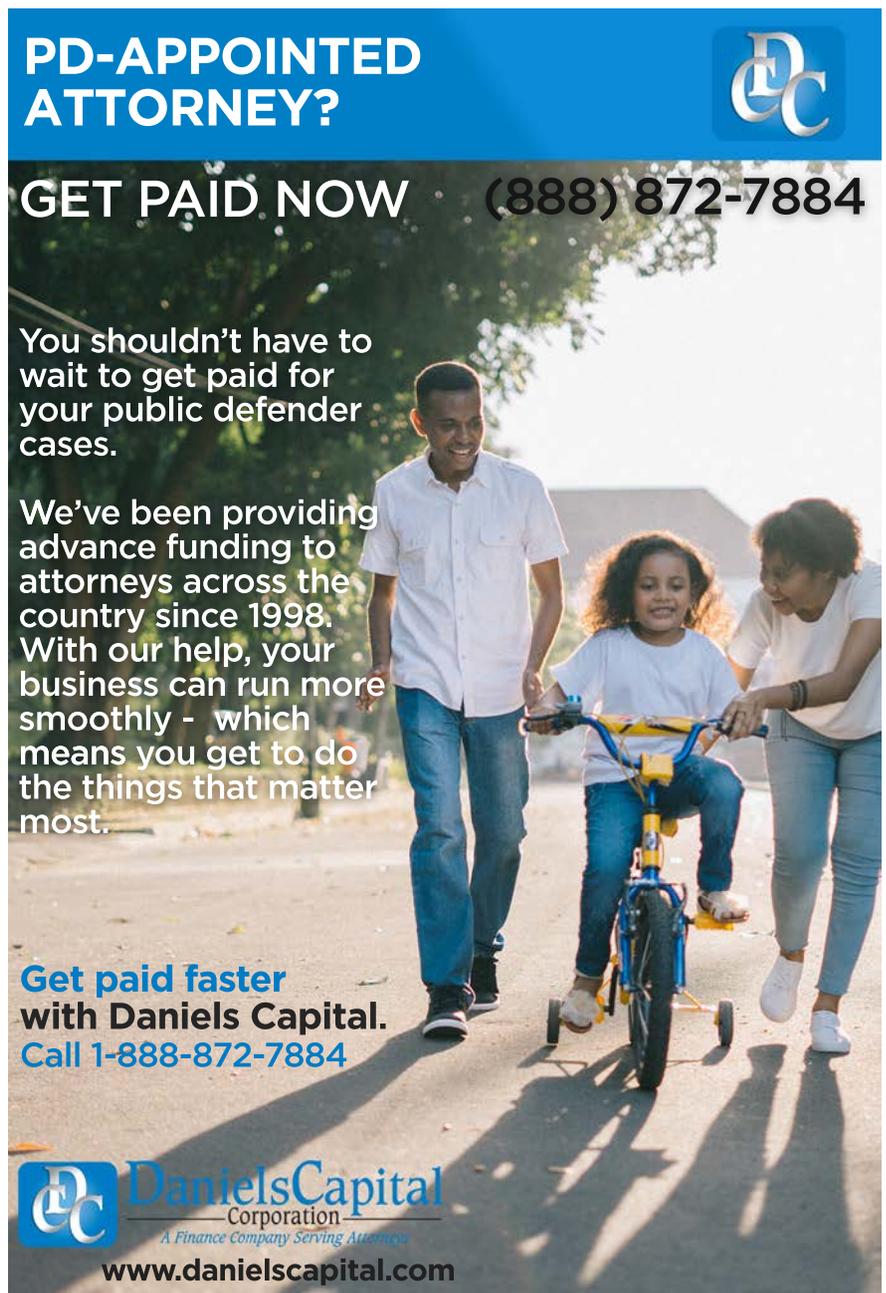
of being accused of parental alienation is a real and credible threat to mothers who raise child abuse issues.²⁰ Courts rarely credit mothers' allegations of child physical or sexual abuse, even when corroboration is present.²¹

According to Professor Meier, simply raising the claim of parental alienation discredits the mother in the eyes of the courts:

"... [N]o courts were prepared to believe that both a father's child abuse and a mother's alienation were true. That

alienation and child abuse are a 'zero sum game' in the eyes of the courts is consistent with the original PAS theory – which framed alienation as using false child abuse claims to undercut father's parenting rights."²²

The converse is not true. When mothers alleged physical child abuse, they lost custody to the alleged abuser 34 percent of the time. When fathers alleged the same about the mother, they lost custody 11 percent of the time.²³ When fathers alleged child abuse by the mother and



PD-APPOINTED ATTORNEY?

