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Shadows and Fog: Is California Civil Code Section 4611 an Effective Deterrent against False Accusations of Child Abuse during Custody Proceedings

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**SHADOWS AND FOG: IS CALIFORNIA CIVIL CODE
SECTION 4611 AN EFFECTIVE DETERRENT
AGAINST FALSE ACCUSATIONS OF
CHILD ABUSE DURING
CUSTODY PROCEEDINGS?**

I. INTRODUCTION

An established and celebrated director separates from his wife, an actress. The couple has two children. During the custody proceeding, the wife accuses her husband of molesting their five-year-old daughter.¹ The husband charges that the accusation is false, but the wife refuses to retract the accusation. The constant media and tabloid coverage focuses on whether the accusation is true. Eventually a court determines that the accusation is false. The husband asserts that the accusation ruined his reputation as a director, and he now seeks redress.

In order to address the growing problem of false accusations of child abuse during family law proceedings, the Governor of California on July 16, 1990 approved an act by the California Assembly² adding section 4611 to the California Civil Code.³ Under section 4611, a court can impose sanctions of \$1000 on a party making the accusation if it finds both

1. This example is loosely based on the custody battle between Woody Allen and Mia Farrow for their adopted daughter, Dylan. The couple is not married. The custody proceedings have been reported by *Time*, the *New York Times*, the *Los Angeles Times* and other newspapers and television news shows. See, e.g., Gloria B. Anderson, *Mia Has the Children; Woody Allen, Real-Life Dad, Sues for Custody*, N.Y. TIMES, Aug. 16, 1992, at A2; James Barron, *Striking Back, Woody Allen Denies Child Sex-Abuse Allegation*, N.Y. TIMES, Aug. 19, 1992, at A2; Richard Corliss, *Scenes from a Breakup*, TIME, Aug. 31, 1992, at 54; John Goldman, *Nanny Casts Doubt on Farrow Charges*, L.A. TIMES, Feb. 2, 1993, at A5; Lynn Smith, *Abuse Claims*, L.A. TIMES, Aug. 22, 1992, at A12; *Woody Allen Files Child-Custody Lawsuit*, N.Y. TIMES, Aug. 14, 1992, at B3; *60 Minutes: Woody Allen* (CBS television broadcast, Nov. 22, 1992).

2. Act of July 16, 1990, ch. 297, 1990 Cal. Stat. ___ (codified at CAL. CIV. CODE § 4611 (West Supp. 1993)).

3. Section 4611 of the California Civil Code provides:

If a court determines that an accusation of child abuse or neglect made during a child custody proceeding under this title was false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions, not to exceed one thousand dollars (\$1,000) and reasonable attorney's fees incurred in recovering the sanctions, against the person making the accusation. For the purpose of this section, "person" includes a witness, a party or a party's attorney.

Upon motion by any person requesting sanctions under this section, the court shall issue its order to show cause why the requested sanctions should not be imposed. The order to show cause shall be served upon the person against whom the

that the accusation was false and that the party knew the accusation was false.⁴ The section further provides that the sanctions are "in addition to any other remedy provided by law."⁵

Currently, no reported cases in California have enforced section 4611, and there is a great probability that courts will rarely enforce the statute. The statute's provisions severely constrain its effectiveness such that courts will only be able to impose sanctions in limited situations.⁶ These provisions also limit the overall scope of section 4611.⁷

This Comment first examines the purpose of section 4611 by discussing the background of false accusations of child abuse during custody proceedings and the legislative history of section 4611.⁸ Next, the Comment analyzes the effectiveness of section 4611 in achieving its purpose of deterring false accusations of child abuse.⁹

Three issues arise when analyzing section 4611: (1) Whether the amount of the sanctions is sufficient to deter false accusations; (2) whether courts or the falsely accused party should receive the sanctions; and (3) whether the statutory requirements that a court must meet before imposing sanctions make the statute ineffective. This Comment proposes that courts should have greater discretion to determine the amount of sanctions,¹⁰ courts should be awarded the sanctions,¹¹ and the statute should provide a definition of "false" that gives courts greater flexibility in imposing sanctions.¹² In addition to sanctions, California should consider imposing criminal penalties on false accusers of child abuse, as do other states.¹³ The California Legislature could also adopt the approach used in *In re Marriage of Lewin*,¹⁴ in which the California Court of Appeal used a false accusation of child abuse as evidence in its determina-

sanctions are sought and a hearing thereon shall be scheduled by the court to be conducted at least 15 days after the order is served.

The remedy provided by this section is in addition to any other remedy provided by law.

CAL. CIV. CODE § 4611 (West Supp. 1993).

The statute will be repealed from the Civil Code on January 1, 1994, but will become operative as Family Code § 3028 on the same day. There will be no substantive change in the statute. CAL. FAM. CODE § 3028 law revision commission cmt. (West 1993).

4. CAL. CIV. CODE § 4611.

5. *Id.*

6. *See infra* part III.

7. *See infra* parts III-IV.

8. *See infra* parts II.A-II.B.

9. *See infra* part III.

10. *See infra* part IV.A.

11. *See infra* part IV.B.

12. *See infra* part IV.C.

13. *See infra* part IV.D.

14. 186 Cal. App. 3d 1482, 231 Cal. Rptr. 433 (1986).

tion of which parent should receive custody of the child.¹⁵ In these ways, California can effectively deter false allegations of child abuse.

II. BACKGROUND

A. *The Situation in California Prior to Section 4611*

In the early 1980s, before the introduction of California Civil Code section 4611, the United States had seen a growing number of child abuse¹⁶ reports.¹⁷ The reasons for the increase were the adoption of mandatory reporting laws¹⁸ and heightened public awareness.¹⁹ The California Legislature established mandatory reporting laws for many professions, including physicians and therapists.²⁰ In addition, the pub-

15. See *infra* part IV.E.

16. The California Penal Code defines child abuse as "a physical injury which is inflicted by other than accidental means on a child by another person[,] . . . the sexual abuse of a child[,] . . . [or] neglect of a child." CAL. PENAL CODE § 11165.6 (West 1992). For purposes of this Comment, child abuse refers only to sexual abuse. The issue of false accusations of child abuse in custody proceedings arises predominantly in regard to sexual abuse because the occurrence of sexual abuse is much more difficult to prove than physical abuse. The California Penal Code defines sexual abuse as "sexual assault or sexual exploitation." CAL. PENAL CODE § 11165.1 (West 1992). According to the California Penal Code,

[c]onduct described as "sexual assault" includes . . . (1) Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen. (2) Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person. (3) Any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, except that, it does not include acts performed for a valid medical purpose. (4) The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose. (5) The intentional masturbation of the perpetrator's genitals in the presence of a child.

Id.

17. Nancy Thoennes & Jessica Pearson, *Summary of Findings from the Sexual Abuse Allegations Project*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES: A RESOURCE BOOK FOR JUDGES AND COURT PERSONNEL* 1, 1 (E. Bruce Nicholson with Josephine Bulkley eds., 1988) (stating that estimates of child sexual abuse reporting have increased significantly between 1978 and 1984).

18. See *infra* note 20.

19. See *infra* notes 21-23 and accompanying text.

20. Section 11166(a) of the California Penal Code provides:

any child care custodian, health practitioner, or employee of a child protective agency, or child visitation monitor who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected . . . abuse

CAL. PENAL CODE § 11166(a) (West 1992 & Supp. 1993).

licity generated by high profile child abuse and child molestation cases,²¹ including molestation charges against the operators of the McMartin Preschool in southern California²² and the death of Lisa Steinberg in New York City,²³ was also a reason for the increased reporting.

As the number of child abuse reports increased, the number of child abuse accusations in family court also increased.²⁴ According to a study regarding sexual abuse allegations,²⁵ "limited information . . . suggests that in most courts approximately two percent to ten percent of all family court cases involving custody and/or visitation disputes also involve a charge of sexual abuse."²⁶ Recent statistics show that in California, the percentage of child abuse accusations in custody disputes is much higher.²⁷

Because courts make custody determinations according to "the best interests of the child," an allegation of child abuse leveled against one parent by the other has a significant impact on a court's choice of the custodial parent.²⁸

Abuse and neglect of a child will often be a determinative factor in custody cases, since it has a direct, harmful impact upon

21. See Thoennes & Pearson, *supra* note 17, at 16 (discussing study conducted by Association of Family and Conciliation Courts Research Unit, which found that increased media attention and campaigns aimed at public awareness have been largely responsible for increased reports of child abuse).

22. See Scott Kraft, *Careers, Reputations Damaged; False Molesting Charges Scar Lives of the Accused*, L.A. TIMES, Feb. 11, 1985, pt. I, at 1, 14 (reporting how McMartin family was accused and acquitted of molesting students at preschool owned and operated by McMartins).

