STATE OF MICHIGAN

COURT OF APPEALS

EDWARD A. BIELASKA,

Plaintiff-Appellant,

v

LAURA LYNN ORLEY,

Defendant-Appellee.

UNPUBLISHED
July 19, 1996

Nos. 173666; 174949;
175287
LC No. 88-824681-DC

EDWARD A. BIELASKA,

Plaintiff-Appellee,

v

LAURA LYNN ORLEY,

Defendant-Appellant.

No. 175388
LC No. 88-824681-DC

Before: White, P.J., and T.G. Kavanagh, and S.N. Andrews,* JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals by right the trial court's award of permanent custody of the parties' minor children to defendant, following the trial court's grant of defendant's motion

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* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.
** Circuit judge, sitting on the Court of Appeals by assignment.

to involuntarily dismiss plaintiff's complaint for permanent custody.[1] Plaintiff also appeals by leave the trial court's post-judgment orders for child support and income withholding and an order for health care/child support.[2] Defendant cross-appeals by leave granted the order awarding her $10,000 in attorney fees.[3] In awarding permanent custody to defendant, the court found that the custodial environment was with defendant mother and relied heavily on its determination that plaintiff had sexually abused both minor children.[4] Plaintiff argues that the court made a clear legal error on a major issue by erroneously admitting evidence of sexual abuse, and that the court's findings were against the great weight of the evidence. In docket no. 173666, we reverse and remand, concluding that the court's findings were against the great weight of the evidence. In docket no. 175388, we affirm the attorney fee award.

I

This protracted and extremely acrimonious custody dispute dates back to 1988.[5] The parties met and began dating around 1986 when both were students at the Lehmann College of Beauty. Defendant was seventeen years old and plaintiff was twenty-three.[6] The parties never married. Their first daughter (hereinafter referred to as the older child) was born August 18, 1987.[7] Defendant was hospitalized for depression while pregnant and spent some time in a home for pregnant women contemplating adoption. When the older child was an infant, defendant lived with plaintiff in his parents' home for about six weeks. After defendant moved out plaintiff saw the older child when defendant permitted it. We discern from the record that by the spring of 1988, the parties' relationship was extremely strained; they lived separately, and defendant began refusing plaintiff regular visitation with the older child.

Sometime around the summer of 1988, when plaintiff was working in California, defendant and plaintiff's sister, Kathy Celentano, visited plaintiff, and defendant became pregnant with their second daughter (hereinafter referred to as the younger child.) In October 1988, plaintiff filed a verified complaint for temporary joint physical custody and for permanent custody of the older child.[8] While defendant was pregnant with the younger child, she began dating Paul Newton.

Judge Giovan, who presided over this case for nearly five years, issued an interim custody order October 21, 1988, awarding plaintiff temporary joint physical and legal custody of the older child from Sunday noon to Wednesday morning.

Less than two weeks later, on November 1, 1988, plaintiff filed the first of many petitions for orders to show cause, alleging defendant violated court-ordered visitation. The October order was set aside and an order was entered granting plaintiff visitation from Sunday through Tuesday and on Thursdays. Numerous orders to show cause for failure to comply with visitation were entered.

Plaintiff filed a motion for an independent psychological custody evaluation of both parents and the older child on February 27, 1989, along with another motion for order to show cause alleging defendant prevented plaintiff from visitation on various dates in December 1988, and February 1989.

An order to show cause was entered on February 27, 1989, and defendant was ordered to appear before Friend of the Court Referee Broderick on March 27, 1989. The younger child was born on March 2, 1989.

On March 31, 1989, an order was entered referring the matter for independent custody evaluation at the University of Michigan Center for the Child and the Family (U-M/1). This was the first involvement of U-M in this case.[9] The U-M/1 evaluator, Meryl Berlin, M.A., submitted a report to the court stating that defendant attended only one session, on May 30, 1989, and refused to further participate in this evaluation. Berlin noted in her report that defendant "passively obstruct[ed] this evaluation in ways that brought it to a premature close."

Defendant married Paul Newton in April 1989, the month after the younger child was born, and she and the children lived with him until mid-May 1993. Defendant filed a motion to modify order modifying interim custody order,[10] and on April 14, 1989, on stipulation of the parties, Judge Giovan entered an order for immediate referral to Wayne County Family counseling for investigation and recommendation regarding custody, support and visitation, as to the older child only. Plaintiff objected to the friend of the court recommendation,[11] and an evidentiary hearing before a referee was ordered.

Defendant first alleged plaintiff sexually abused the older child in a "motion for supervised visitation only" filed August 18, 1989.[12] A hearing before Referee Markey took place in November 1989. Defendant testified before the referee that in mid-July, when the older child was twenty-two months old, defendant was assisting the older child in the bathroom and the older child stood up, spread her legs, and said "Ed tickled me here," pointing to her privates. The allegation was found unsubstantiated by Referee Markey in a report regarding visitation dated December 7, 1989, which we quote here because the referee's findings and recommendations were later adopted by the circuit court:

> Review and Findings
>
> The issues are two, that is whether or not the child has been harmed or abused, and what then is the liberalist [sic] visitation recommendable with the child's safety in mind.
>
> There is an allegation of improper body tickling done by the father, and the father's dog, in the area of the child's vagina.
>
> The mother described the occasion where the child was standing or sitting on the commode and speaking lightly of tickling done by the father, and pointing to the area on her body involved. The incident was said to have happened in July of 1989.
>
> Counsel for the Plaintiff pointed out that the mother in testifying before this Referee, quoted the child in different words than she used in quoting the child to Linda Merkle, A.C.S.W. as reported in Ms. Merkle's report. The mother used the terminology Ed did, instead of the father did.

> The child ... was seen by Linda Merkle at the Counselling and Evaluation Center of the Northwest Guidance Clinic, in Garden City, between August 22nd and September 8th, of 1989. Ms. Merkle reported that the child at 24 months did not, or was not able to verbalize to her the incident.
>
> We note that the matter was not reported to the Police Department or the Protective Service Agency by the Newtons.
>
> There were no claim [sic] by the mother, in speaking of the event, that the child had told her that the father aforehand had forbade the child to speak of what happened, or that the father had tried for secrecy.
>
> There also was no suggestion that there was a previous happening.
>
> The incident was alleged to have happened in July, and it was reported in August to the University of Michigan. The report was made by the mother after she became aware that the University's evaluation team was disenchanted with her attitude. Meryl Berlin, M.A., the evaluator who wrote up the report for the University of Michigan Center for Children and Family, stated that after telling of the incident the mother declined the offer of the University's evaluation team to come in and discuss the situation, and to have the matter pursued.[13]
>
> At our hearing Mr. Bielaska was not questioned by either party relative to the tickling.
>
> For our part, at the completion of testimony and review of the report submitted, we had serious doubts that the tickling incident occurred at all. We had greater doubts that the tickling was done in an inappropriate area. On a more serious charge, polygraph tests would be insisted on.

Referee Markey recommended plaintiff have visitation with the older child two afternoons a week and every other Sunday, and that the parties regularly appear at the Family Counseling and Mediation Division "to mediate the strained relationship between the two principles [sic] pointing towards a long term cooperation in the interest of the child." Both parties filed requests for a de novo hearing regarding visitation in late December 1989.

The court docket printout indicates a hearing was held on January 19, 24 and 25, 1990.[14] Referee Markey's findings and recommendations were adopted by the court by order dated February 12, 1990.

Orders to show cause why defendant should not be punished for contempt for failure to allow visitation were entered on March 2 and April 24, 1990, followed by the issuance of a bench warrant on May 15, 1990. Soon after, defendant and Paul Newton left the state with the children, against court orders, and their whereabouts were unknown. Plaintiff married Claudia Bielaska in April 1990, and

hired private investigators to search for the children. Plaintiff did not see either child for more than three years.

Defendant and the children returned to Michigan from North Carolina in May 1993 without advising plaintiff, defendant having separated from Paul Newton. Plaintiff learned that the children were back in Michigan, and obtained another bench warrant on May 19, 1993. Pursuant to court-ordered visitation, plaintiff saw the younger child for the first time ever on May 23, 1993, and saw the older child for the first time in about three years the previous day. At a May 28, 1993 hearing defendant was awarded temporary physical custody of the children so long as she lived at the Plymouth, Michigan address and plaintiff was awarded reasonable visitation. The court also ordered, for the second time, that defendant, the younger child, and plaintiff appear for paternity testing. Defendant complied with this second order.[15]

In mid-June 1993, shortly after returning to Michigan, defendant began taking the children to social worker Karen Schulte for sex abuse counseling. Schulte was not court-appointed and was affiliated with the Family Consultation and Treatment Services, Inc., in Clawson. Schulte testified at trial that she saw defendant for the first time, and defendant's mother, Linda Orley, on June 15, 1993, and saw the children on June 17, 1993. We note that defendant initiated this counseling, of both children, before the alleged second incident of sexual abuse. This second incident is alleged to have involved the older child and to have occurred on June 27, 1993. The first incident concerned only the older child and was alleged to have occurred in 1989.

On defendant's motion, Judge Giovan recused himself on September 24, 1993, and the case was reassigned to Judge Colombo. On October 15, 1993, an order was entered, which was later quashed, for independent evaluation of the parties and the minor children by the Family Assessment Clinic of the University of Michigan's Interdisciplinary Project on Child Abuse and Neglect, to be supervised by Dr. Kathleen Faller (U-M/2-Faller). On October 18, 1993, Judge Colombo entered an order awarding temporary physical custody to defendant and requiring that visitation be supervised by plaintiff's parents within their eyesight. Visitation was to be at plaintiff's residence from 1:00 to 5:00 p.m., to alternate each week on Saturday and Sunday, pending the court's final determination of custody and visitation at trial.

On November 4, 1993, plaintiff filed a motion for restraining order and psychological evaluations alleging that during the times the children visited plaintiff, persons, including defendant's family, would observe the house from parked cars, drive by, and drive up and down the block.

Beginning on November 4 and extending into December 1993, defendant and the children were seen at U-M by the Faller group, and videotapes were made of several sessions. Defendant alleged a third incident of abuse, asserting that the younger child told her plaintiff sexually abused the younger child during a November 28, 1993 visitation. This allegation was one issue at a show-cause hearing/trial held in December 1993, and was determined to be without merit by Judge Colombo, as discussed below.

On November 19, 1993, the court ordered that psychological evaluations be conducted by Dr. Patricia Wallace. An order quashing the U-M/2-Faller independent evaluation was entered by Judge Colombo on December 6, 1993.[16] The reasons are not totally clear as no hearing transcript is before us.[17]

At a show cause hearing before Judge Colombo on December 10, 1993, plaintiff alleged defendant refused to comply with the court's visitation order and defendant alleged plaintiff violated the supervised visitation requirement. Defense counsel represented to the court that plaintiff had sexually abused the younger child during the last visitation, November 28, 1993. At this time the younger child was 4 1/2 years old, and the older child was six.