GET PAID NOW (888) 872-7884

You shouldn't have to wait to get paid for your public defender cases.

We've been providing advance funding to attorneys across the country since 1998. With our help, your business can run more smoothly - which means you get to do the things that matter most.

Get paid faster with Daniels Capital. Call 1-888-872-7884

Daniels Capital Corporation
A Finance Company Serving Attorneys
www.danielscapital.com

Quick Guide to Advantages and Disadvantages of Chapter 48 vs. Chapter 767

	Concern	Children's Court – Wis. Stat. chs. 48, 813, and 938	Family Court – Wis. Stat. ch. 767
1.	Alleged abuser has immediate access to child	Faster, can protect immediately through temporary restraining order (TRO)	Possibly if a family court action is in progress and the court acts quickly in response to an emergency motion
2.	Alleged abuser does not have immediate access to child	Speed is not the primary concern	Action proceeding here can accomplish same result
3.	Burden of proof	Reasonable belief that abuse has occurred as stated in petition	Civil burden of proof
4.	Expertise in child abuse cases	Court only hears cases involving children, mostly child abuse and neglect (and delinquency)	Court hears cases involving family issues, many of which involve children, but not specifically child abuse
5.	Ability to fashion long-term remedies in custody and placement	Limited to two years on an injunction	Has authority to fashion long-term custody and placement solutions
6.	Property division	No authority	Authority
7.	Perceived bias against mothers	Not documented; case law shows that nationwide, children's courts are less biased against mothers	Some documented
8.	Guardian ad litem for the child	Appointed by court if court issues TRO and respondent is other parent; county might or might not pay for GAL	Appointment is discretionary; parties generally pay
9.	Who prosecutes the action and who represents them?	Civil case: the petitioner prosecutes the action, retains their own counsel	Civil case: the petitioner prosecutes the action, retains their own counsel
10.	Confidentiality	All cases are confidential, subject to certain statutory exceptions. Injunction cases are confidential.	All cases are public

the mother claimed parental alienation, the father lost custody half as often as the mother. The rates of “winning” child custody cases when abuse is not alleged, but alienation is, is similar for fathers and mothers. Thus, a mother alleging child abuse faces an increased risk of losing custody just for raising that issue, especially if the father alleges parental alienation. A father does not face that same risk.²⁴ Meier concluded:

“The gender contrast here is also stark: Mothers are nearly 3 (2.9) times more likely than fathers to lose custody when alleging abuse by the other parent; when they allege child abuse their odds of losing custody increase to 4.2 times more than fathers.”²⁵

The figures regarding cases of proven abuse are more alarming. In cases of this

type reviewed by Meier, mothers lost custody to an abuser-father 24 percent of the time when the child had been physically abused and 2 percent of the time when the child had been sexually abused. Fathers never lost custody to an abusive mother.²⁶

The message to mothers is clear: A mother raising allegations of child abuse faces a risk in family court that she will be disbelieved simply for raising those allegations. Fathers who are alleged abusers, and fathers who raise allegations that the mother is abusing the child, will be safer in family court. Lawyers should take these risks into account when raising child abuse issues.

Disclosure of Abuse is to the Mother

The problem of perceived bias against

mothers is especially concerning when allegations of child abuse are disclosed to the mother because the mother may be viewed as suspect in family court matters, as seen above.

How do judges in criminal court and children's court matters view disclosures of child abuse to the mother? Studies or data on this do not seem to exist, but there is case law that points to disclosures to a mother as natural and expected.

If the disclosure is solely to the mother, both criminal court judges and children's court judges may be much more receptive. In fact, the Wisconsin Court of Appeals and the Wisconsin Supreme Court both have commented on the disclosure to the mother being a test

of whether to believe a child's hearsay statements.