23. Lisa Steinberg was beaten to death by her father, a lawyer. *The Fascination of Abomination*, N.Y. TIMES, Feb. 1, 1989, at A24; *The Shocking Crime*, L.A. TIMES, Feb. 5, 1989, pt. V, at 4. Neighbors, teachers and law enforcement officials were all aware that Lisa Steinberg's father was abusing her but did not report their suspicions to the authorities. *MacNeil/Lehrer NewsHour: Lisa's Story* (PBS television broadcast, Nov. 12, 1987).

24. "The rise of allegations [of child abuse] within divorces is seen as paralleling the rise in reports to protective service agencies in general." Thoennes & Pearson, *supra* note 17, at 4.

25. *Id.*

26. *Id.*

27. A survey conducted by the Office of Family Court Services showed a 24% increase in the number of child custody mediation cases during the past three years, with 26% of the 1700 custody disputes involving physical or sexual child abuse. *Custody Battles Increase Sharply*, L.A. TIMES, Nov. 10, 1991, at A45.

28. CAL. CIV. CODE § 4600(b) (West 1983 & Supp. 1993) (to be recodified at CAL. FAM. CODE § 3040, effective Jan. 1, 1994) ("Custody should be awarded . . . according to the best interests of the child . . ."). The California Civil Code provides that "in making a determination of the best interest of the child in any proceeding under this title, the court shall . . . consider . . . any history of abuse by one parent against the child." CAL. CIV. CODE § 4608(b) (West Supp. 1993) (to be recodified at CAL. FAM. CODE § 3022(b), effective Jan. 1, 1994); see also E. Bruce Nicholson, *Child Sexual Abuse Allegations in Family Court Proceedings: A Survey of Legal Issues*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES: A RESOURCE BOOK FOR JUDGES AND COURT PERSONNEL*, *supra* note 17, at 255, 259.

the child. . . . Physical abuse or sexual abuse by a parent is usually, in and of itself, sufficient to determine that it is not in the best interest of a child to be under the control of that parent.²⁹

Consequently, an allegation of child abuse can be a very effective tactic in a child custody proceeding.³⁰

Courts will find it difficult not to consider the allegation of child abuse, even though it may be false.³¹ "The philosophy seems to be that if an error is going to be made, it must be made in favor of protection of the minor child."³² The result of this philosophy is that the child may be separated from the accused parent,³³ or a court may mandate supervised visits.³⁴

False accusations of child abuse made during child custody proceedings are problematic because of the context in which these accusations arise.³⁵ The most common situation involving a false allegation of child abuse is one in which a wife accuses her estranged spouse of abusing their child.³⁶ Such allegations, although false, can give the accusing parent a tactical advantage in a custody proceeding or settlement negotiations.³⁷

29. Nicholson, *supra* note 28, at 259.

30. Thoennes & Pearson, *supra* note 17, at 12; see also Alan Abrahamson, *False Charges of Child Abuse Dog Custody Battles*, L.A. TIMES (San Diego ed.), Oct. 21, 1990, at B1, B12 (reporting that mother hoped to gain tactical advantage by making false accusation of child abuse against father).

31. Curtis M. Loveless, *Sexual Abuse Allegations in Child Custody Cases—Some Practical Considerations*, 5 J. AM. ACAD. MATRIM. LAW. 47, 49 (1989).

32. *Id.*

33. *Id.*

34. Susan Romer, *Child Sexual Abuse in Custody and Visitation Disputes: Problems, Progress, and Prospects*, 20 GOLDEN GATE U. L. REV. 647, 673 (1990).

35. Lucy Berliner, *Deciding Whether a Child Has Been Sexually Abused*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES: A RESOURCE BOOK FOR JUDGES AND COURT PERSONNEL*, *supra* note 17, at 48, 60; Frances Sink, *Studies of True and False Allegations: A Critical Review*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES: A RESOURCE BOOK FOR JUDGES AND COURT PERSONNEL*, *supra* note 17, at 37, 42-43.

36. See Thoennes & Pearson, *supra* note 17, at 3 ("[M]ost sexual abuse allegations arising during the course of a divorce or custody action involve actions against fathers, stepfathers or mother's boyfriend."); Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 154 (1990) ("An examination of the accused and accusing parties in our sample suggests that depicting these cases as 'mothers against fathers' oversimplifies the problem."). Although 48% of the accusations were made by the mother against the father, other scenarios included the mother accusing the child's stepfather (6%), the father accusing the mother's new partner (10%) and the father accusing the mother (6%). *Id.*

37. Thoennes & Tjaden, *supra* note 36, at 151-62; see also Loveless, *supra* note 31, at 58 ("[T]he person bringing the allegations normally has very little to lose because definitely proving or disproving the allegations is almost impossible.").

One study indicates that fourteen percent of child abuse accusations in family law cases were possibly "deliberate false reports."³⁸ Other experts contend that false allegations are very uncommon.³⁹

Deliberate false reports must be distinguished from unfounded and unsubstantiated reports of child abuse.⁴⁰ In California, neither unfounded reports nor unsubstantiated reports are considered deliberate false reports.⁴¹ Notably, section 4611 of the California Civil Code does not define a "false" report of child abuse.⁴²

B. *Legislative Background of California Civil Code Section 4611*

To prevent parties from making false allegations of child abuse in order to gain a tactical advantage in custody proceedings, the California Assembly introduced Assembly bill 3546, which later was enacted as California Civil Code section 4611.⁴³ The author of AB 3546, former Assemblyman Norman Waters, hoped that the provision would "discourage a parent from making or repeating the accusation if they know that a fine [would] be imposed."⁴⁴

In its discussion of the need for legislation in this area, the Senate Committee on the Judiciary proposed that AB 3546 add another excep-

38. A 1988 study conducted by the Association of Family and Conciliation Courts, and reported by the California Assembly Committee on the Judiciary, "indicated that, of the family law cases in which both sexual abuse allegedly occurred and the child protective service worker or court worker expressed an opinion regarding the good faith nature of the report, 14 percent were viewed as possibly a deliberate false report." CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, REPORT ON AB 3546, at 2 (1990).

39. Sandra J. Morris, *Sexually Abused Children of Divorce*, 5 J. AM. ACAD. MATRIM. LAW, 27, 36; see also John E.B. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J. FAM. L. 1, 21 (1989-90) (stating that there is no convincing evidence that substantial portion of sexual abuse allegations in child custody cases is fabricated).

The "avenging parent" who "will do anything to get revenge or obtain custody of the child" is one explanation for allegations of sexual abuse during child custody disputes in which there is an apparent absence of abuse. LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS § 13.10, at 491-92 (1989). However, "[c]ontrary to popular belief, this is the most infrequent explanation for child sexual abuse allegations." *Id.* at 492. "Deliberately false allegations made to influence the custody decision or to hurt an ex-spouse do happen, but they are viewed by knowledgeable professionals as rarities." Thoennes & Pearson, *supra* note 17, at 17; see also CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, *supra* note 38, at 2 ("Deliberate false reports of child sexual abuse to child protective services, whether or not a family law action is pending, have been estimated to be less than one percent by . . . experts.").

40. See *infra* notes 154-57 and accompanying text for the distinctions between "unfounded," "unsubstantiated" and "false" reports of child abuse.

41. See CAL. PENAL CODE § 11165.12 (West 1992).

42. See CAL. CIV. CODE § 4611. See *supra* note 3 for the text of § 4611.

43. CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, *supra* note 38, at 3.

44. *Id.*

tion to California Civil Code section 47(b).⁴⁵ Section 47(b) “provides absolute immunity from liability for any communication and all torts . . . to all parties and witnesses.”⁴⁶ Before the adoption of AB 3546, the only exception to section 47(b) was malicious prosecution.⁴⁷ Malicious prosecution is an action for damages brought by a person who has been civilly sued or criminally prosecuted maliciously and without probable cause, after the termination of the criminal prosecution or civil suit in favor of the person claiming the damages.⁴⁸ California courts have allowed malicious prosecution actions because permitting persons to recover for individual wrongs outweighs the policy of encouraging free access to the courts.⁴⁹ Section 4611 provides an additional exception to the absolute immunity rule established in section 47(b)—false accusations.⁵⁰

The California Assembly amended the original AB 3546 by adding a clause stating that the remedy provided by the statute “is in addition to any other remedy provided by law.”⁵¹ The Assembly Committee recognized that falsely accused parents undergo great suffering and should be able to recover damages from the accuser in a civil suit.⁵² The Committee referred to *Tushinsky v. Arnold*,⁵³ in which a wife, fully aware that the charges were false, informed her attorney that her husband was molesting their twelve-year-old daughter.⁵⁴ The attorney advised the wife to file a petition under the Domestic Violence Prevention Act (DVPA).⁵⁵

45. *Id.* at 2. California Civil Code § 47(b) makes a publication or broadcast privileged if it is made

[i]n any . . . judicial proceeding . . . [except that an] allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

CAL. CIV. CODE § 47(b) (West 1982 & Supp. 1993).

46. CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, *supra* note 38, at 1.

47. *Silberg v. Anderson*, 50 Cal. 3d 205, 216, 786 P.2d 365, 371, 266 Cal. Rptr. 638, 644 (1990); *Ribas v. Clark*, 38 Cal. 3d 355, 364, 696 P.2d 637, 643, 212 Cal. Rptr. 143, 149 (1985); *Pettitt v. Levy*, 28 Cal. App. 3d 484, 489, 104 Cal. Rptr. 650, 653 (1972).

48. BLACK'S LAW DICTIONARY 958 (6th ed. 1990).

49. *Silberg*, 50 Cal. 3d at 216, 786 P.2d at 371, 266 Cal. Rptr. at 644-45; *Albertson v. Raboff*, 46 Cal. 2d 375, 382, 295 P.2d 405, 410 (1956).

50. CALIFORNIA SENATE COMMITTEE ON JUDICIARY, REPORT ON AB 3546, at 2 (1990).

51. A. 3546, 1989-90 Reg. Sess., at 2 (May 16, 1990) (amended in assembly).

52. CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, *supra* note 38, at 3.

53. 195 Cal. App. 3d 666, 241 Cal. Rptr. 103 (1987).

54. *Id.* at 669-70, 241 Cal. Rptr. at 104-05.

55. *Id.* at 670, 241 Cal. Rptr. at 105; see CAL. CIV. PROC. CODE § 540 (West Supp. 1993). The purposes of the DVPA are

Pursuant to the DVPA, the husband was criminally charged with child abuse,⁵⁶ but the charge was eventually dismissed.⁵⁷ The husband filed a malicious prosecution claim against his wife and won a judgment for \$6.15 million.⁵⁸

Although it approved the bill, the California Senate Committee on the Judiciary addressed a concern that parents would be deterred from making good faith allegations of child abuse by their fear that sanctions would be imposed if the reports could not be proven.⁵⁹ The Senate Committee reports emphasized that before a court could impose sanctions, it would have to determine that the accusation was false and that the accuser knew it to be false at the time it was made.⁶⁰ The Senate Committee appears to have concluded that requiring a showing of knowledge provided sufficient procedural safeguards to protect those who make good faith allegations of child abuse.⁶¹

III. FLAWS IN SECTION 4611

The way in which the California Assembly has constructed section 4611 limits the statute's effectiveness and makes its enforcement unlikely. The statute primarily establishes three requirements: (1) The sanctions amount may not exceed \$1000;⁶² (2) the court must determine that the accusation was false;⁶³ and (3) the court must determine that the accuser knew the accusation was false at the time the accusation was made.⁶⁴

Problems arise with section 4611 in three areas. First, although the statute provides that a party can be fined \$1000 for a false accusation in a child custody proceeding,⁶⁵ the sanctions may not be an effective deterrent against parties who make false accusations.⁶⁶ Second, the statute does not specify whether courts or the falsely accused party should

to prevent the recurrence of acts of violence and sexual abuse against a spouse . . . or a person with whom the respondent has had a child . . . , and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable those persons to seek a resolution of the causes of the violence.

Id.

56. *Tushinsky*, 195 Cal. App. 3d at 670, 241 Cal. Rptr. at 105.

57. *Id.*

58. *Id.*

59. CALIFORNIA SENATE COMMITTEE ON JUDICIARY, *supra* note 50, at 2.

60. *Id.* at 2-3.

61. *See id.*

62. CAL. CIV. CODE § 4611.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See infra* part III.A.

recover the sanctions.⁶⁷ Third, courts cannot impose sanctions unless the complaining party meets certain stringent proof requirements—requirements that virtually prevent effective enforcement of the statute.⁶⁸

A. *The Ineffectiveness of a \$1000 Fine*

A court may impose sanctions of \$1000 plus reasonable attorney's fees if a court determines that the accuser made a deliberately false accusation of child abuse.⁶⁹ The purposes of the sanctions are to deter those who contemplate falsely accusing a parent of child abuse and to punish those who do make such claims.⁷⁰ The author of AB 3546 hoped that the bill would "discourage a parent from making or repeating the false accusation if they know that a *fine will be imposed.*"⁷¹ The statute makes clear that the sanctions are "*in addition to any other remedy provided by law.*"⁷² Thus, they are clearly punitive in nature, and as such, are intended to deter harmful conduct.

However, it is unlikely that the \$1000 fine is sufficient to deter and punish those who make false accusations.⁷³ The Assembly Committee on the Judiciary addressed this issue: "The sanction of \$1,000 is insignificant to a wealthy person, but may be very significant to a poor person."⁷⁴ Neither the Assembly nor the Senate resolved the issue, presumably leaving its resolution to future legislation.⁷⁵ Regardless of the wealth of the individual making the allegation, \$1000 is an insignificant amount when compared to the costs of defending oneself against a child molestation accusation, which may be as high as \$100,000.⁷⁶

Parties engaged in a custody battle have taken extensive and sometimes illegal measures to prevent their opponents from obtaining custody of the child.⁷⁷ *Morgan v. Foretich*⁷⁸ illustrates that sanctions can be an ineffective deterrent if a parent is highly motivated to gain custody of a

67. See *infra* part III.B.

68. See *infra* part III.C.

69. CAL. CIV. CODE § 4611.

70. CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, *supra* note 38, at 2.

71. *Id.* at 3 (emphasis added) (quoting Assemblyman Norman Waters).

72. CAL. CIV. CODE § 4611 (emphasis added).

73. See *infra* notes 74-76 and accompanying text.

74. CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, *supra* note 38, at 4.

75. The issue is presented in the California Assembly Committee on Judiciary Report on AB 3546, but is not mentioned in the California Senate Committee on Judiciary Report. See CALIFORNIA SENATE COMMITTEE ON JUDICIARY, *supra* note 50.

76. See *infra* note 125.

77. See, e.g., *People v. Lortz*, 137 Cal. App. 3d 363, 187 Cal. Rptr. 89 (1982) (noting that father violated custody order by kidnapping baby from mother).

78. 546 A.2d 407 (D.C. 1988), *rev'd on other grounds*, 564 A.2d 1, *cert. denied*, 488 U.S. 1007 (1989).

child. The heavily publicized *Morgan* case⁷⁹ involved a doctor who accused her husband of sexually abusing their daughter.⁸⁰ The court found that the evidence was insufficient to support the wife's allegations.⁸¹ The wife consequently hid her daughter with her parents and went to jail for refusing to reveal the child's whereabouts.⁸²

Although there is no evidence that Elizabeth Morgan's accusations were false, her situation illustrates a potential weakness with section 4611. When a parent is desperate to prevent his or her spouse from gaining custody of their child, it is unlikely that a \$1000 fine, or even a malicious prosecution suit, will prevent that parent from engaging in illegal activity, including falsely accusing the other spouse. Thus, it is unlikely that the \$1000 fine is sufficient to deter false allegations.

Another shortcoming of the statute is that it includes "reasonable attorney's fees and costs incurred in recovering the sanctions," but it does not account for the costs incurred by the accused in trying to defend against a false accusation.⁸³ Often, the accused does not merely defend himself or herself against the false accusation in the family court,⁸⁴ but may have to defend against the charges in a juvenile court⁸⁵ or even a criminal court proceeding.⁸⁶ The California Assembly Committee on the Judiciary recognized this as a potential issue that needed to be addressed, but made no attempt to resolve it.⁸⁷

79. The case received national and international media attention. See, e.g., Susan Baer, *Custody Case Dad Loses Again*, TORONTO STAR, Dec. 7, 1990, at E7; Anne Gearson, *Lives of Two Families Consumed by Custody Fight that Began in 1984*, L.A. TIMES, May 31, 1992, at A14; *Ruling on Custody Ends Bitter Case*, N.Y. TIMES, Dec. 1, 1990, at A1; *Crier & Company: Were They Really Abused* (CNN television broadcast, Mar. 31, 1992). Furthermore, ABC aired a movie on the case in November of 1992 entitled "A Mother's Right: The Elizabeth Morgan Story." *A Mother's Right: The Elizabeth Morgan Story* (ABC television broadcast, Nov. 29, 1992).

80. *Morgan*, 546 A.2d at 408.

81. *Id.* at 409.

82. *Id.* at 409-10.