At the hearing, plaintiff's father and plaintiff's mother, who claimed to have supervised the children's visitations, denied the allegations and testified that plaintiff had been hanging Christmas lights on the house throughout most of that visitation and was never alone with the children during the visitation, or during prior supervised visitations. Plaintiff's parents testified they had the children in their presence or view throughout the visitation. Plaintiff also denied the allegations as did his wife, Claudia Bielaska, who testified she was present as well.

Karen Schulte testified she had been counseling the older child and the younger child and, based on their statements, opined visitations were not properly supervised. Over plaintiff's objections, Schulte was qualified as an expert in child sexual abuse. Schulte testified:

> [S]tatements that the children made to me on November 30th and December 1st, when [the younger child] told me on November 30th that her father had taken her into the bedroom, shut the door, locked it, laid down on the bed next to her and touched her bottom with his finger.
>
> And that [the older child's] statements made to me on December 1st that she was not with [the younger child] during the whole part of the visit and she was not certain where [the younger child] was or what she was doing. There were times during that period when she didn't know where [the younger child] was, that she didn't know where her father was either.

Plaintiff objected to admission of Schulte's report on hearsay grounds, and defendant argued it should be admitted to show defendant's good faith in denying plaintiff visitation. The court admitted it only on the issue of good faith and not for the truth of the matter asserted. The court questioned Schulte how certain she was visitation was not properly supervised, and she replied sixty-forty. When the court asked if she was troubled by the fact that these allegations were made during a time that the court had ordered an expert to conduct an evaluation on this issue, Schulte stated she did not believe defendant had any motivation to encourage the children to make these allegations.

The court made the following findings and conclusions:

THE COURT: . . . This Court entered an order that required that visitation would occur every weekend, alternating Saturday and Sunday, from one to six p.m.

On Sunday, November 28th, 1993 there was a visitation at the home of the plaintiff, Edward Bielaska. Present fpr [sic] that visitation were both of the plaintiff's parents, Joseph Bielaska and Mary Jane Bielaska. At approximately 3 p.m. the plaintiff's wife, Claudia Bielaska, came home from work.

During the course of that visitation Christmas lights were being put up on the outside of the home. At times both children were outside. On one occasion [the older child]--[the older child] was outside and [the younger child] was inside. [The younger child] was inside with Mary Jane Bielaska. [The older child] was outside with Joseph Bielaska and the plaintiff.

On another occasion the two girls walked down the street with Claudia Bielaska. They were in the view of Joseph Bielaska.

At no time during the course of that day was Edward Bielaska alone with either of the children. There was no situation where Edward Bielaska took [the younger child] into his bedroom and locked the door and improperly touched her.

When [the younger child] came home from this visitation she told her mother, the defendant, that Edward Bielaska had taken her into a bedroom and inserted his index finger in her vagina. As a result, the defendant contacted a therapist who had been seeing the children, Karen Schulte Ladd. She suggested that an appointment be made at St. Joseph hospital with Dr. Church.

Dr. Church conducted an examination.[18] She indicated she thought [the younger child] was believable, but there was no physical evidence of any sexual abuse. As a result, on the visitation scheduled for the next Saturday, rather than complying with my order that required the parents of the plaintiff to supervise visitation, the defendant, after consulting with her attorney, Mr. Maloney, made the decision to send her mother as the supervisor. There was a violation of my order when this occurred.

The reason that I believe that what [the younger child] says did not occur is premised upon these facts:

One, I find the testimony of [plaintiff's parents] Joseph and Mary Jane Bielaska believable and compelling. I don't believe that they would put either their grandchildren or their son in the position of--well, the grandchildren in the position of being sexually abused or their son in the position of having someone make accusations that he sexually abused the children.

> Moreover, I think it is very compelling that [the younger child's] recitation of the facts does not comport with facts we know to be the case.
>
> For example, she indicated that the door was locked in the bedroom. There is no lock on the door. She indicated that Claudia was a doctor. That's not true. She indicated that her grandfather was at work. That's not true.
>
> Moreover, it seems like she has given inconsistent statements as to what occurred. We have heard that according to the testimony of the mother [the younger child] said that the finger was inserted in the vagina. According to the testimony of Karen Schulte Ladd, he touched her bottom and then indicated the vagina area.
>
> There is one other fact that makes it highly improbable that in fact this occurred. I appointed an expert to conduct an examination on this--on these issues. In fact, the expert is doing her work at this very time.
>
> Unless the plaintiff is insane, no one in their right mind would do these types of things while there is an investigation being conducted on this very issue during this time frame. It just makes absolutely no sense at all.
>
> Moreover, I believe the testimony of the defendant suggests that she recognizes that in fact it's probably true that there was no sexual abuse on the date in question because she wants visitation to continue. Her real concern is not, in my judgment, about sexual abuse, but rather, a belief that there was inadequate supervision.

The court held defendant in contempt of court, finding her actions demonstrated bad faith, and sentenced her to three days in jail, then suspended the sentence, but warned defendant the next time she violated a court order she would receive at least a seven-day sentence.

Plaintiff's petition for permanent custody was heard beginning on February 7, 1994. Judge Colombo was unavailable on that date, and the case was spun off to visiting District Judge Daniel Van Antwerp.

The court stated on the record that based on prior discussion in chambers, neither party was interested in joint custody. Plaintiff moved for full custody of the children. Defendant moved for restricted visitation for plaintiff based on alleged sexual abuse of both children. Trial took place from February 7 to 23, 1994.

Plaintiff's theory as advanced in opening statement was that defendant is a defiant, dysfunctional person with a pathological sexuality that she enmeshes with her children,[19] and that her allegations of sexual abuse by plaintiff were contrived and well-timed to suit her purposes, the first allegation being raised after the court-ordered U-M/1-Berlin evaluation had not gone her way. Counsel stated that defendant herself abused her children, including by removing the older child from plaintiff, and later

removing the children from Paul Newton, the only father the younger child had known the first four years of her life. Plaintiff's counsel also stated that defendant educationally neglected the children and did not attend to their medical needs.

Defense counsel in opening statement stated that "despite plaintiff's claims this case is primarily about child sexual abuse." He stated that the older child had told defendant when she was 2 1/2[20] that plaintiff had sexually assaulted her in 1989, that defendant had been sexually and physically assaulted by plaintiff, that plaintiff sexually abused the older child in June 1993, and Dr. Church's finding of "peri-hymenal inflammation" of the older child in July 1993 was consistent with that, and that U-M's family assessment clinic and social worker Karen Schulte would opine the older child was sexually assaulted by plaintiff.

Carol Rivera, defendant's sister-in-law, testified that she received a telephone call on June 24, 1993, and was told "that a phone call had gone to my brother stating that they had planned to accuse Ed [plaintiff] once again of abuseing [sic] the children." She called plaintiff to warn him because, as her relationship with defendant continued and different events transpired, Rivera had serious doubts that plaintiff had ever sexually abused his children. Plaintiff had no knowledge that this was going to happen and Rivera told him what she had heard. Plaintiff's and his wife's trial testimony regarding this phone call was in accord. Defendant accused plaintiff of sexually abusing the older child three days after Rivera's warning to plaintiff.

Kellie Beveridge testified she was a rental tenant in plaintiff's house in 1993, through the end of August. Plaintiff did not live in the house at the time. Beveridge testified the Bielaskas were old friends of her family. On June 27, 1993, she was home alone and plaintiff called and asked if he could bring his daughters over to swim in the pool. She said yes. Plaintiff came over with the two girls and his mother. Beveridge met them outside and then went into the house for a phone call. She watched the girls from the kitchen window. The girls were playing in the pool and plaintiff and his mother were watching them.

Beveridge testified Mrs. Bielaska might have waited in the kitchen while the older child went to the bathroom. Plaintiff went around to the front while they came in to go to the bathroom because he was checking on the bushes. Beveridge went back outside with Mrs. Bielaska and went to the front of the house to talk with plaintiff. Beveridge agreed that at that time she could not be sure whether the older child went into the bathroom. She talked with plaintiff about five to ten minutes and then went back into the house. Plaintiff went to the backyard where the children and Mrs. Bielaska were getting ready to leave.

Beveridge testified she was aware that allegations were made that plaintiff sexually abused the older child that day in a pink bedroom. She testified that plaintiff never came into the house. The girls came in to use the bathroom while she was in the house. During that time period, Beveridge's girlfriend occupied the pink bedroom. The room contained only a futon, some boxes and clothes on the floor. When shown the picture allegedly drawn by the older child of the bedroom, Beveridge testified that

there was no dresser in the room and the bed and closet were in different locations. The visit lasted only about forty-five minutes to an hour and a half.

Plaintiff's mother, Mary Jane Bielaska, testified that on June 27, 1993, she went with the children and plaintiff to plaintiff's house, which Beveridge was renting. Mrs. Bielaska testified that the children were in her sight at all times and that plaintiff was never alone with them. Mrs. Bielaska testified she was determined to be there because of what the Orleys were saying and that no abuse occurred. Plaintiff denied he ever abused either of his children. Plaintiff was not allowed to see the children after June 27, 1993 until October 1993.

Plaintiff called Patricia Wallace, Ph.D, the court-appointed psychologist, who presented audio tapes of an interview with defendant and the two children. Dr. Wallace's report, admitted at trial, was entitled "Child Custody Evaluation" and states that it was based on her interview and observation sessions held between November 22, 1993, and January 26, 1994. The report states in pertinent part:

> This report was prepared in compliance with a Court Order issued by the Honorable Robert J. Colombo, Jr., . . . pursuant to MCLA 722.27(d).
>
> * * *
>
> The purpose of the current examination is to provide the court with a mental health/child custody assessment and recommendation to assist the court in the determination of custody, in the best interests of the two children.... The report represents the compilation of the result of the comprehensive psychological examinations, including psychological testing and social interview of the children, their biological parents, their step-mother, Claudia Bielaska and their grandmother, Ms. Linda Orley. The evaluation process consisted of joint and individual interview sessions with the parents and other nuclear family members. There was also administration and interpretation of psychological assessment tests, as well as review of previous relevant court and medical documents submitted. During the evaluation process, each of the two daughters was observed in the presence of their mother and their father, alone and jointly. Each child was also observed in the presence of each parent individually.

Dr. Wallace testified she reviewed Karen Schulte's reports and all the data she received: reports, photographs, test results, tapes, and drawings. Dr. Wallace testified she first met with the parents and asked them to settle the matter between themselves, which was not possible. She then set appointments to meet with them individually and with the children. Dr. Wallace observed that both children demonstrated in their speech and drawings a good relationship with their father with no fear of him.