A child's disclosure of child sexual abuse to their mother is considered a lodestar of reliability. In the case of *State v. Gerald L.C.*, the court discussed the excited utterance exception to the hearsay rule:²⁷

"While we are mindful that each case must be viewed on its particular facts, a survey of Wisconsin cases that have applied the excited utterance exception to child sexual assault victims' statements reveals three common factors: (1) the child is young – under the age of ten, (2) the time between the incident and the child's report is less than a week and (3) the child first reports the incident to his or her mother. This is consistent with the rationale behind admitting such statements – that young children will tend to repress the stressful incident, will report the incident only to their mother and will be less likely than adults to consciously fabricate the

Procedures to File in Children's Court

Statute: Wis. Stat. § 813.122

All forms are at the Circuit Court Forms page: <https://tinyurl.com/r4vtjq6>.

File these forms:

- Petition for TRO: CV-412. Line 4 requests a Statement of Facts. This can be done in the petition, which is filed under penalty of false swearing (but need not be notarized) or can be done in an attached affidavit. The more detail that the petitioner offers, the greater the basis for the court making a decision.

- Proposed order for TRO CV-413.

- Proposed order for Injunction CV-414.

- If the court doesn't issue an injunction:

- CV-447–Order for hearing when no injunction issued
- Electronic filing is now mandatory for attorneys in all Wisconsin counties for civil (CV) and temporary restraining order (TRO) cases. It is voluntary for self-represented litigants. **WL**

incident over a period of time."²⁸

The Wisconsin Supreme Court declined to extend *Gerald L.C.* to a "bright line rule," but in some later cases, the court assumed that statements to a mother are trustworthy.²⁹

Interaction of Children's Code and Family Code

The strategy of filing for a child abuse injunction in children's court and the related family case in family court is not novel. Many Wisconsin lawyers have pursued this strategy. Most of the

You're Invited!

Please join us at one of two receptions honoring the long time service of

Justice Jon Wilcox & Justice Louis Butler



to the Wisconsin Law Foundation

Tuesday, May 19

Graze

1 S. Pinckney St., Madison, WI
5:30 - 7:00 p.m.

Thursday, May 28

Doc's Smokehouse

754 Vel R. Phillips Ave., Milwaukee, WI
5:30 - 7:00 p.m.

Donations to support the good work of the Foundation will be gratefully accepted.



WLF180 2/20

cases reporting this strategy are unpublished, so will not be cited here.³⁰

The strategy was clearly used in at least one published case, *Scott M.H. v. Kathleen M.H.*³¹ In this case, the father petitioned for a child abuse injunction under Wis. Stat. chapter 813 while a divorce action was pending. The circuit court heard the injunction case and ruled in favor of the petitioner. The court, however, declined jurisdiction in the injunction case and made placement decisions as part of the divorce action. The court of appeals held that the circuit court had jurisdiction over the injunction case even while the divorce action was pending and could have made placement determinations pursuant to the injunction case. In that case, the trial judge appeared to be the same in both cases.

A court presiding over a Wis. Stat. chapter 767 matter does not have jurisdiction to issue child abuse injunctions, and a court presiding over a matter not brought under Wis. Stat. chapter 767 does not have jurisdiction to make final custody and placement determinations, although

it can make those for a period of up to two years under the injunction statute. However, for a marital-dissolution case involving long-term placement and property division issues, children's court is inadequate because it has no jurisdiction over these issues.

A contested divorce tends to move more slowly through the court system than a child abuse injunction matter brought under Wis. Stat. chapter 813. A GAL may not be appointed immediately. Some court procedures require the parties to pass several procedural hurdles before getting a GAL, such as going through mediation. Thus, immediate protection is not possible.

Conclusion

Choosing the appropriate forum for the desired relief is a vital consideration in a case involving child abuse allegations. Going back to the client, Janet, there are factors that would lead a lawyer to file for a child abuse injunction under Wis. Stat. chapter 813:

- The allegations of abuse are still being investigated. With an incomplete investigation, a family court judge might defer action and leave the child with a potentially abusive parent. If the facts are compelling and can be stated sufficiently in an affidavit supporting a petition for a TRO, the children's court judge might find "reasonable belief" sufficient to grant a TRO. The TRO will give more time for an investigation.