83. See CAL. CIV. CODE § 4611.

84. See *infra* notes 91-119 and accompanying text.

85. See *infra* note 111 and accompanying text.

86. See *Tushinsky v. Arnold*, 195 Cal. App. 3d 666, 24 Cal. Rptr. 103 (1987). For a discussion on which court should have jurisdiction over the proceedings, see Leonard P. Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201 (1987); and Romer, *supra* note 34, at 674-77.

87. CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, *supra* note 38, at 4.

*B. Determining Whether Courts or the Accused Party
Should Receive the Sanctions*

California Civil Code section 4611 states that a court may impose a maximum of \$1000 in sanctions on a party and that the sanctions may include reasonable attorney's fees.⁸⁸ It is reasonable to infer that the accused party recovers the sanctions because he or she spends a considerable amount of money defending the suit.⁸⁹ There are strong arguments, however, that courts should recover the sanctions.⁹⁰

In California, the process involved in determining whether a child abuse allegation is true is lengthy and presents a great burden on both the accused and the court. When a parent accuses another parent of child abuse during a custody proceeding, the family court personnel⁹¹ or anyone required by California's mandatory reporting law⁹² will probably report the allegation to the child protective agency.⁹³ The child protective agency will make an initial response regarding the report; then an investigating officer⁹⁴ from the child protective agency will decide whether to intervene in the custody proceeding or permit the family court to determine the validity of the allegation.⁹⁵ The custody hearing is suspended until the investigating officer from the child protective agency makes this decision.⁹⁶

The next step in this process depends on whether the accused party contests the abuse allegation.⁹⁷ If the accused party does not contest the abuse allegation, then the child protective agency worker will decide which court determines the custody issue and will issue any protective orders necessary for the child's welfare.⁹⁸ If the accused party contests the accusation, the investigating officer then decides whether family

88. CAL. CIV. CODE § 4611.

89. See *infra* note 125 and accompanying text.

90. See *infra* notes 126-30 and accompanying text.

91. See, e.g., CAL. PENAL CODE § 11165.7(c) (West 1992 & Supp. 1993).

92. See *supra* note 20.

93. CAL. PENAL CODE § 11166.5(a) (West 1992 & Supp. 1993). The family court has the discretion to report the child abuse allegation. Thoennes & Pearson, *supra* note 17, at 5. "[D]iscretion centers around determining whether . . . a given case entails 'abuse' or merely poor judgment in behavior, and in establishing whether there is 'reasonable suspicion' of sexual abuse." *Id.* at 5-6. Child protection services are confident that the discretion the family court exercises in deciding whether to report the allegation does not pose any risk to the child. *Id.* at 6.

94. CAL. WELF. & INST. CODE §§ 305-306, 309 (West 1984 & Supp. 1993).

95. Edwards, *supra* note 86, at 238.

96. Thoennes & Pearson, *supra* note 17, at 5.

97. Edwards, *supra* note 86, at 238.

98. *Id.*

court or juvenile court is the appropriate forum in which to determine whether the allegation is true.⁹⁹

When an abuse allegation is contested, the investigative officer considers several factors to decide whether the juvenile or the family court should determine the abuse issue.¹⁰⁰ The first factor is the type of allegation made.¹⁰¹ For example, an accusation of sexual abuse may be more difficult to prove than an accusation of physical abuse.¹⁰² "A sexual abuse allegation involving a young child may require more complicated evidentiary, procedural and investigative issues than a physical abuse allegation."¹⁰³ Other considerations include: the strength of the accusation,¹⁰⁴ the timing of the accusation during the family court proceedings,¹⁰⁵ whether the "superior investigative tools of the juvenile court investigator" are necessary to protect the child,¹⁰⁶ the attitudes of the accusing and accused parents towards the allegation,¹⁰⁷ whether the investigating officer believes that the family court can adequately protect the child,¹⁰⁸ and the nonabusive parent's ability to protect the child.¹⁰⁹ Finally, during the course of the investigation of the accusation, the investigator should be aware that "unless a contested case containing sexual abuse allegations is very carefully handled, it is likely to destroy any chance of a significant relationship between the child and the alleged perpetrator."¹¹⁰

After the investigative officer considers these factors, he or she has several choices. The officer may initiate a juvenile court proceeding, which "often suspends the custody proceeding in family court until the juvenile court petition is heard."¹¹¹ Alternatively, the officer may reach an informal supervision agreement with the parents,¹¹² but if the accused

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Loveless, *supra* note 31, at 49.

111. Edwards, *supra* note 86, at 239. *But see In re Brendan P.*, 184 Cal. App. 3d 910, 230 Cal. Rptr. 720 (1986) (holding that juvenile court lacked jurisdiction over superior court in child custody case); *In re William T.*, 172 Cal. App. 3d 790, 218 Cal. Rptr. 420 (1985) (rejecting rule that juvenile court dependency cases have precedence over and supersede domestic relations actions).

112. *See* CAL. WELF. & INST. CODE § 300 (West 1984); Edwards, *supra* note 86, at 239.

party denies that the abuse occurred, it is unlikely that the parents will reach agreement.¹¹³ The investigative officer may also wait until the family court proceeding has been resolved before intervening.¹¹⁴ Finally, the investigative officer may close the investigation.¹¹⁵

In rare cases, the accused party will be criminally charged with child abuse.¹¹⁶ In this scenario, the California Department of Justice determines whether formal action against the accused is necessary.¹¹⁷ If the Department of Justice determines that the report is substantiated, then it will charge the accused.¹¹⁸ Consequently, the accused will be thoroughly investigated by the proper authorities and will, at least temporarily, lose custody of the child.¹¹⁹

For the accused, the investigation is an emotionally draining experience.¹²⁰ Counselors from the Department of Social Services interview the accused to determine whether the accused poses any danger to the child.¹²¹ Although the investigative officer should assume neither the guilt nor the innocence of the accused,¹²² falsely accused parties have

113. Edwards, *supra* note 86, at 239 n.237.

114. *Id.* at 239.

115. *Id.*

116. See *Tushinsky v. Arnold*, 195 Cal. App. 3d 666, 24 Cal. Rptr. 103 (1984) (stating that wife criminally charged her husband with sexually abusing their daughter).

117. CAL. PENAL CODE § 11169 (West 1992 & Supp. 1993).

118. *Id.* But see David P.H. Jones & Ann Seig, *Child Sexual Abuse Allegations in Custody or Visitation Disputes*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES: A RESOURCE BOOK FOR JUDGES AND COURT PERSONNEL*, *supra* note 17, at 22, 29 (finding that no criminal charges were filed against accused in study of 20 cases of child abuse allegations in custody disputes). However, "these small scale studies are of limited analytical value. The cases reported are often used for clinical rather than for research purposes." Romer, *supra* note 34, at 651.

119. Jones & Seig, *supra* note 118, at 29.

120. See *Child Abuse and Neglect in America: The Problem and the Response; Hearing Before the Select Committee on Children, Youth, and Families: House of Representatives*, 100th Cong., 1st Sess. 33 (1987) [hereinafter *Hearing*] (statement of Douglas J. Besharov, resident scholar, American Enterprise Institute) ("[D]etermination that a report [of child abuse] is unfounded can only be made after an unavoidably traumatic investigation . . ."); see also Steven R. Churm, *Abused; Mother Whose Children Were Taken from Her Says Her Family Is a Victim of "The Red Scare of the 80's,"* L.A. TIMES (Long Beach ed.), Sept. 22, 1985, pt. IX, at 1, 4 (detailing that mother's life "unraveled" after investigation began).

121. Edwards, *supra* note 86, at 211.

122. According to a department spokeswoman, the Department of Social Services does not take a position on the guilt or innocence of the parent until all the facts have been gathered. Abrahamson, *supra* note 30, at B1. However, a falsely accused father said that "social service investigators seemed more interested in proving his guilt than finding truth." *Id.*; see also Churm, *supra* note 120, at 1 ("Suspected offenders often are presumed guilty until they can prove their innocence.").

stated that they are made to feel guilty, often having to explain every touch or contact they have had with the child.¹²³

This time-consuming and expensive process gives rise to arguments both for allowing the accused and for allowing courts to recover the sanctions imposed on the accuser. A falsely accused individual suffers a great emotional toll,¹²⁴ as well as a financial burden.¹²⁵ Courts, too, must spend considerable time and money trying the matter, which often includes the original custody proceedings, an investigation of the child abuse charge, a civil¹²⁶ or criminal proceeding¹²⁷ against the accused, a civil suit for malicious prosecution, and the imposition of sanctions.¹²⁸ Both courts and the accused, then, have sufficient justification for recovering sanctions.