Dr. Wallace testified that the children stated they thought Paul (defendant's husband) was "mean" and "crabby" and Claudia (plaintiff's wife) was kind. Dr. Wallace testified about a drawing, which was of two stick figures, the older child drew on August 17, 1993, labeled "Ed making her touch

his 'rear end' [Exhibit 12]." Dr. Wallace testified that defendant told her the older child drew it for Schulte. A second drawing was made in Dr. Wallace's office [Exhibit 12A]. Dr. Wallace testified that Exhibit 12 was inconsistent with what she had been told the father allegedly did and that it is unusual for a child to draw a stick figure with one leg. Dr. Wallace testified the drawing in Exhibit 12 "is so odd" in terms of the relationship of the penis, the arms, the neck, the head, and that it is very mature and would not ordinarily be drawn by a young child. The older child's nickname, printed on the page, was also significant in that the initial letter was not printed in the ordinary manner of a young child. These features raised a question in Dr. Wallace's mind whether it was really drawn by a little girl or by someone else.

Dr. Wallace was asked whether she believed that defendant fabricated the evidence depicting sexually inappropriate behavior. She replied:

> A.I said that I believed, and I still believe, she fabricated evidence proving sexually inappropriate behavior. One of those pieces of evidence was the drawing.

Exhibit 12A was a picture of a mermaid drawn by the older child in Dr. Wallace's office. The older child copied it from a picture of a mermaid. Here, the initial letter was printed as a child of that age would ordinarily print. Based on this and other drawings of people made by the older child in Dr. Wallace's presence, Dr. Wallace opined that the older child did not draw Exhibit 12. Dr. Wallace saw the older child sign her name on at least ten sheets of paper, and did not believe the older child wrote her name on Exhibit 12 because of the way the initial letter is constructed.

Dr. Wallace presented additional drawings made by the older child in Dr. Wallace's office where the child had signed her name consistent with the other drawings (a closed initial letter) and inconsistent with the name as printed on Exhibit 12 (an open letter). Referring to this picture, the following later transpired in cross-examination:

> Q. You are saying it is a fraud perpetrated by my client [defendant] or attempted fraud on you with respect to her offering you this as a picture signed by ... [the older child] in Karen Schulte's office?
>
> A. I don't think I used those terms but I would certainly agree with the implication of your statements.

Additional drawings by the younger child were admitted. One was a drawing of Claudia (plaintiff's wife) which says Claudia is sad "because she misses me." Another shows defendant crying and it says "Laura [mother] -- using the first name -- crying because she is going to visit Ed, her natural father." Dr. Wallace testified that this is significant because it shows the child's awareness of the feelings surrounding the visits.

Dr. Wallace testified that when plaintiff's wife, Claudia, entered the office the girls had no inhibition, jumped up and ran to her, almost knocking her down, and said, "Hi, we will be there this weekend."

Dr. Wallace testified that false accusations of sexual abuse most often occur where there is animosity between the parents. Dr. Wallace's report stated that defendant's psychological testing indicated the likelihood of resentment and hostility, and defendant's answers reflected defensiveness, evasiveness, and possibly conscious deception.

Dr. Wallace testified that defendant provided her with several hundred photographs and, at trial, Dr. Wallace produced a number of these photographs, some of which she had attached to her report. She was concerned about the nature of the photographs, as they depicted the children in the nude in "complemented positions with males," specifically, Paul Newton. Dr. Wallace testified that a substantial number showed explicit and provocative nudity, that several depicted Newton with the children while he was nude or nearly nude, and the children kissing him on the lips. Dr. Wallace testified:

> There was [sic] a lot of pictures of the girls under the covers in the bed with the male. There were a lot of pictures of them naked with him clothed and it did not look to me from the -- across time, I was looking at these pictures across their ages, that it was healthy or respectful for the girls to have grown or to be able to grow with a sense of pride into adulthood.

Dr. Wallace testified that the photographs of the children's vaginal areas were significant, because there has to be a motive to depict the vaginal area from different perspectives and make it the focal point of the picture. Dr. Wallace continued:

> There were several photographs that raised questions for me because they were photographs of a male or a female in some cases gripping the children or touching children in there [sic] genital area on the photograph and it was beyond a chance because there was [sic] so many of them that I just, as I said, I pulled out those and I stopped.
>
> There was [sic] lots of pictures of them kissing, mouth kissing [sic] male.

Dr. Wallace described the photos as provocative, showing the buttocks of the girls while lying flat in the tub. Several photos of the girls show bruises. There was one with defendant smiling while her hand was under one of the girls' dresses. In another photo, Paul's hand is on the child's genital area over her clothes.[21]

Dr. Wallace testified that, more disturbing were defendant's statements which were inconsistent with the photographs. Defendant had told Dr. Wallace that the children had never seen a penis, which they referred to as a "bird," before Exhibit 12 was allegedly drawn in August 1993. Dr. Wallace noted that one of the photos showed the older child in the bathtub with a little boy, his penis clearly showing. Dr. Wallace could not understand why no one raised the question that the children had seen a penis. Dr. Wallace testified that she thought the amount of nudity in the photographs, the explicitness and continuation across time, were out of character with a custodian, i.e., defendant, who is concerned about her children growing up in a healthy environment.

Dr. Wallace further testified that during her interview with defendant "there were several indications where Laura would intermingle her name and her tone, herself into the description of what was happening with the children". Dr. Wallace testified:

> During Miss Orley's explanation to me of how her daughters were touched by their father, she gave her fingers to me, two fingers up in a motion that show me [sic] she became seductive. I asked her at that point -- this was during the day of the tape -- I asked her, are you showing me what they did? I believe it was during the tape. And I said, was it one finger or two? And she said they didn't say how many fingers.
>
> I said, why are you using two to demonstrate to me? Are you showing me what your daughter showed you or are you making this up for yourself. And she said, this is just the way she imagined it.
>
> * * *
>
> Q. Was there anything about the manner in which she disclosed that to you which was remarkable?
>
> A. Absolutely. As I stated, the fact that it was seductive, that it was almost a disassociative reaction in the terms of the experience she was expressing in my office at that time.

Dr. Wallace testified that Schulte's November 4, 1993, report stated that during a session with the children on June 26, 1993, both children "talked about fear of going to visit their father because he was talking about 'touching our bottoms'." Dr. Wallace testified that it was never clear to her why the children, ages six and four, would be frightened about

> . . . what was going to happen unless there was something that was associated with it and there is nothing associated in this explanation where he was going to touch our eyes, nose, ears or bottom. This report, June 26th date, there was no basis that I could find for them to be afraid of him touching them.

Wallace also noted:

> . . . That was never clear why the children were in therapy in the Sex Abuse Group prior to any sex assault allegations in this case. I wasn't sure. It never was really clear how they happened to be in thereaphy [sic].

Wallace noted regarding the alleged incident involving the older child on June 27, 1993, that Schulte's report of a session on June 29, 1993, contained the statement, "She [the older child] stated 'Ed' is being mean. He keeps saying he's gonna touch my bottom." Dr. Wallace opined the statement does not make sense if the incident had occurred two days earlier. Dr. Wallace testified that Schulte's

report states as to a session on August 10, 1993, that defendant related to Schulte that she had observed the older child playing with her Barbie dolls saying: "No, I don't want to touch your penis and you can't make me do it." However, when Dr. Wallace asked defendant why the children said "penis" instead of "bird," defendant told Dr. Wallace that the children did not learn the word "penis" until after these incidents had occurred, when defendant read the book "How We Grow" to the children.

Wallace addressed Schulte's note that the older child told her aunt, defendant's teenage sister, "that Ed made her do that and she didn't want to tell because she was too embarrassed." Dr. Wallace stated that children do not interpret and identify embarrassment prior to mid-childhood and pre-adolescent changes. To be able to express and identify "embarrassment" would be unlikely in a child of six. Dr. Wallace testified that the comment attributed to the older child that Ed "tried to kiss me on the lips, but I got my hand on it, so he couldn't kiss me on the lips" was inconsistent with the many pictures showing both children kissing others on the lips, including Paul Newton.

As to defendant's relationship with plaintiff[22] and Paul Newton, her husband, Dr. Wallace stated:

> In my estimation there was a great deal of interchanging of Ed and Paul with things that they did. They were both excessive drinkers. They both forced her into sex relationships. They both were big liars. That became interchangeable, not necessarily I seek out these people but rather that coincidentally is the way she explained they were similar.

Dr. Wallace testified that defendant also interchanged the names Ed and Paul. At one time, she stated Paul had molested the children. Initially, when Dr. Wallace received the photographs from defendant, she thought they were pictures of the children with plaintiff, not Paul.

Dr. Wallace testified she found a great deal of interviewer bias in Schulte's reports, and that that affected the weight she gave to those reports. When asked about the likelihood that interviewer bias may have had an impact upon the "invented memory" of the children, Dr. Wallace opined that young children of four and six could be affected by the adults around them:

> . . . If you tell the child over and over something has happened and if you create a memory for them like dream fantasy or real life, it becomes a permanent part of the structure . . .

Wallace testified that repeated questioning of the children could be frightening to them and cause them to impulsively respond, unless they feel comfortable with it. She testified that the Schulte reports reflect several meetings where the children had difficulty separating from their mother, and that the mother's presence would be an influence on the children's responses. Dr. Wallace testified that it was clear from the older child's statement to her, "I forgot what mommy told me to say," that the older child had come to the meeting with Dr. Wallace with preconceptions of what questions would be asked and what she should answer.[23]

Unlike Schulte, Dr. Wallace administered the Minnesota Multi-Phasic Inventory (MMPI) to both plaintiff and defendant. Dr. Wallace testified that she used the test results as part of her evaluation. She testified that defendant's test results showed a preoccupation with sex, that defendant was denying human frailties, and that defendant sees herself as virtuous and conforming. Dr. Wallace testified that defendant's answers are those given by a person who is very evasive or consciously deceptive.

Dr. Wallace's report stated that plaintiff's MMPI showed a profile indicative of frankness, honesty, being outgoing, gregarious, sociable and sensitive. Defendant was more defensive and evasive, with evidence of resentment and hostility. Dr. Wallace did not find any evidence to support the allegations of abuse either in plaintiff's personality or in his interaction with the children that she observed.