- The alleged abuse is disclosed to the mother. Disclosures of abuse to the mother might be inherently suspect in a divorce action but might not suffer the same bias in children's court.

- Statistically, the mother will have a great chance of losing custody altogether in a divorce action if she even raises child abuse allegations.

The facts and circumstances of each case differ. Lawyers should consider which forum offers the best protection for the children and their client. **WL**

ENDNOTES

¹Wis. Stat. ch. 767.

²Wis. Stat. § 48.14(10).

³Wis. Stat. § 48.15.

⁴Wis. Stat. §§ 813.122, 48.14(10).

⁵Lori Kornblum, contributor to Daniel Pollack, "Distant Memories, Fresh Wounds: Litigation Strategies for Sexual Abuse Lawsuits," *Policy & Practice* 76(3) (June 2018), <https://tinyurl.com/rl7omqf>.

⁶Wisconsin Court System website, <https://www.wicourts.gov/services/attorney/redactfaq.htm>.

⁷Wis. Stat. § 813.122.

⁸Wis. Stat. § 813.122(1).

⁹Wis. Stat. § 813.122(4)(a)(2).

¹⁰Wis. Stat. § 813.122(3)(a).

¹¹Wis. Stat. § 767.215.

¹²Wis. Stat. § 767.225.

¹³*Guardians ad Litem in Family Court*, <https://www.wisbar.org/forpublic/ineedinformation/pages/guardians-ad-litem.aspx>; Milwaukee County Circuit Court, Local Court Rules, 5.13, <https://tinyurl.com/pae8yuy>. Courts may order mediation in other cases. See Dane County Local Court Rule 407, <https://familycourtservices.countyofdane.com/Local-Court-Rule-407>.

¹⁴Wis. Stat. § 813.122(3)(bm).

¹⁵This has been a discussion on an electronic list for guardians ad litem in Wisconsin. This is not an official policy but is based on reports of GALs around the state.

¹⁶Wis. Stat. § 767.407.

¹⁷"The judge decides who pays for the GAL's services. The requirements vary from county to county. Generally, each parent is responsible for one-half of the GAL's total costs, including the GAL's legal fees and investigation costs, such as tests and experts. The court also may require the parents to pay an initial deposit and periodic payments to the GAL during the case. If the judge decides that both parents are unable to pay for the GAL's services immediately, the judge may have the county pay the GAL bill. However, the

parents are still responsible for the GAL fees and the county may require the parents to reimburse the county." *Guardians ad Litem in Family Court*, <https://www.wisbar.org/forpublic/ineedinformation/pages/guardians-ad-litem.aspx>.

¹⁸Lawyers who defend individuals against child abuse allegations through injunctions do not necessarily practice in family law, and vice versa.

¹⁹Joan Meier, "Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations," *GWU Law School Public Law Research Paper* (Oct. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448062.

²⁰*Id.* at 15-18.

²¹*Id.* at 21.

²²*Id.* at 17.

²³When mothers alleged that the father had engaged in child sexual abuse, they lost custody 33 percent of the time. Interestingly, the percentage is the same for the fathers alleging child sexual abuse against the mother, but the data set was small (only six allegations total for the fathers.) *Id.* at 23.

²⁴*Id.* at 18-19.

²⁵*Id.* at 23.

²⁶*Id.* at 23-24.

²⁷Wis. Stat. § 908.03(2).

²⁸*State v. Gerald L.C.*, 194 Wis. 2d 548, 557-58, 535 N.W.2d 777 (Ct. App. 1995) (citations omitted).

²⁹See, for example, *State v. Huntington*, 216 Wis. 2d 671, 684, 575 N.W.2d 268 (1998), and cases cited by the court in *Huntington*.

³⁰Under Wis. Stat. section 809.23(3), unpublished opinions cannot be cited as precedent or authority. An unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under Wis. Stat. section 752.31 (2) can be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion.

³¹*Scott M.H. v. Kathleen M.H.*, 218 Wis. 2d 605, 609, 581 N.W.2d 564 (Ct. App. 1998). **WL**