However, a determinative factor in deciding who should be awarded the sanctions is that sanctions are not the exclusive remedy available to the falsely accused.¹²⁹ The accused can sue the accuser for malicious prosecution.¹³⁰ A lawsuit for malicious prosecution may result in recovery for the accused that can far exceed the \$1000 in sanctions provided by section 4611.¹³¹ If the accused prevails in a malicious prosecution suit and also recovers the sanctions, he or she would actually receive a double

123. Abrahamson, *supra* note 30, at B1.

124. *See supra* note 120 and accompanying text.

125. "Falsely accused families are totally devastated, financially and emotionally Parents may lose job, home, savings, incur staggering debt and the family is probably ruined for life." *Conference on the Preservation of the Family: Summary of the 1988 Public Hearings on the Family*, California State Assembly, at 44 (1988) (testimony of Stephen Konnoff); *see also* Churm, *supra* note 120 (reporting that mother wrongfully accused of child abuse estimated that costs of recovering children, clearing name and paying medical bills exceeded \$15,000); *Falsely Accused of Child Abuse, Victims Demand Legal Reform*, CHI. TRIB., Jan. 23, 1987, § 5 (Tempo), at 2 (ex-wife's false accusation that ex-husband molested daughter cost husband \$100,000 in legal fees and lost wages); *ABC World News Tonight: American Agenda* (ABC television broadcast, May 9, 1991) (reporting that daughter falsely accused father of sexual abuse and father spent \$40,000 to clear name).

126. *See supra* notes 111, 114 and accompanying text.

127. *See supra* notes 116-19 and accompanying text.

128. *See supra* note 3.

129. *See supra* note 51 and accompanying text.

130. The absolute immunity from liability rule, set forth by California Civil Code § 47(2), now codified at CAL. CIV. CODE § 47(b) (West 1982 & Supp. 1993), for any communication and all torts, extends to all parties and witnesses. CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, REPORT ON AB 3546, *supra* note 38, at 1. The only exception to this absolute immunity from liability is malicious prosecution. *Id.* "The principle purpose of [former] section 47(2) is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Silberg v. Anderson*, 50 Cal. 3d 205, 213, 786 P.2d 365, 369, 266 Cal. Rptr. 638, 642 (1990).

131. *See Tushinsky v. Arnold*, 195 Cal. App. 3d 666, 669-70, 241 Cal. Rptr. 103, 105 (1987) (upholding decision that husband could recover \$6.15 million from his wife for malicious prosecution).

remedy for the false accusation. Courts, on the other hand, do not have any remedy against the accused for wasting time and taxpayers' money other than the sanctions.

A problem with this argument is that it assumes that the falsely accused will take action against the accuser. The falsely accused party usually is not interested in initiating another legal proceeding against the accuser once the family law proceeding has been resolved.¹³² The emotional toll of the custody proceeding, coupled with a malicious prosecution suit, can have a traumatic emotional effect on the family, especially on the accused¹³³ and on the child.¹³⁴ By the time the accused proves that the accusation is false, the accused is often too drained to even consider filing another legal action.¹³⁵ In this instance, the accused should be able to recover compensation for the suffering that he or she has experienced as a result of the false accusation. However, if the legislature truly wishes to deter people from making false accusations, it must strongly urge falsely accused persons to take legal action against their accusers.

Ultimately, the family court should recover the sanctions for three reasons. First, a false accusation of child abuse unduly burdens the family court in terms of both time and money.¹³⁶ Second, the falsely accused has other alternatives to recovering damages for false accusation,¹³⁷ while courts have no other option. Third, and most importantly, the purpose of section 4611 is better served by allowing courts to receive the sanctions. If courts recover the section 4611 sanctions, then falsely accused parties are encouraged to seek other civil remedies, which can be quite substantial and are therefore a more effective deterrent than the \$1000 sanctions that section 4611 may impose.

132. In a study of 20 child custody disputes, researchers found that in three disputes involving false accusations by one parent against the other, the three mothers who made false accusations were not sued by the falsely accused ex-spouse. Jones & Seig, *supra* note 118, at 23. An article in the *Los Angeles Times* described how a falsely accused parent had no interest in bringing an action against his ex-wife, who admitted that she falsely accused her husband of child abuse in order to gain custody of her daughter. Abrahamson, *supra* note 30, at B1.

133. *See supra* note 120 and accompanying text.

134. A false accusation of child abuse can be particularly traumatic for the child. One mother described how her child, who was temporarily taken from her custody after she was wrongfully accused of child abuse, hid under his bed for two hours when he saw police cars pass by the front of his house because he was afraid of being taken away from his mother again. Churm, *supra* note 120, pt. IX, at 4.

135. *See supra* notes 120, 125 and accompanying text.

136. *See supra* notes 91-123 and accompanying text.

137. *See supra* notes 129-31 and accompanying text.

C. Courts Must Determine the Falsity of the Accusation
and Knowledge of Falsity

False allegations of child abuse are also problematic because it is difficult to prove with certainty that a given accusation is "true" or "false."¹³⁸ Child abuse, especially sexual abuse, is very difficult to prove.¹³⁹ "All but the most flagrant cases of sexual abuse are difficult to validate."¹⁴⁰ The testimony of the victims, often small children, is problematic.¹⁴¹ Parents on either side of a custody battle usually can call expert witnesses to verify that the child either is or is not being molested.¹⁴² In other scenarios, the party making the false accusation may be delusional or mentally ill.¹⁴³ Furthermore, even if there is substantial evidence that a child has been sexually abused, in some cases it is all but impossible to identify the perpetrator.¹⁴⁴ The difficulty of proving sexual abuse undermines the ability of family or juvenile courts to determine by a preponderance of the evidence¹⁴⁵ the veracity of an accusation.

The statute requires that before sanctions may be imposed, a court must "determine that [the] accusation of child abuse or neglect made during a child custody proceeding under this title was false and the person making the accusation knew it to be false at the time the accusation was made."¹⁴⁶ Before a court can determine that a statement is "false"

138. See Loveless, *supra* note 31, at 58.

139. John E.B. Myers, *supra* note 39, at 6; Thoennes & Pearson, *supra* note 17, at 17.

140. Thoennes & Pearson, *supra* note 17, at 17.

141. One problem with having a child testify is that there are situations in which the child, after repeated questioning by a therapist or parent, agrees that the event happened and will testify to that effect even though the molestation or abuse never occurred. Sink, *supra* note 35, at 43. This occurs because the "child is young and does not understand the implications of the questions being asked of them, is acting out of anger at the accused parent, or out of a need to be compliant with the questioning parent or interviewer." *Id.*

Another problem is the reluctance of children who have been molested or abused to testify about the event in court. See Berliner, *supra* note 35, at 57. However, John E.B. Myers has written that the perceived problems with child witnesses can be overcome, and that children can be very effective witnesses. Myers, *supra* note 39, at 7-10.

142. Romer, *supra* note 34, at 673; see also Edwards, *supra* note 86, at 221 ("In family court, absent some court order, there is nothing to prevent each parent from securing one or more evaluations of the child.").

143. A small study conducted by David P.H. Jones and Ann Seig found that the emotional disturbance of the accuser was a significant factor in the rate of fictitious reports of child abuse. Jones & Seig, *supra* note 118, at 27. Some researchers have found that mental illness of the accuser accounts for a higher percentage of false accusations of child abuse during custody disputes. See *id.* (finding in study of 20 cases of accusations of child abuse during custody proceedings that where accusation was fictitious, accuser had emotional problems).

144. Myers, *supra* note 39, at 36.

145. See CAL. EVID. CODE § 115 (West 1966 & Supp. 1993). "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." *Id.*

146. CAL. CIV. CODE § 4611.

under section 4611, it must thoroughly investigate the allegation.¹⁴⁷ Social scientists and psychologists have suggested various methods of conducting an investigation.¹⁴⁸ One study suggests that the family's complete history, including alcohol use, sexual history, relationship dynamics and abuse history, should be investigated.¹⁴⁹ A more common evaluation method is to interview the child.¹⁵⁰ The emotional disturbance of the perpetrator, the timing of the allegation, the physical evidence and the vindictiveness of the accusing adult all are relevant factors in determining the veracity of abuse charges.¹⁵¹ In any event, the accused and the accused's family will be subject to intense scrutiny by the courts and social services.¹⁵²

If an accusation is not supported by sufficient evidence, a court is more likely to define the allegation as "unfounded" or "unsubstantiated" than as "false."¹⁵³ The California Penal Code defines an unfounded report of child abuse as a report "determined by a child protective agency to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse."¹⁵⁴ An unfounded report is, therefore, not necessarily a false report.