Dr. Wallace found it significant that Paul Newton was never available for interview, "given their interchanging Paul's name and Ed's name and the word dads in various contents [sic] and from the reports I read and various conflict [sic] and the way Miss Orley described things to me." In summary, Dr. Wallace testified:

> As I indicated in the report, I believe that the children would be best served if they are in another environment because I feel insecure that they're being protected safely and not from the father Ed but rather from other environmental things that might be happening there.
>
> I think the mother and Mr. Bielaska both could benefit from family unification processes to help those children understand what they are, who they are. They need a lot of help. That's my feeling. They need a lot of attention. I don't mean sexual abuse attention but maybe a rather more global or holistic approach to their healthy development.

On cross-examination, Dr. Wallace stated she believed the established custodial environment is with defendant. She testified that she felt it was not critical to her custody recommendation for her to first make a determination of the validity of the allegations of sexual abuse because she is not the trier of fact. She testified that unless asked to do so by the court, she does not render an expert opinion about whether the sex abuse occurred:

> Q. Okay. Let me make sure I understand. You're a custody evaluator. There's an allegation or child sexual abuse and you're required to form an opinion and give a recommendation?
>
> A. Yes, sir.
>
> Q. And is it your testimony that you don't have to form an opinion about whether or not this sexual abuse occurred or not?

A. I said, I don't make the decision. I am not a trier of fact for law and whether or not these events occurred.

* * *

Q. Okay. Then let me try it a different way.

Is it your testimony that you don't have to form an opinion about whether or not sexual abuse occurred when that's a primary allegation in a custody case?

A. I think I have to have an ideal [sic] within my own in the context of any evaluation of whether or not this person did or did not do a sexual abuse act. I don't have to say they did or didn't. I have to make the recommendation in accordance with that opinion, yes, sir.

When asked to express her opinion, she stated:

My professional opinion is that the children may believe and the mother may believe that it happened. I do not find support that Mr. Bielaska would have been the person who would have done it given the information available to me.

When asked for her ultimate opinion as to what was best for the children, Dr. Wallace stated:

In my opinion they would get the best opportunity for advancement and growth if they are in an environment other than the one the mother has provided thus far.

As I suggested to the Court, that is either with the father or, at least temporarily, temporarily with the [paternal] grandparents.

By agreement of counsel the defense called Karen Schulte, who was admitted as an expert witness on assessment but not on treatment. Throughout Schulte's testimony, she referred to her report and letters she sent to defense counsel, which had been admitted into evidence.

Schulte testified that she first saw defendant and defendant's mother, Linda Orley, on June 15, 1993. Defendant told her she was concerned about the older child's aggressive behavior, hitting and kicking her mother, temper outbursts, difficulty sleeping, and about some statements she had made, including that she hated her father, Ed, and that "Ed annoys me and hurts my heart." Schulte testified that defendant told her that the older child at 22 months had told defendant while sitting on the potty that "Ed tickled me here," indicating the area between her legs. Schulte testified as to family history that defendant's relationship with plaintiff "was a very problematic and abusive relationship," that the 6 1/2 years age difference between the parties was significant, that plaintiff had forced defendant to have sex with him the first time, and that there was an incident of physical abuse when defendant was pregnant with the younger child.[24]

As to the children's developmental history, defendant reported to Schulte that the older child was speaking in sentences at fifteen months, had a good vocabulary, and was potty-trained at eighteen months.[25] Schulte saw the older child and defendant on June 17, 1993. She estimated she saw the older child seven times and the younger child three times before reaching her opinion after the August 17, 1993, visit. Schulte testified she completed her report on September 20, 1993. Schulte did not administer any standardized psychological testing to defendant or either child.[26]

Schulte testified that the older child "spontaneously" stated to her that Ed touched her bottom, after they had gone through pictures depicting different parts of the body. Schulte then testified that the older child also told her Ed made her touch his bird. When asked in what context that statement was made, she responded:

> The statement was Ed made me touch his bird, and the context of that was the mother had reported to me that she heard the children playing and they were speaking of this, you know, talking about Ed making them touch his bird and things like that in the context of playing with their dolls. And after she reported that to me, I saw [the older child] and [the younger child] together, and [the younger child] said, yes, this had, in fact, happened, that [the older child] had told her that this had happened. [The older child] initially denied it.

Plaintiff's counsel objected on hearsay grounds and defense counsel withdrew the question.

Schulte testified the younger child also stated that Ed had touched her bottom. She testified that both girls indicated the "front part" as meaning bottom. Defense counsel then asked Schulte:

> Q Okay, and did you make any determination specifically on the child's anatomy after that as to what they were referring to?
>
> A No.
>
> Q Now, did either of the children give you any--
>
> THE COURT: No, no, the front part--the front part of the bathing suit, any particular front part?
>
> MS. SHULTE [sic]: It has, I'm sorry, it has just a--it's a figure of a boy, and it has just the bottoms of a bathing suit. So I asked them what was underneath the bathing suit and [the older child] said, underwear, and I said --it could look like bathing suit or shorts, and she said what--and I said what's underneath the underwear, and she said the bottom. And I said what about in back, and she said, she couldn't give me anything for that. And the same with [the younger child.] [The younger child,] when I asked her what was under the bathing suit, she said the bottom. And I asked her what was in back and she didn't say anything either.

Schulte then testified that both children indicated they were touched "with the index finger, with Ed's index finger."

Schulte testified that significant behavioral indicators exhibited by the older child were temper tantrums and nightmares, that those are indicators of stress "and can be indicators when a child's been sexually abused and under a great deal of stress." Schulte testified that the younger child "was talking with advanced knowledge of sexual activity, she was talking about people being naked lying down in bed together, and was talking alot about birds, which she referred to was [sic] male genitalia."

Schulte testified that the following credibility factors were present and that the children's reported behaviors were consistent with what defendant had reported to her:

> What I can say, I'll begin with [the older child], was that she was able to--when I did the assessment with her on truthfulness, she was able to have--exhibit a knowledge of truthfulness and to let me know that it was important to be truthful, that she thought it was better to be truthful than to tell a lie, that when she made statements about what happened, she exhibited very little affect that she was very constructed in her approach, had difficulty talking about these things, that the statements were not always made in the very same manner, that you would see in a child who had been coached where they're just saying the same thing over and over again, and show very little affect when they're talking about what's happened.
>
> The reported behaviors would be consistent with what the developmental stages were as reported by the mother that if she was able to speak at 15 months in sentences, that the statement that the mother made that [the older child] said at 22 months would be consistent with that.
>
> That having been potty trained at 18 months, that the mother's statement that [the older child] was sitting on the potty at 22 months--when she--potty chair at 22 months when she made that statement would be consistent with that. With respect to [the younger child] being younger, [the younger child] isn't as credible as [the older child]. That's not unusual with a younger child. She is a lot more anxious. When she talked about things, however, her affect was more appropriate. She tended to, when she talks about being angry about what happened, she would sound angry, rather than with [the older child] who is--has a lot more difficulty talking about the feeling part about what happened to her. She is acting out more where as [the younger child] is more able to talk about it.

Schulte testified the older child drew Exhibit 12 in her office on August 17, 1993, and that she witnessed her doing so. It is unclear from her testimony whether the older child drew the picture before or after the following events, about which Schulte testified as follows:

> Q And what is the significance of that picture with respect to your--the issue of the credibility factors?

A What happened was that [the older child]--as I mentioned before had--after she said that these things happened, then she recanted and said that it didn't happen. And the younger child--I had [the younger child] and [the older child] in my office and [the younger child] kept saying, "You told me that this happened, you told me he made you touch his bird", and [the older child] kept saying, "No, I didn't."

And so I asked the mother to come into the office, because I wanted to be sure that the --

* * * *

I asked the mother to come into the office because I wanted to be sure that there wasn't pressure coming from the mother to say things that were not true. And during that session we talked about the importance of truthfulness, and the mother was able to tell the child that she wanted her just to tell the truth and that if, in fact, what she had said before wasn't true she would not be angry with her. It was okay, but right now the most important thing was for [the older child] to tell the truth. And that's what we talked about.

And at that point, [the older child] said, "Yes, it is true. He did, Ed did do all those things to me. He did make me touch his bird."

Schulte testified she diagnosed the older child with post-traumatic stress disorder. She did not make a diagnosis of the younger child because she was not exhibiting significant behavioral symptoms. Schulte testified that she opined the older child and the younger child were sexually abused by plaintiff.

Plaintiff's counsel then objected on hearsay grounds to admission of Schulte's report. The court admitted the report.

During cross-examination, plaintiff's counsel asked Schulte about calling defendant mother into the room when the older child denied three times that plaintiff had made her touch his bird:

Q[plaintiff's attorney]: Well, is it not a confrontation to bring somebody in as important in the children's lives as their mother, and have her sit there and talk to them about as you said it, telling [the older child] to tell the truth. I quoted you, Mother was able to tell [the older child] to tell the truth." Are you familiar with studies that indicate that telling the truth can, in fact, be triggering words quoted for to aid them to tell the truth? Can that not be used and health studies indicate that just the comment to tell the truth can be used to trigger a child to report something?

A I'm not aware of studies that show that.

Q Well, tell me, would you believe that a statement from a mother to tell the truth could not carry with it the stronger meaning to a child such as [the older child] regarding what she is supposed to do right now?

* * *

A It would depend on how the mother stated that to the child.

On further cross-examination, Schulte was shown various photographs that Dr. Wallace testified about; one of them showed one of the girls lying in bed with Paul Newton. Schulte testified she had never seen the photographs and agreed that it was consistent with the child having a memory of laying in bed with her father and testified she believed the man in the photo was Paul Newton. Schulte testified that a father can touch a child in the vaginal area and it would not be inappropriate. Schulte did not remember whether defendant had stated the children did kiss on the lips, but defendant had told her the children had not seen an adult penis. Schulte admitted that was inconsistent with Paul Newton's trial testimony that the children had seen his penis. Schulte testified that she would not assume the pictures were inappropriate without determining the circumstances under which they were taken.

Schulte testified she did not video or audio tape her sessions with the children. She was asked to clarify the statement in her letter to defense counsel dated July 1, 1993, that the older child "appeared to be overwhelmed and confused about what has happened since her move to Michigan and the issue of the identity of her father. Schulte responded that the older child told her she "was very angry with her mother for not telling her who her real father was, and she was upset because of that. And she told me that she wanted Paul to be her real father," and not Ed.

Schulte testified, referring to her July 1, 1993, letter to defense counsel, that as of June 22, 1993, the older child had not reported any touchings to her, and that on June 29, 1993, the older child talked about Ed coming into the room when she was changing into her bathing suit. Schulte testified that she presumed at that point that a touching had occurred between June 22 and 29. She recommended no visitations take place after June 27, 1993.

Schulte testified that she was never told that plaintiff had been warned on June 24, 1993, that defendant was going to accuse him again of sexual abuse, and that that information would have been significant to her in her evaluation and assessment. Schulte testified that it would also have been significant to her evaluation and assessment to have known that the children's June 27, 1993 visit with their father was supervised by plaintiff's mother. Schulte also testified she was unaware that the older child reported to Dr. Church on July 30, 1993, that no one had bothered her private areas, but Schulte did not regard that as significant.

Schulte testified that her notes for June 22, 1993 state that the older child said she did not want to visit her father because, "Ed talked about wanting to touch bottoms, mine and [the younger child's]." Schulte did not find it incredible that plaintiff would be making these statements prior to performing the act.

Schulte testified she was aware that prior allegations of sexual abuse had been litigated in 1990 and were found to be without merit. Schulte testified:

> I don't believe that children deliberately make things up about sexual abuse, specifically sexual abuse and say that these things happened to them when they did not.

Schulte did concede that studies show there are adults who make up such charges. However, Schulte testified she did not believe defendant made up these allegations because defendant is concerned for her children's best interests. Schulte conceded it would be inconsistent with the children's best interests if the record showed defendant failed to have the children inoculated properly, missed appointments with the doctor[27] and failed to comply with the court's order to participate in an evaluation at U-M. Schulte agreed it could affect her findings if she was given inaccurate information.

On further cross-examination, Schulte conceded that the younger child's having nightmares in June 1993 may have been related to the fact that the only father she had known for the first four years of her life, Paul Newton, had been left by her mother and she was now being told to see a man who is her real father. Schulte testified Dr. Church's findings that the younger child had no inflammation, no scarring, normal hymen, and a normal hymenal opening were not significant to her.

Schulte testified it would not affect her trust in defendant if she found that defendant lied about various things to her. Schulte testified that she was aware that defendant had not witnessed any sexual or physical abuse of the children. She testified that the older child's behavior of talking in a monotone, difficulty with eye contact, hiding her face, gazing off into space, are not behaviors that would be seen in a child who does not have an actual memory of the events.

Schulte agreed that defendant had a strong belief that her children had been sexually abused by plaintiff and that she would be likely to show her bias to the children. Plaintiff's counsel pointed out that Schulte's report contained factual errors, including that plaintiff was not involved with either child during their infancy and did not see the older child until she was 15 1/2 months old. Plaintiff's counsel informed Schulte that plaintiff had visitation from the time the older child was three months old until defendant thwarted visitation and then took the children out of state. Schulte stated it was her understanding that plaintiff had had no contact with the older child.

Defendant had reported to Schulte that she found the children playing in a closet with a flashlight and the younger child told her that the older child tried to play a "suck bottom game" with her, and that the older child later told defendant that plaintiff had done that with her. Schulte testified that the older child never mentioned any "suck bottom" game to Schulte.

Schulte testified that she thought defendant was capable of asking non-leading, non-suggestive, non-repeated questions of the children because Schulte had talked with defendant about how to talk with the children in that way. Schulte agreed she would be surprised if U-M/2-Faller videotapes taken in November and December 1993 showed defendant leading and directing the children's comments and

offering positive reinforcement to the children's negative comments about their father. Schulte agreed she did not know if defendant was doing that with the children when Schulte was evaluating them.

Schulte denied that her findings were subjective, but did concede she had administered no standardized psychological testing.

Dr. Kathleen Faller's de bene esse deposition was admitted into evidence over plaintiff's objection that she never saw or talked to the parties or the children and her testimony was based on hearsay.

During Dr. Faller's deposition, plaintiff's counsel questioned Faller about inaccuracies in the U-M/2-Faller reports. The report of the interview social worker Ellen Devoe conducted with defendant wrongly stated that the parties had been married, that defendant had remarried during "the three years that she was gone," and that the older child was in first grade.

At deposition, plaintiff's counsel questioned Dr. Faller about several cases she had been involved in where her group determined there had been sexual abuse and the court later found there was no abuse, and disagreed with her findings and methodology. Plaintiff's counsel referred to a deposition of Dr. Elissa Benedek, then president of the American Psychiatric Association, in which Dr. Benedek testified, after having reviewed a videotaped interview done by Dr. Faller of a child, that she did not believe the interview met the standards for an unbiased interview regarding the question whether sexual abuse occurred. Dr. Benedek opined Dr. Faller's interview was replete with leading questions, and that Dr. Faller engaged in repeated questioning while giving the child rare opportunity to tell her story in her own words.

Dr. Faller testified that she was never told the parties had been ordered to attend an evaluation at U-M in 1989. Dr. Faller testified she is a social worker and therefore not qualified to administer psychological tests. Dr. Faller testified defendant did not tell her, as to the allegations of sexual abuse on the November 28 visitation, that plaintiff's parents were present during that visitation. Dr. Faller testified in her group's evaluation of the children they reviewed Schulte's report and Dr. Church's report. They did not review any other psychological evaluations, court records, or request information from plaintiff. Dr. Faller conceded the only information she had available was from defendant and defense counsel, that she was missing data from plaintiff, and testified "we preceded [sic] with the information that we had, and we expect the Court to take into account the information that we did and didn't have and give it whatever weight they do to our opinion."

Dr. Wallace was then recalled by plaintiff for the purpose of eliciting her observations following her review of the U-M/2-Faller videotaped interviews. Dr. Wallace testified that one tape contained an interview of the younger child, with interviewer and defendant present, consisting of games. The tape showed that the younger child was instructed what to do when she met with Dr. Wallace. Dr. Wallace opined that the younger child was being coached, rehearsed and prepared to tell what the interviewer and defendant believed to be the "truth." Dr. Wallace testified that it is possible to use the cue words,

"tell the truth," to get the desired response from a child who, at the age of four, believes the "truth" is what her mother and the clinician want her to say. Dr. Wallace testified that the adults clapped for the younger child when she said what they wanted her to say and did not reinforce the positive things she said about plaintiff.

The court stated it would watch all six hours of the tapes. Dr. Wallace testified that the videotaped interview was structured for an adult, not a child. It was formal and inhibiting:

> They were set up verbally several times about [what] they were going to have to testify to, or what they were going to have to talk to me about, or what to expect in another environment which is not only irresponsible but it borders on lack of ethics to try to get the child to prepare for another evaluator. It's real close in terms of that line.
>
> The intonations that were used across the tapes that I was able to look at were systems and questions of positive ending "yes" and an "up" with things that did not apply to a positive ending.
>
> * * *
>
> If they wanted a positive response, if they wanted the child to say, "yes", you are right. They would end up with a . . . [high voice].

Dr. Wallace testified that she found a consistent pattern of bias and leading questions to set up the message that "Daddy Ed was bad and Daddy Paul was good." At one point the younger child was told, "It's okay if you don't want to see your dad."

Wallace commented on another pertinent episode in the tape:

> My recollection stands out with regard to the 11/19 tape with [the younger child] is that Laura [defendant] asked the therapist or the researcher to allow her to give questions to [the younger child.]
>
> At which time she said, "Tell them what will happen if you don't have supervision or somebody isn't there to watch you when you are with your Daddy Ed."
>
> And [the younger child] looked at mom and said, "He'll go to jail, right?" And to me it was [sic] she was responding to what she had been taught or told to say.
>
> She couldn't -- it was unlikely that she would have thought of that as a response without her mother having told her that or somebody.

Wallace also noted that defendant clapped her hands and gave positive, clear reinforcement when the younger child said negative things about plaintiff.

Reviewing the videotaped interview with the older child, Dr. Wallace testified:

> . . . I can comment as I stated earlier that it appears to me very clearly as a mode of setting the child up to fulfill expectations of the statements.
>
> One of the things that I heard clearly was -- the therapist or the researcher asked the child, "Do you like him? But you don't really like him, do you?" It looks like a turnaround sentence. Those things were there.
>
> She asked the child, "Do you have nightmares?" And then, "Does your sister have nightmares?" As though it was setting it that "both of you have nightmares, right?" Those are the sort of things that I saw as biased.

Wallace summarized:

> In my estimation the interviewers both had information or ideas that a sex abuse had occurred. And that it was the dad Ed that had committed it; and that the child should be frightened of or uncomfortable with Ed. The interviewer undressed the male doll and fumbled with the penis while [the older child] was asked leading "penis-related questions" which provided visual as well as auditor[y] "markers."

Dr. Wallace testified the danger in the type of questioning is that it presumes the existence of a fact and the child is unable to separate what is real or true from what is expected at the time. The child responds to what she thinks she is supposed to say with regard to the created memory.

Wallace continued:

> The fact that the therapist did not ask the child if she remembered or if it happened[,] but rather asked the child to respond to the assumption[] "Can you show me?" That moved her from qualifying whether or not that was true or false or having the opportunity to recant in any way if, in fact, she wanted to.
>
> So to not give the child that opportunity is structured and leading for the child. Because if they want to and they are out of the sight of others and they feel trust in the therapist, they can recant if they so desire.

* * *

> In my opinion, the task was oriented towards substantiation of an allegation versus oriented towards discovery as to what may or may not be in the child's memory at that time.

* * *

> She was not offered the opportunity to say what did happen but only to respond to what the interviewer asked her what happened.
>
> * * *
>
> The interviewer asked the child whether or not -- and she brought up the term finger. Finger had not been used anywhere in the dialogue. The interviewer brought up, "Was his finger inside or outside?"

Dr. Wallace testified that it ws significant that the interviewer showed her left index finger and said, "Had he touched you with this finger?" She testified that the interviewer showed the child both visually and auditorially what she should say. When the older child was asked how many times her father touched her, at first she said it was only one time, and then she said it was five times in one day. Dr. Wallace regarded the interviewer's question, "Are you worried that if you go see your dad, that it might happen again," was significant in that it was suggestive and leading.

Dr. Terrance Campbell, a clinical psychologist, testified for plaintiff as an expert. His deposition testimony had earlier been admitted.[28]

Dr. Campbell also reviewed the U-M/2-Faller videotapes. Dr. Campbell opined that because of the very long significant history preceding these tapes, no informed psychologist could ethically state whether what the child is reporting is accurate or imagined. He commented that the tapes reflected the influences of all the prior interviews in which the children had been involved, and noted that an investigation had been conducted in June, 1993, long before these tapes were done in November and December 1993. Dr. Campbell testified:

> The interviewers asked slanted one-sided questions that were designed to obtain only information that was consistent with the hypothesis the children had been sexually abused.
>
> The interviewers did not seek information that could indicate that the children had not been sexually abused. Under those circumstances, the probability of a reliable interview is exceedingly low or approximating zero.

He observed that in all four tapes the children were very passive compared to the high level of interviewer involvement. The interviewers did most of the talking. Dr. Campbell testified that that is significant because it is important to develop a verbatim, uninterrupted narrative from the child, in her own words, her version of what happened in order to discriminate between imagined allegations and actual instances of child sexual abuse. The interviewers were so active that they kept jumping in with questions. A warm verbatim narrative from the child was never obtained.