A court likewise cannot impose sanctions for an unsubstantiated report of abuse. An unsubstantiated report is not an unfounded report, but is one "in which the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . has oc-

147. See Sink, *supra* note 35, at 45; see also *Hearing*, *supra* note 120, at 33 (statement of Douglas J. Besharov) ("[T]he determination that a report is unfounded can only be made after an unavoidably traumatic investigation that is, inherently, a breach of parental and family privacy.").

148. See *infra* notes 149-51 and accompanying text.

149. Thoennes & Pearson, *supra* note 17, at 11.

150. Jones & Seig, *supra* note 118, at 23-25; see also Berliner, *supra* note 35, at 56 (suggesting that child's statement may be most important or only evidence of abuse).

151. Jones & Seig, *supra* note 118, at 27-28.

152. See *Hearing*, *supra* note 120, at 33 (statement of Douglas J. Besharov) (stating that even if report is unfounded, case workers must inquire into intimate personal and family matters and may question friends, relatives, neighbors, school teachers, daycare personnel, doctors, clergy and others).

153. See *Morgan v. Foretich*, 546 A.2d 407 (D.C. 1988), *rev'd on other grounds*, 564 A.2d 1, *cert. denied*, 488 U.S. 1007 (1989), in which the court determined that the report of child abuse simply was not supported by the evidence. *Id.* at 410-11. No cases have been reported in California in which a court has determined the reports to be "false." See *In re Marriage of Lewin*, 186 Cal. App. 3d 1482, 1489 n.4, 1490, 231 Cal. Rptr. 433, 436 n.4, 437 (1986) (stating that wife's accusations of child abuse against husband were "bizarre" and "unfounded").

154. CAL. PENAL CODE § 11165.12(a) (West 1992) (emphasis added). Under § 11165.12(a), the court could conclude that the facts alleged by the accuser are true, but do not constitute child abuse. For example, a party could accuse the other parent of beating the child, but the courts can determine that the child was merely disciplined and not abused.

curred.”¹⁵⁵ Virtually the only instances in which a court can determine with certainty that the charge is false are if the parent admits that the accusation was false,¹⁵⁶ or if there was no evidence to support the accusation.¹⁵⁷

In addition to finding that a statement was false, a court must also find that the accuser *knew* the statement was false at the time the accusation was made.¹⁵⁸ This determination is difficult for a court to make. As with determining the falsity of the statement, the only time a court could be certain that the accuser knew the statement was false is if the accuser admits he or she was lying.¹⁵⁹ Furthermore, a mentally ill parent who has an impaired perception of reality can make a false accusation.¹⁶⁰ In that case, the parent may not have the capacity to *know* the falsity of the statement, and sanctions, therefore, would be inappropriate because the accusation would not be malicious or intentional.¹⁶¹

With the exception of those instances in which an accuser admits that the accusation was deliberately fictitious, courts will infrequently find both that the accusation is false and that the accuser knew it was false. Thus section 4611 will not be frequently enforced. To determine the falsity of an accusation, at the very minimum, will require some sort of investigation,¹⁶² or a court ruling that the person lied about the child abuse allegation.¹⁶³ In the latter case, the accused could obtain a judgment from another court that the accusation was false by initiating a malicious prosecution suit against the accuser.¹⁶⁴ In *Tushinsky v. Arnold*,¹⁶⁵ the falsely accused father alleged that the accuser, his wife, did not “honestly, reasonably, and in good faith believe [the accused] to be

155. *Id.* § 11165.12(c).

156. In some instances, a parent does admit lying about an accusation. An article in the *Los Angeles Times* described how a wife admitted that she had falsely accused her husband of child abuse in order to gain custody of their daughter. Abrahamson, *supra* note 30. The wife admitted she lied after Social Services had already initiated an investigation of her husband. *Id.*

157. However, an accusation would more likely be characterized as “unsubstantiated” than as “false” if no evidence existed to support the accusation. See *supra* note 155 and accompanying text for a definition of “unsubstantiated.”

158. CAL. CIV. CODE § 4611 (emphasis added).

159. See *supra* note 156 and accompanying text.

160. See Jones & Seig, *supra* note 118, at 27 (describing three situations in which parents making fictitious allegations of child abuse were emotionally disturbed).

161. See *supra* note 118 and accompanying text.

162. See *supra* notes 94-96 and accompanying text.

163. See *supra* note 156 and accompanying text.

164. See *Tushinsky v. Arnold*, 195 Cal. App. 3d 666, 241 Cal. Rptr. 103 (1987).

165. 195 Cal. App. 3d 666, 241 Cal. Rptr. 103 (1987).

guilty of the crimes charged, and *knew the charges to be false.*'¹⁶⁶ A malicious prosecution suit, therefore, can satisfy the requirements of section 4611.¹⁶⁷

Regardless of the outcome, any custody proceeding involving allegations of child abuse will most likely be lengthy and complex. In many circumstances, at least two proceedings will take place before a court may exercise its discretion to impose sanctions under section 4611: (1) the custody proceeding at which the accusation is made; and (2) the civil¹⁶⁸ or criminal¹⁶⁹ proceeding addressing the charge leveled at the accused. Even if these proceedings take place, a court may be reluctant to conclude that an allegation was both false and known by the accuser to be false¹⁷⁰ because there are so many uncertainties in child molestation cases.

IV. INCREASING THE EFFECTIVENESS OF SECTION 4611

Section 4611 must be made more effective so that it deters parties from making false accusations of child abuse during child custody proceedings. First, courts should have discretion to determine the appropriate amount of sanctions for a parent who has falsely accused another parent of child abuse.¹⁷¹ Second, the purpose of the statute¹⁷² will be better served by allowing courts, rather than the falsely accused parent, to receive the sanctions.¹⁷³ Third, California could resolve some ambiguity in section 4611 by providing a definition of "false" in the statute.¹⁷⁴ Fourth, the California Legislature should provide criminal penalties, in addition to civil sanctions, for false accusations of child abuse to better deter false allegations.¹⁷⁵ Finally, as an alternative to either criminal or civil penalties, California courts could consider the false accusation as a factor in their determination of which parent is better suited to receive

166. *Id.* at 670, 241 Cal. Rptr. at 105 (emphasis added) (quoting accused's malicious prosecution suit against accuser).

167. *See* CAL. CIV. CODE § 4611.

168. *See supra* note 111 and accompanying text.

169. *See supra* notes 116-19 and accompanying text.

170. *See In re Marriage of Lewin*, 186 Cal. App. 3d 1482, 1489 n.4, 1490, 231 Cal. Rptr. 433, 436 n.4, 437 (1986) (characterizing accusations as "unfounded" and "outrageous" rather than "false").

171. *See infra* part IV.A.

172. *See supra* notes 43-44 and accompanying text.

173. *See infra* part IV.B.

174. *See infra* part IV.C.

175. *See infra* part IV.D.

custody of the child.¹⁷⁶ Any of these modifications would make section 4611 more effective.

A. Courts Should Have Greater Discretion to Determine the Amount of Sanctions

The effectiveness of section 4611 depends upon its ability to deter parents from making false allegations of child abuse. The statute should allow courts the discretion to issue sanctions of more than \$1000. Permitting courts to issue sanctions greater than \$1000 would have a greater deterrent effect.¹⁷⁷

The statute could also permit courts to award punitive damages to the falsely accused. Some provisions within the California Civil Code, in areas other than family law, do permit punitive damages.¹⁷⁸ The purpose of punitive damages is to deter, and punitive damages usually allow courts to take into account the defendant's wealth when determining the sanctions amount.¹⁷⁹

Courts should base the amount of sanctions, or whether to impose sanctions, on the circumstances surrounding the allegation. Section 4611 only provides that courts have the discretion to impose sanctions if a false accusation is made and the accuser knew the accusation to be false.¹⁸⁰ The statute does not indicate "appropriate factors" that courts should consider when determining the sanctions amount.¹⁸¹ For exam-

176. See *infra* part IV.E.

177. See *supra* notes 43-44 and accompanying text.

178. E.g., CAL. CIV. CODE § 1942.5 (West 1985) (providing that lessee can recover punitive damages from lessor for retaliatory action under certain circumstances).

179. Section 3294(a) of the California Civil Code provides that

[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

CAL. CIV. CODE § 3294(a) (West 1970 & Supp. 1993). In their treatise on punitive damages, Linda Schlueter and Kenneth Redden stated that the purpose of awarding punitive damages is to punish and deter, but not to force the wrongdoer into bankruptcy. LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 4.4(A)(5)(d)(1), at 122-23 (2d ed. 1989). This "punish and deter" policy is consistent with the policy that the California Assembly wished to promote by passing § 4611. CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, *supra* note 38, at 3.