Dr. Campbell testified that the interviewers simply went in and began asking questions without preparation of detailed questions before the interview, and that they did not ask questions that could

obtain information that disconfirmed their expectations. He testified that under those circumstances, "the probability of a biased interview soars." He further testified that the interviewers did not formulate questions which would give them information about the extent to which the children were possibly being systematically alienated and estranged from their father, or systematically influenced in what they recalled by their mother, the maternal grandparents and previous therapists.

Dr. Campbell testified that one area which was not explored was that of innocent touching. He testified that children very often interpret interviewers' series of repeated questions as meaning they did not get it right before and they better change their answer to what this big person expects.

Dr. Campbell testified that the interviewers' questions create imagery in the child's mind, and can result in the problem that the questions create the child's imagination. Over time, what the child imagines and what the child remembers may become confused. Dr. Campbell testified that the method of interviewing he saw on the four videotapes was "very, very conducive to that outcome."

Dr. Campbell testified that children try to respond to adults in a manner they think the adults want and that he saw evidence in the videotapes that clues were being given the children regarding what was being looked for:

> In that interview [with the younger child], [the younger child's] mother who is in the session for most of the interview, it hit. The interviewer would ask the questions, and you could see little [the younger child] turn her head looking towards mom. She was seeking mom's guidance. She was seeking mom's input.
>
> That is what children will do in these circumstances if they are unsure and uncertain.

Dr. Campbell testified that the children were surrounded by a "network" of adults who agreed with each other and endorsed each other's points of view, including the mother, grandparents, Schulte and the U-M participants. He noted that there are positive references to Schulte by the U-M interviewers in the videotapes, so the children knew the U-M people approved of Schulte's work.

Dr. Campbell testified that the children were subjected to suggestibility. He testified that there is evidence of "parental alienation syndrome" where the children are being alienated from their father to the extent that they don't even recognize that he is their father, and that that foretells very serious consequences for these children unless it is corrected.

Plaintiff rested and defendant moved for dismissal of plaintiff's case pursuant to MCR 2.504. The parties argued the motion, and the court granted defendant's motion, stating:

> The Court, as has been pointed out, can make a decision at this time based upon the evidence that has been submitted.

What is best for the children is the most important point. The Court noted it when Dr. Campbell was on the stand and also from the deposition.

He stated, "In a child custody hearing where there are allegations of sexual abuse by either one parent or the other or both that determination should made [sic] prior to any consideration of awarding of the legal and permanent custody."

I have been appointed here to make that determination. I have not been appointed to decide on visitation, attorney fees or any extra motions that may come along with the case.

I was told specifically that the Plaintiff in this case, Edward Bielaska, denies any wrongdoing as far as sexual abuse of the children and believes that someone, either a boyfriend, a friend, or a biological on the mother's side is putting things into the children's heads.

Mr. Bielaska believes that the sooner he gets custody, the better it will be for the kids.

The Defendant Laura Lynne [sic] Orley sometimes called Laura Orley Newton denies coaching or encouraging the children to make up stories about what has happened and vehemently opposes Plaintiff having custody of the kids.

It is her belief that he has abused the children.

Now, [the older child] the six-year-old is a loving child. She would make as [sic] good teacher or in any profession or career that deals with people.

[The younger child], on the other hand, has a vivid imagination and would make a good artist, actress, author. Some of the things that [the younger child] has said, you don't know what they are a combination of: if they are a combination of facts or fantasies or dreams including nightmares.

Some person could have nightmares without anyone knowing about it. Or her conversations with her sister.

But some of the things that [the younger child] has said about Claudia being involved is being totally disregarded by the Court. Because it seems that because of her imagination, she is mixed up involving the extent of the people that have claimed to have been involved.

As far as grandfather saying, "Stop it" and knowing about it, it doesn't look like he would be the type to be involved in that. Or the grandmother.

In my twenty-five years on the bench, this is one of the hardest cases that I have been called upon to decide.

The experts seem to throw mud at one another and poke holes in each other's positions. So you have to wonder if these so-called experts are really experts at all; whether they have a lot of knowledge or whether they are adept at getting through the facts.

It's kind of hard to hold them in the same esteem as you would have held them prior to listening to them.

I look at this case from all sorts of angles. There is a lot of good information about suggestive memory and putting ideas in people's heads especially children's heads.

I looked at Judge Giovan's decision which contained some good points as to where is the motive that the Plaintiff has, the biological father might have in doing something like this.

Then of course leading questions, suggestive talk practices, inflections, intonations and everything else.

I looked at the Defendant Laura Orley and I said to myself at the beginning of the case, "She is coaching." Then as the evidence and testimony developed, it looks like she is not that type of person.

Edward Bielaska testified himself when asked, "Well, what are her bad points?" Do you remember it was like 45 seconds to 60 seconds that passed and he is trying to think of something. And he can't think of anything.

I tried to see if maybe Laura Orley is a liar; maybe she is a cheat; maybe she has some devious scheme or plan. But I have not been able to see that at all.

Then I looked at Edward Bielaska and I said, "What about the criticism of him?" Well, one visit to a psychologist or a social worker.

Laura Orley says, "Well, he did lie." But his parents don't seem to think so. His wife doesn't see any basis. Yet, most of the so-called experts have testified that it is sexual what the children say. They go on to see if there is corroboration to gain a substantiation of the children.

Those tapes are especially poignant. Discarding all of the criticism, the way the interviews were being held by the University of Michigan Assessment Clinic in saying that they should change their ways; to validate; to point it out. But they didn't.

Discarding what was said and the leading questions, the children still hold to the premise that Edward has molested them.

You can see that when [the younger child] freezes up and was asked if she was telling falsehood and lies. She shakes her head and says vehemently in a no position.

Then you say, "Maybe there has been some change. Are there later things that have been put into [the younger child's] head and [the older child's] head?"

Then you go back and Karen Schulte's original interview at that time says that there [sic] allegation of sexual abuse.

There is an established family home with the mother. She may not be doing everything right but she is trying.

The fact that she is on welfare doesn't make any difference in this matter. She is able to provide food, clothing and shelter.

I am a little disturbed that [the older child] goes to a private school and she is not exposed to other children.

It seems that Laura is oversheltering her children as a mother. To have them in North Carolina and watch videos of religious things and plays on T.V. with religious things and nothing else, that again is overmothering.

But all in all, under all these circumstances, the legal and permanent custody should remain with the mother Laura Lynne [sic] Orley.

The Court doesn't make this determination but would recommend to Judge Colombo that Plaintiff father should not have visitation for a period of eight months unless and until he gets some consultation himself as recommended by the University of Michigan Assessment Clinic. That would be my suggestion to Judge Colombo. That is not an order.

Now, if at any time during that eight-month period Judge Colombo is asked my suggestions or recommendations that the mother wants the father to visit during that eight months, it would be up to the mother. That would be up to the mother.

The court later issued a written opinion addressing Dr. Wallace's testimony in greater detail[29] and further discussing the children.[30] The court made specific findings of fact under the Child Custody

Act, determining that six factors were in defendant's favor and four were in plaintiff's favor. The court awarded defendant permanent custody. The parties subsequently came before Judge Colombo on defendant's motion for attorney fees. The court awarded defendant $10,000 in attorney fees.

II

Plaintiff argues the court committed clear legal error by erroneously weighing the best interest factors. MCL 722.27(1)(c); MSA 25.312(7)(1)(c), which controls the determination of custody matters where an existing order establishes custody, provides in part:

> The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.

MCL 722.23; MSA 25.312(3), as amended by PA 1993, No. 259, 1, effective November 29, 1993, provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

In reviewing the trial court's findings of ordinary and ultimate facts, this Court applies the great weight of the evidence standard. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). Based on our painstaking review of the entire record, including the six hours of tapes, we conclude the trial court's determination that plaintiff had sexually abused both children was against the great weight of the evidence.

There were three allegations of sexual abuse, of the older child in August 1989 and on June 27, 1993, and of the younger child on November 28, 1993. The trial court made no specific findings as to the individual allegations, either from the bench or in its written opinion and order, but made a general assessment of the credibility of the allegations.

As to the August 1989 allegation, the evidence indicates that defendant refused to let the first U-M court-appointed evaluators investigate this incident, the older child did not or was unable to verbalize the incident to a social worker defendant took her to for evaluation in August shortly after the incident was alleged to have occurred, and the incident occurred during a time when relations between the parties were very strained, defendant having repeatedly refused to comply with court-ordered visitation, and plaintiff having sought redress in the courts. The friend of the court referee found the allegation unsubstantiated, and Judge Giovan, after holding a hearing on January 19, 24, and 25, 1990, adopted the referee's findings.

As to the two later alleged incidents, there was testimony by plaintiff's parents and his wife that, after plaintiff was warned defendant was going to again accuse him of sexual abuse on June 24, 1993, all of the children's visitations with plaintiff were supervised.

Most of the trial focused on the June 27, 1993 incident. This incident is alleged to have occurred three days after plaintiff was warned that defendant intended to again accuse him of sexual abuse. There was testimony that plaintiff's mother supervised the entire visit, and Kellie Beveridge testified she was present at all times during that visit. Both of them testified plaintiff was never alone with either child, as did plaintiff. The children denied to Dr. Church that anyone had bothered their private parts. Although not dispositive, we note that no physical evidence of abuse was found. Dr. Sowa examined the older child the day after this incident and found no physical evidence of abuse. Dr. Church examined the children on July 30, 1993, and found no physical evidence of abuse.

As to the third alleged incident, there was testimony that the November 28, 1993 visitation was at all times supervised by both of plaintiff's parents and by Claudia Bielaska. The three testified at trial that plaintiff was never alone with either child on this date and had spent virtually the entire visit hanging Christmas lights outside on the house. Judge Colombo had found this allegation unsubstantiated.

The trial court's opinion seems to indicate that, notwithstanding all this testimony, it found that the children's demeanor during the videotaped interviews by the U-M/2-Faller Group and certain statements made by the children during the interviews were compelling, and it was not persuaded that defendant was the type of person to manipulate her children. The court was also troubled with aspects of Dr. Wallace's testimony. We find these determinations did not stand up to the great weight of the evidence at trial.

Although defendant may not have appeared motivated to fabricate at trial, the psychological test results of both Dr. Wallace and the U-M/Faller Group indicated she was preoccupied with sex. Dr. Wallace testified defendant's test results were indicative of evasiveness and perhaps conscious deception. There was evidence that defendant had not been truthful in many of her representations to Schulte, representations that Schulte relied on in making her assessment. Schulte's testimony regarding what defendant had reported to her about the older child's developmental history (being potty trained and talking in sentences by age eighteen months) was contradicted at trial by testimony that both children were behind in their learning, could not count well, could not read, and had been kept out of school in North Carolina; there was also testimony that the older child was not toilet trained at age three. Further, Schulte's testimony made clear that defendant failed to inform Schulte as to certain matters which Schulte testified she would have taken into account in her assessment had she known them, including: that defendant had been hospitalized for depression, that the June 27, 1993 visitation with plaintiff was supervised, that the children had seen Paul Newton's penis and lip-kissed him and others, and that plaintiff had been involved in the older child's care when she was an infant until defendant took the children out of state.

Moreover, defendant took both children to sex abuse counseling with Schulte before any alleged incident occurred with the younger child, and after a four-year interval since the alleged incident with the older child, and within several weeks of plaintiff having once again resorted to the courts to see his children after having learned, through private investigators, that they were back in Michigan.

The trial court based its finding of sexual abuse largely on statements the children made to Schulte, a social worker hand-picked and hired by defendant to substantiate that sexual abuse had occurred, and the children's statemetns in the videotapes.

We have viewed the taped interviews in their entirety and agree with Campbell's and Wallace's assessments of them. Further, we do not concur with the trial court's characterization and assessment of the children's behavior during the taped interviews.[31] We are unable to conclude from the tapes that the abuse actually occurred, and we find the trial court's reliance on the tapes to substantiate the allegations

to be unwarranted and against the great weight of the evidence regarding the tapes themselves as well as the totality of the evidence.

Plaintiff introduced the videotaped interviews for the non-hearsay purpose of showing the type of questioning and suggestibility to which the children were subjected. Although it is somewhat difficult to discern from the nature of the proceedings whether the trial court relied on the taped interviews only in its consideration of which expert opinion(s) to accept, or additionally as underlying substantive evidence of abuse, it appears the court placed considerable weight on the children's allegations during the taped interviews.

In *People v Meeboer (After Remand)*, 439 Mich 310; 484 NW2d 621 (1992), the Court noted:

> The Court warned against bootstrapping the admission of a hearsay statement on extrinsic or corroborating evidence, holding that the evidence "must possess [an] indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." [*Id*. at 323, citing *Idaho v Wright*, 497 US 805, __; 110 S Ct 3139, 3151; 111 L Ed 2d 638 (1990).]
>
> * * *
>
> Factors related to trustworthiness guarantees surrounding the actual making of the statement include: (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. [*Id*., 324-325.]
>
> * * *
>
> While under MRE 803(4) a statement does not necessarily have to be made to a medical doctor, the fact that the statement was made to a psychologist "suggests that the statement by the victim in this case may be less reliable than a statement made to a physician." [*Id*., 327, quoting from *People v LaLone*, 432 Mich 103, 113; 437 NW2d 611 (1989).]

Consideration of the principles set forth in *Meeboer (After Remand)* and the evidence presented at trial leads us to conclude that the statements made by the children during the tapes and reported by the therapists were not trustworthy. Many of the statements were not heard by the therapists, but were reported by defendant. The U-M/2-Faller Group's investigation occurred in November and December 1993, well after the first two alleged incidents involving the older child, and after Schulte's investigation and involvement. The children were very young and immature. The statements made by the children during the videotaped interviews followed leading and repeated questioning. There was expert testimony by Drs. Campbell and Wallace that the Faller Group's questioning was coercive and suggestive. Our independent review of the tapes leads us to the same conclusion. Dr. Wallace testified the Schulte reports indicated bias. The Schulte examinations were initiated by defendant to validate her belief that the children had been sexually abused by plaintiff. Schulte performed no psychological testing and all her information was obtained from defendant and her family. The U-M/2-Faller Group relied exclusively on Schulte's assessment and Dr. Church's records.[32] The propriety of defendant sitting in on most of the interviews conducted by the U-M/2-Faller Group was seriously questioned at trial. Drs. Wallace and Campbell testified defendant encouraged certain answers and that her presence would affect the interview. Again, our independent review is in accord. Neither Schulte[33] nor the U-M/2-Faller Group ever interviewed plaintiff.

When the tapes are viewed in their entirety, it is clear that the interviewer assumed the veracity of defendant and assumed that the abuse has occurred. The focus was on getting the children to describe the abuse. The children were subjected to repeated questioning until the desired response was obtained.[34] Further, there was no real exploration of the children's relationship and experiences with Paul Newton.

We also believe the trial court improperly believed or interpreted that Dr. Church's testimony buttressed a determination that plaintiff had sexually abused the children, while disregarding much more probative evidence which suggested plaintiff did not abuse the children. The trial court's opinion states:

> Dr. Annamarie Church, M.D., of St. Joseph Mercy Hospital in Pontiac, Michigan, did a physical examination of the children (one month after an alleged occurrence.) She saw some redness and minor inflammation and, despite the children denying that they had been touched by their father, concluded that the exam results were not inconsistent with a history of sexual abuse.

Dr. Church testified:

> Q. Let's see if we can get our semantics on track, Doctor. Would it be accurate to say that your use of the diagnostic nomenclature, quote, "history of sexual abuse," unquote, actually means, "A history has been given to me of sexual abuse by someone. But I was not present. And I am reporting that a history, a story, a recitation of possible facts, has been given to me"?

A. Correct.

Q. Thank you. So it doesn't not [sic] necessarily mean, absent further appropriate verification, that that history is in fact true.

A. Absolutely.

Q. What it means is, "A history, a story, some recitation from someone connected with the children who I am evaluating, has been given to me purporting to suggest sexual abuse"?

A. Purporting to suggest.

Q. Suggestive of sexual abuse or stating that it has happened.

A. Right.

Q. Fine. But that in no way means that there is in fact historically documentable findings that sexual abuse has been perpetrated upon this child; correct?

A. At least not to my knowledge that there is factual documentation.

She further testified:

A. The first go-around in the July whatever visit, my assessment would be basically non-specific findings. Not in the "definite sexual abuse" category, not in the "probable sexual abuse" category. The "maybe but not likely," I think is how they term it, would be the best category.

Adding the child's history in the November assessment, [the younger child's] history, probably would move it higher in the same category. Certainly not into the "definite sexual abuse." Maybe in the low category two or high category three I guess is where I would put it with the added history.

Dr. Church was asked "exactly what is your assessment?" and she replied:

I guess I would have to hedge it, because I'm not sure I've gotten a complete picture yet. I can definitely say <u>on physical examination there is not -- no specific finding that would lead me to say these children have been sexually abused</u>.

Taking into account [the younger child's] history, which would be the next biggest chunk, I guess, of information, increases the possibility. But I still know that I am in the midst of a custody battle. And I don't know all the details of that. So I would

> not -- I would not like to be the judge on this one. I wouldn't like to have to make that decision, did it or did it not happen. I don't think I have enough information.

Thus, although the court correctly observed that Dr. Church's findings "were not inconsistent with a history of sexual abuse," it is clear after reviewing her entire testimony that the "history" was obtained from defendant. It is also clear that she made no finding of sexual abuse. Further, she clarified that "a history" meant a "claim" of sexual abuse and not an actual finding.

We also conclude the trial court improperly imputed the children's knowledge of sexual matters to plaintiff. On this subject, the court's opinion stated:

> The court also takes cognizance of the fact that these children are aware of explicit sexual terms and of the private parts of both males and females at an age that children usually do not know of these things. They can not only relate the instances of abuse in some detail, but they can also demonstrate it on their bodies, demonstrate it on dolls, draw it on paper, and specifically identify it when drawn on a computer.

In light of the trial testimony, the trial court could not reasonably correlate the children's knowledge of sexual matters with plaintiff. In this regard, we note that photographs taken of the children during the four years they lived with Paul Newton, depicting the children in the nude, some with the focus on the genital area, the testimony of Newton that the children had seen him nude, the testimony that defendant was very concerned with the scrubbing of the children's vaginas, and the photographs of the children kissing Newton and others on the mouth, raise the question whether the children's environment was sexually charged in the four years prior to their return to Michigan. The trial court did not comment on these photographs or the children's experiences with Newton in its opinion. We have viewed the photographs attached to Dr. Wallace's report, and while we do not concur with all her characterizations of the photographs, we agree they are inconsistent with many of defendant's claims regarding the children's knowledge and exposure, or lack thereof, to sexual matters prior to their return to Michigan.

Additional factors support our conclusion that the trial court's determination that plaintiff had sexually abused both children was against the great weight of the evidence. The change in environment from North Carolina to Michigan, the breakup of their home, the loss of their "father" Paul Newton, and the information that they had a new "father" whom they had to visit created a traumatic situation for the children, which could account for the children's nightmares, anger, and the acting out. In addition to Dr. Wallace's testimony that these changes would cause the children a good deal of stress and could account for the symptoms the children were exhibiting, Schulte's report dated July 1, 1993, noted that the older child "appeared to be overwhelmed and confused about what has happened since her move to Michigan and the issue of the identity of her father." Trial testimony supported that defendant and her family undermined the possibility that the children could gradually and comfortably adjust to seeing plaintiff, by making it evident to the children that defendant did not want them to see plaintiff. For example, there was trial testimony that in defendant's household plaintiff was referred to as "the jerk." There was also evidence that defendant inappropriately involved the children in this litigation by telling

them about court proceedings, and that defendant (and one U-M/2-Faller evaluator) coached the children about "what to tell the judge." Considering all the circumstances, we cannot agree with the trial court's imputing of the stress the children exhibited during some of the videotaped interviews to plaintiff's having sexually abused them.