180. See CAL. CIV. CODE § 4611.

181. See *id.* For example, § 3345 of the California Civil Code provides:

- (a) This section shall apply only in actions brought by, on behalf of, or for the benefit of senior citizens or disabled persons . . . to redress unfair or deceptive acts or practices or unfair methods of competition.
- (b) Whenever a trier of fact is authorized by a statute to impose either a fine, or a civil penalty . . . or any other remedy the purpose or effect of which is to punish or deter, and the amount of the fine, penalty, or other remedy is *subject to the*

ple, a person who knowingly makes a false accusation could be sanctioned by a court under section 4611, but the accuser may be mentally ill.¹⁸² This mental illness is an "appropriate factor" that courts should consider when imposing sanctions. Similarly, a court should be able to consider the motivation of an accuser to lie.

In addition, the "reasonable attorney fees incurred"¹⁸³ should extend to all legal proceedings stemming from the false accusation of child abuse. The statute becomes a more effective deterrent not only because the false accuser has to pay the sanctions, but because he or she must also pay the attorney's fees the accused expended as a result of the false allegations. This helps make the accused whole. Because several proceedings, including a criminal proceeding¹⁸⁴ or a malicious prosecution suit,¹⁸⁵ may be involved, attorney's fees can be quite costly.¹⁸⁶ California law currently awards attorney's fees for custody proceedings.¹⁸⁷ Therefore, allowing the prevailing party in a child custody proceeding who has been falsely accused of child abuse to recover attorney's fees is not inconsistent with California law. By including attorney's fees, the size of sanctions is increased, and the sanctions therefore become a better deterrent.

Courts need flexibility in imposing sanctions because parties in custody proceedings make false accusations for different reasons. By increasing the limit on sanctions above \$1000, courts would have a greater parameter within which to act. Courts would then have flexibility, which would give them wide discretion to determine the appropriate sanctions for every unique situation.

B. Courts Should Receive the Sanctions

Although arguments exist for allowing the injured party to recover the sanctions,¹⁸⁸ the underlying purpose of section 4611 would be best served if courts were allowed to recover the sanctions. By making sanctions payable only to courts, the falsely accused is encouraged to seek

trier of fact's discretion, the trier of fact shall consider all . . . appropriate factors, in determining the amount of fine, civil penalty or other penalty, or other remedy to impose.

CAL. CIV. CODE § 3345 (West Supp. 1993) (emphasis added).

182. See *supra* note 160 and accompanying text.

183. CAL. CIV. CODE § 4611.

184. See *supra* notes 116-19 and accompanying text.

185. See *supra* notes 130-31 and accompanying text.

186. See *supra* note 125.

187. See CAL. CIV. CODE § 4370 (West 1983 & Supp. 1991) (to be recodified at CAL. FAM. CODE § 270, effective Jan. 1, 1994) (providing that award of attorney's fees for custody proceedings are based on respective party's need and ability to pay).

188. See *supra* notes 124-28 and accompanying text.

redress through a civil lawsuit,¹⁸⁹ otherwise the accused will not recover anything for the false accusation. Awarding courts the sanctions further deters false accusations because an accuser might be forced to pay sanctions to a court as well as damages to the accused.¹⁹⁰

In its report on section 4611, the Assembly Committee on the Judiciary referred to section 47(2) of the California Civil Code which, according to the Assembly Committee, grants "absolute immunity from liability for any communication and all torts *except malicious prosecution* to all parties and witnesses."¹⁹¹ The Assembly amended section 4611 to include the language that "this remedy is *in addition to any other remedy provided by law.*"¹⁹² The inclusion of this language indicates that the Assembly desired to encourage parties to seek civil redress, such as malicious prosecution, when they have been falsely accused of child abuse in a custody proceeding.

A falsely accused party should be encouraged to seek damages from the accuser in a civil suit so that the public will recognize that individuals who make false accusations may be subject to severe penalties. Putting the public on notice may deter future false allegations of child abuse. Unfortunately, because parties often are so drained from the legal proceedings involved with custody proceedings and investigation of the allegations, one who has been falsely accused of child abuse may not wish to litigate the matter further.¹⁹³ However, if a falsely accused party cannot recover money under section 4611, the parent could consider seeking other civil remedies. Assuming that the investigation proves the accusation is false, the parent can seek redress in a malicious prosecution proceeding that could result in an award of over one million dollars.¹⁹⁴ Encouraging further litigation may not be desirable to either the parties involved or the public, but making these awards available does convey the message to the public that California courts will not tolerate false accusations of child abuse.

189. See *supra* notes 129-31 for a discussion of malicious prosecution suits. Although the party may need to engage in more litigation in order to recover damages, malicious prosecution is an alternative.

190. See *supra* notes 136-37 and accompanying text.

191. CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, *supra* note 38, at 2 (emphasis added). Former section 47(2) of the California Civil Code is now codified as CAL. CIV. CODE § 47(b).

192. CAL. CIV. CODE § 4611 (emphasis added).

193. See Abrahamson, *supra* note 30, at B12.

194. See, e.g., Tushinsky v. Arnold, 195 Cal. App. 3d 666, 670, 241 Cal. Rptr. 103, 105 (1987).

C. *The California Legislature Should Provide a Definition of "False" in Section 4611*

If section 4611 provided a definition of the word "false," courts would find it easier to enforce the statute. The California Penal Code already defines unfounded¹⁹⁵ and unsubstantiated¹⁹⁶ reports of child abuse, but does not define a false report. Similarly, section 4611 refers to false accusations of child abuse;¹⁹⁷ however, the meaning of false for the purposes of the statute is unclear.

The statute should define false so as to eliminate the necessity to find both that the accusation was false and that the accuser knew it to be false at the time he or she made the accusation. The statute should provide, for example, that *in custody proceedings*, a false report of child abuse is a fictitious accusation made with the intent to gain custody of the child.¹⁹⁸ This would allow courts to infer that in a custody proceeding the intent of the accuser is to gain custody of the child. Thus courts would only have to determine whether the allegation is fictitious. This definition addresses the concerns of commentators that accusations made during child custody proceedings should immediately be suspect because of the potential to abuse the judicial system.¹⁹⁹ Determining that a report is fictitious, however, is still a burdensome task for courts, but it provides a necessary procedural safeguard for those persons making good faith allegations of child abuse.

If the statute went further by allowing courts to impose sanctions for unfounded reports of child abuse,²⁰⁰ it would be more likely that courts would impose sanctions. However, such a definition could deter people from making good faith allegations of child abuse.²⁰¹ Although false reports are included within the California Penal Code's definition of

195. See CAL. PENAL CODE § 11165.12(a), and *supra* note 155 and accompanying text for a definition of unfounded.

196. See CAL. PENAL CODE § 11165.12(c), and *supra* note 156 and accompanying text for a definition of unsubstantiated.

197. CAL. CIV. CODE § 4611.

198. This is similar to a definition that Frances Sink uses to distinguish between unfounded and false reports of child abuse. See Sink, *supra* note 35, at 38-39.

199. See Thoennes & Pearson, *supra* note 17, at 12; see also Margaret C. Fisk, *Abuse: The New Weapon*, NAT'L L.J., July 17, 1989, at 1, 20 (stating that one characteristic of false accusations is that they are brought up after custody proceeding has started). *But see* Myers, *supra* note 39, at 24 ("[T]he fact that allegations of abuse arise for the first time when a family breaks up does not mean the allegations are false. Mental health professionals confirm that many children first disclose or experience sexual abuse when their parents divorce.").

200. See *supra* note 195.

201. When § 4611 was passed, some legislators expressed concern that even with a high standard—a requirement that the court determine that the accusation was false and known to be false at the time the statement was made—the statute would deter parties from making

unfounded reports, the definition also encompasses situations that do not involve deliberately false accusations.²⁰² Changing the standard from false to unfounded would give courts too much discretion to impose sanctions, and parties who make good faith allegations of abuse that are later proven unfounded would be punished. While the law should deter false accusations of child abuse during custody proceedings, it should not do so at the expense of parties who make good faith allegations.

D. California Should Adopt Criminal Penalties Similar to Those Adopted by Other States

The effectiveness of section 4611 depends on its capacity to deter. Section 4611 would be a better deterrent if it imposed criminal liability on persons who make false accusations of child abuse during custody proceedings. While the California Penal Code does address false accusations of child abuse,²⁰³ it only provides for an award of damages; the statute does not mention criminal penalties.²⁰⁴

In contrast to California law, several other states impose criminal penalties for false accusations of child abuse.²⁰⁵ Several states provide that false reports of child abuse in any situation will result in a misdemeanor conviction.²⁰⁶ Tennessee law makes a false accusation of child abuse a felony.²⁰⁷ Generally, these states do not distinguish between false accusations of child abuse in custody proceedings and false allegations of child abuse in other cases. However, some states do. Kansas law

good faith allegations of child abuse. CALIFORNIA SENATE COMMITTEE ON JUDICIARY, *supra* note 50, at 2-3.

202. *See supra* note 154 and accompanying text.

203. "[A]ny such person who makes a report of child abuse known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused." CAL. PENAL CODE § 11172(a) (West 1992 & Supp. 1993).

204. *See id.*

205. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3620.01 (1989 & Supp. 1992); COLO. REV. STAT. § 19-3-304(3.5), (4) (Supp. 1992); FLA. STAT. ANN. § 415.513(4) (West 1986 & Supp. 1992); IOWA CODE ANN. § 232.75 (West 1985 & Supp. 1992); KAN. STAT. ANN. § 38-1309(d) (1986); MICH. STAT. ANN. § 25.248(13)(5) (Callaghan 1992); MO. ANN. STAT. § 210.165 (Vernon 1983 & Supp. 1992); OHIO REV. CODE ANN. § 2921.14 (Anderson Supp. 1991); TENN. CODE ANN. § 37-1-413 (1991); TEX. FAM. CODE ANN. § 34.031(a) (West 1986 & Supp. 1992); WASH. REV. CODE ANN. § 26.44.060(4) (West 1986 & Supp. 1992).

206. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3620.01 (class three misdemeanor); COLO. REV. STAT. § 19-3-304 (class three misdemeanor); FLA. STAT. ANN. § 415.513(4) (second degree misdemeanor); IOWA CODE ANN. § 232.75 (simple misdemeanor); MICH. STAT. ANN. § 25.248(13)(5) (misdemeanor); MO. ANN. STAT. § 210.165 (class A misdemeanor); OHIO REV. CODE ANN. § 2921.14 (first degree misdemeanor); TEX. FAM. CODE § 34.031 (class B misdemeanor); WASH. REV. CODE ANN. § 26.44.060(4) (misdemeanor).

207. *See* TENN. CODE ANN. § 37-1-413 (class E felony).

specifically provides that a false accusation of child abuse during a custody proceeding is a misdemeanor.²⁰⁸

California should similarly provide criminal penalties for false accusations of child abuse during custody proceedings. Criminal penalties would be a more effective deterrent than sanctions because criminal penalties have an equal impact, regardless of the accuser's economic class level. Furthermore, sanctions do not have the lasting impact that a criminal record has on a false accuser.

California should amend its Penal Code to make a false report of child abuse a misdemeanor.²⁰⁹ California should not make false reports of child abuse a felony because of the possibility that this would deter parties from making good faith allegations. Even if a false report of child abuse is a misdemeanor rather than a felony, a potential problem with any criminal statute is that criminal penalties might not be imposed often because courts would have to determine that an accusation is false beyond a reasonable doubt.²¹⁰ Given the added difficulty of proving sexual abuse allegations, the prosecution may be unlikely to convict anyone under this penal provision.

However, the deterrent effect of section 4611 depends on the *threat* of punishment rather than the actual imposition of penalties. A statute imposing criminal liability for making a false report would enhance the threatened penalties, and thus be consistent with the purpose of section 4611.²¹¹ The weaknesses of section 4611 might best be remedied, therefore, by amending California's Penal Code to make false accusations of child abuse during custody proceedings a criminal offense in addition to enhancing the sanctions in section 4611. By having both a criminal and a civil statute, California would increase the possible penalties for making false allegations of child abuse. This would enhance the deterrent impact of section 4611. At the same time, it would ensure that if the prosecution were unable to meet the criminal burden of proof, courts could use the civil statute. Thus, if a prosecutor could not prove the allegation false beyond a reasonable doubt,²¹² courts might still be able to find the allegation false by a preponderance of the evidence²¹³ and impose sanctions.

208. See KAN. STAT. ANN. § 38-1309(d) (class C misdemeanor).

209. The California Penal Code only provides that the false accuser can be held liable for civil damages. CAL. PENAL CODE § 11172 (West 1992 & Supp. 1993).

210. See CAL. PENAL CODE § 1096 (West 1985 & Supp. 1993) (providing that state has burden of proving criminal defendant guilty beyond reasonable doubt).

211. See *supra* notes 43-44 and accompanying text.

212. See *supra* note 210.

213. See *supra* note 145.

E. As an Alternative to Criminal Penalties, the California Legislature Should Adopt the Lewin Approach

To deter false accusations of child abuse, California should consider adopting the approach of *In re Marriage of Lewin*.²¹⁴ In that case, the trial court decided that it was in the best interest of the child for the father to have custody.²¹⁵ The trial court based its determination in part on the fact that the mother "made numerous bizarre, outrageous, and totally unfounded accusations against [the father], which were intended and designed to cause him embarrassment."²¹⁶ In this way, the mother's unfounded allegations of child abuse worked against her in the custody proceeding.

Instead of imposing sanctions on the false accuser, the policies that section 4611 is designed to enforce might be better served if courts used the false accusation in its determination of which parent should gain custody of the child. Texas law follows this approach.²¹⁷ According to the Texas Family Code, "[e]vidence of a false report [of child abuse] shall be admissible in any suit between the parents involving terms of conservatorship."²¹⁸ Although Texas law has a much less rigid definition of a false report than California should adopt,²¹⁹ the California Legislature should consider adopting Texas' practice of including false accusations of child abuse as a factor in the custody proceeding.

If the California Legislature incorporated the *Lewin* approach into the Civil Code, parents would likely give serious consideration before making a false accusation of child abuse. Permanent loss of custody for making the false accusation would perhaps be the greatest deterrent. To many parties, this "cost" would be much greater than either sanctions or a criminal record. However, there is a danger that parents who have a good faith belief that the child is being abused may be deterred from making the allegation if permanent loss is a possible punishment. There-

214. 186 Cal. App. 3d 1482, 231 Cal. Rptr. 433 (1986).

215. *Id.* at 1489-90 n.4, 231 Cal. Rptr. at 437 n.4.

216. *Id.* at 1489 n.4, 231 Cal. Rptr. at 437 n.4.

217. TEX. FAM. CODE ANN. § 34.031.

218. *Id.*

219. The Texas Code provides that "[i]f in connection with a pending suit affecting the parent-child relationship, one parent of a child makes a report alleging child abuse by the other parent that the parent making the report knows lacks factual foundation, the report shall be deemed a knowingly false report." TEX. FAM. CODE ANN. § 34.031. A false report in Texas, then, is the equivalent of an unsubstantiated report as defined by the California Penal Code. The California Penal Code defines an unsubstantiated report as one "in which the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . has occurred." CAL. PENAL CODE § 11165.12(c).

fore, the legislature must proceed cautiously in using the *Lewin* approach.

V. CONCLUSION

By adopting section 4611 of the California Civil Code, the California Legislature attempted to address the problem of false accusations of child abuse during custody proceedings. The situation is delicate. The legislature had to adopt a bill that would deter parties from making false accusations of child abuse during custody proceedings, while simultaneously wording the statute so that parties making good faith allegations of child abuse would not be inhibited. Currently, the scope and effectiveness of section 4611 are excessively limited by the provisions.

The statute can be effective if its provisions are modified. First, section 4611 must give courts greater discretion in determining the amount of the sanctions. This will provide a more effective deterrent because courts could award sanctions substantially greater than \$1000. In addition, it will also safeguard against bad faith allegations as courts would have the discretion to consider all the circumstances surrounding the accusation. Second, the statute should provide that courts receive the sanctions rather than the falsely accused party. Falsely accused persons consequently would be encouraged to seek from the false accusers additional remedies that can greatly exceed the monetary sanctions provided by the statute. Third, it would be easier for courts to enforce section 4611 if a definition of "false" was included in the statute. The current requirements that the accusation be false and that the accuser know that the accusation is false are too stringent.

Additionally, California could amend its Penal Code to make false accusations of child abuse during custody proceedings a crime. Such an amendment would provide another effective deterrent against these accusations.

Finally, California could adopt the *Lewin*²²⁰ approach in section 4611. In that case, the false accusation of child abuse was used in the court's determination of which parent should have custody of the child. This provision may be the most effective in deterring false accusations because the parent could potentially lose custody of his or her child.

The issue of false accusations of child abuse in custody proceedings is controversial. Some researchers contend that false accusations are infrequent while others report that they occur with greater frequency.²²¹

220. 186 Cal. App. 3d 1482, 231 Cal. Rptr. 433 (1986).

221. See *supra* notes 27, 38, 39 and accompanying text.

There is a concern that if the punishment for false accusations is too severe, parents with good faith allegations will be deterred from making them. Overall, though, the legislature and the courts must try to prevent parents from using false accusations of child abuse as a tactical weapon in order to gain custody.

*Douglas J. Loewy**

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