We conclude that the trial court discounted or disregarded most of the trial testimony, which supported that plaintiff had not sexually abused the children and that the Schulte and U-M/2-Faller Group interviews and evaluations were unreliable in that they proceeded from the presumption that plaintiff had sexually abused the children and relied to a great extent on unsubstantiated representations made by defendant. It was undisputed that neither Schulte nor the U-M/Faller group interviewed plaintiff. It was undisputed that Schulte performed no psychological testing of defendant, while Dr. Wallace, who had been appointed by Judge Colombo, did perform psychological testing. The trial court disregarded Dr. Wallace's test results, which were in accord with the U-M/Faller testing results in advising that defendant seek therapy and in identifying defendant's preoccupation with sex. Nonetheless, the court found Schulte credible and Dr. Wallace not credible, based in part on the fact that she was not sure what was done with the original of a drawing [Exhibit 12]. While we have our own reservations about Dr. Wallace's concerns regarding the drawing, her opinion was based on many factors other than her belief that the drawing was fabricated.[35]

The court made the following determinations as to the best interests factors:[36]

a) Love, etc. - This factor greatly favors the mother because of the abuse-created fear, mistrust and apprehension of the children toward the father.

b) Capacity, etc. - This factor slightly favors the father, especially about education. He is more sensitive to the educational needs of the children, who are now behind in learning, due, in part, to the mother's ineffectual tutoring or neglect. The mother, however, is deeply involved in following a Christian life for her and her children; more so than the father.

c) Capacity, etc. - This factor favors the mother. Whereas both parents keep clean and neat households, keep themselves and the children well-dressed, and keep the children bathed and clean, the health status of the children favors the mother. She has spent endless hours under difficult circumstances trying to serve the mental health needs of the children, although she has neglected some of their physical health, e.g. dental needs.

d) Length of time, etc. - This factor greatly favors the mother. Again, under adverse conditions the children have lived in a satisfactory environment with their mother, although not entirely stable, and its continuity would be in the best interests of the children.

e) Permanence, etc. - This factor greatly favors the father as he has lived with his wife of five years, basically in his own home. The mother, on the other hand, has moved three

times during the same period and is now separated from her husband and their marital home in North Carolina.

f) Moral fitness, etc. - This greatly favors the mother because of the court's finding of sexual abuse by the father. This is so, despite the past defiance of the orders of the court by the mother.

g) Mental & physical health, etc. - This favors the mother. Both parents are physically healthy. There was an allegation that the mother once may have tried to commit suicide, but this was denied by a witness at the hearing. Nevertheless, the conduct of the father reveals a very serious moral, mental and psychological aberration.

h) Home, etc. This favors the father. Home record of the children with the mother appears good. There is an absence of community involvement by the children, however, such as having friends, and this is weighed against the mother.

i) Reasonable preferences, etc. - The father waived having the minor children interviewed by the court in this matter, the mother deferred making a decision about having the children interviewed by the court.

j) Willingness, etc. - This factor favors the father, although it is not given very much weight because of good reasons for the mother's stance in the whole matter.

k) Any other factor, etc. - The factor that the court has determined that the father has sexually abused the children is a crucial factor in favor of the mother.

Because the trial court's assessment of the factors judged to weigh in defendant's favor was greatly influenced by the finding of sexual abuse, the court's conclusions regarding the factors must be set aside and the order awarding custody to defendant vacated.[37] While we might conclude from the record that the court would still weigh factors (a) and (d) in defendant's favor, there was substantial evidence apart from the sex abuse issue that could support a finding in plaintiff's favor on factors (f), (g) and former factor (k). Further, we conclude the trial court's finding that factor (c) weighed in defendant's favor was against the great weight of the evidence.[38] At best, the parties should have been judged equal as to this factor.

III

Defendant on cross-appeal argues that Judge Colombo's post-trial order awarding her only $10,000 in attorney fees, of a total $48,000 requested, constituted an abuse of discretion because the court erroneously concluded defendant's counsel was responsible in part for the length of the trial, and on other occasions took excessive time.

Defendant sought attorney fees under MCR 3.206 and the Paternity Act (Act), MCL 722.711 et seq.; MSA 25.491 et seq. Plaintiff argued in response to defendant's motion that the relief sought was premature, and was inappropriate because it was defendant's action in violating the court's orders and leaving the state that necessitated this litigation, and that defendant had not fulfilled the pleading requirements of MCR 3.206(C)(2).

Defense counsel argued at the March 25, 1994 hearing that plaintiff had paid more than $25,000 to litigate this action, that plaintiff owned a home, and that defendant was on ADC. Plaintiff's counsel responded that plaintiff had spent all his money on this case and in paying the previous attorney,[39] that he did not own the home but had a land contract under which he owed payments, and that plaintiff had paid current counsel a retainer of one dollar to handle the appeal. Plaintiff's counsel also argued that plaintiff had to borrow from his father the $2,000 he needed to obtain the trial transcripts for appeal of this case.

The hearing transcript reveals that following argument by counsel, Judge Colombo awarded $10,000 in attorney fees under MCR 3.206:

> THE COURT: Okay. This matter is before the Court on defendant's motion for attorney fees. The request is sought under MCR 3.306(C) [sic] which authorizes a petition for attorney fees at the present time.
>
> The party who requests attorney fees must allege facts sufficient to show that the party is unable to bear the expense of the action and that the other party is able to pay.
>
> It does appear that in fact the defendant is unable to pay and that she is receiving ADC. It also appears that plaintiff is employed and has some ability to pay, although at this point in time it does also appear that he has no assets that he can presently reach to pay attorney fees.

The court then discussed the factors in determining a reasonable attorney fee, as set forth in *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982), observed that the proceedings were unduly long due to defendant's attorney, and determined that a "reasonable reimbursement" was $10,000. We conclude the court did not err in declining to award defendant a greater portion of her attorney fees under MCR 3.206(C) or the Paternity Act.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Thomas G. Kavanagh
/s/ Steven N. Andrews

[1] Defendant's motion was brought pursuant to MCR 2.504(B)(2). This appeal is docket No. 173666.

[2] Docket Nos. 174949 and 175287. As plaintiff has not briefed either of these appeals, we decline to consider the separate merits of the issues raised in these appeals.

[3] Docket No. 175388.

[4] The trial court erroneously applied the pre-1993 amendment eleven best interest factors of MCL 722.23; MSA 25.312(3). The court determined six of the factors favored defendant, and four favored plaintiff, factors (b), (e), (h), (j). Plaintiff waived factor (i), having the children interviewed by the court, and defendant deferred decision on that issue. Of the six factors favoring defendant, the determination that plaintiff had sexually abused the children was a factor in four factors, (a), (c), (d), (f), (g) & (k).

[5] Judge Giovan presided over this case from its inception in 1988 until he recused himself in September 1993. Judge Robert J. Colombo, Jr., was then assigned to the case and presided except as to the February 1994 custody trial, at which retired district Judge Daniel Van Antwerp presided.

Judge Van Antwerp issued findings of fact and conclusions of law on the custody issue following the trial, as well as recommendations to Judge Colombo that plaintiff not have visitation rights for eight months or thereafter, unless and until plaintiff obtained counseling. Judge Colombo adopted Judge Van Antwerp's findings and recommendations and issued the post-judgment orders appealed here.

[6] Defendant was born September 7, 1968, and plaintiff was born November 23, 1962.

[7] The record contains an acknowledgement of plaintiff's paternity of the older child, signed by both parties, dated August 31, 1988.

[8] Plaintiff's complaint alleged he had supported the older child since birth, that for a six-week period in April and May 1988, defendant failed to allow plaintiff visitation on a regular basis. Plaintiff alleged that following September 4, 1988, defendant had again refused plaintiff time with the child and demanded $50 per day to visit with the older child. Plaintiff alleged that the older child was covered on his health insurance, but defendant failed and refused to use the insurance and that defendant was uninsured. Plaintiff additionally alleged that defendant refused to take the older child to the hospital on September 18, 1988, when she had a fever of 103 degrees, stating she could not afford it; that defendant leaves the child in the car alone when she goes shopping; that on information and belief defendant has applied and is receiving AFDC benefits despite being employed; that plaintiff is self-employed; that defendant is mentally unstable, having tried to commit suicide and having struck plaintiff a number of times; that defendant had stated a number of times she did not want the responsibility of a minor child and prior to delivering the older child, had stayed in a home for women who are going to place their child for adoption; and that on information and belief defendant was pregnant and the father was unascertainable.

[9] The University of Michigan was involved in two separate evaluations, one in 1989 and another in late 1993, each undertaken by different clinics.

The first court-ordered independent evaluation, referred to here as U-M/1, was conducted in 1989, prior to any allegations of sexual abuse being raised by defendant. Defendant refused to cooperate in this evaluation. In August 1989, after the U-M/1 evaluation was performed, defendant notified the evaluator, Ms. Berlin, of the alleged sexual abuse by plaintiff of the older child earlier that month but refused to have the U-M/1 team do further investigation. In late 1993, the University of Michigan became involved for a second time when the court ordered another independent evaluation to be conducted, but by a different clinic -- U-M's Family Assessment Clinic of the Interdisciplinary Project on Child Abuse and Neglect, under the direction of Dr. Kathleen Faller. This is referred to as U-M/2-Faller.

[10] Defendant's motion is not in the lower court record, plaintiff's response, filed April 11, 1989, is.

[11] The friend of the court recommended defendant be awarded custody, that plaintiff be granted visitations on Saturday from 10 a.m. to 6 p.m. until the older child reaches age two, and then on alternate weekends and holidays, birthdays, etc., and that defendant pay child support of $50 per week.

[12] The motion stated in pertinent part:

> 2. Upon return fro [sic] the last overnight visitation with Plaintiff the minor female indicated to Defendant that Plaintiff had tickled or fondled the minor's vaginal region.
>
> 3. Defendant is fearful that continued unsupervised visitation will result in further sexual misconduct toward the minor female which would cause irreparable harm to the minor and the Defendant.

Judge Giovan entered a "Modified Order Modifying Interim Custody Order and Referring the Matter of Custody and Child Support to the Friend of the Court" on September 22, 1989. In October 1989 an order to show cause was entered based on defendant's failure to comply with the visitation order.

[13] The U-M/1 Berlin report, dated August 21, 1989, states in pertinent part:

> This evaluation was discontinued prior to its completion due to Ms. Newton's failure to attend all but one scheduled session, and to her repeated failures to return my telephone calls to reschedule sessions. This situation persisted even after Ms. Newton's attorney, Stephen Boak, was apprised that the evaluation would be discontinued if his client did not soon contact the Center.

> Because the evaluation was incomplete, no recommendations can be forwarded. However, I did obtain information that might be of assistance to the Court. The information obtained was gathered during interviews held at the University . . .

We quote further from this evaluation because it is informative regarding the parties' history:

> Brief Description of the Context:
>
> Mr. Bielaska (26) and Ms. Newton (21) are an unmarried couple who met two to three years prior to [the older child's] birth. Both described their relationship as long fraught with conflict, and each detailed a history of multiple break-ups and reconciliations prior and subsequent to [the older child's] birth. The couple's disagreements were primarily related to differences between them regarding religious convictions and lifestyle preferences - Ms. Newton is a Christian who takes issue with Mr. Bielaska's occupation as a comedy club owner.
>
> Relations between Mr. Bielaska and Ms. Newton, though problematic for some time, became strained enough by June 1988 for both to conclude that things could not be worked out between them. The Court's involvement regarding custody began in September, 1988. This occurred at about the same time that the couple had a mid-night argument about [the older child] (with her present) that culminated in shoving, that later resulted in assualt [sic] charges filed by each against the other.
>
> According to Mr. Bielaska, his contact with his daughter has been consistent since she was three months of age, except for periods when Ms. Newton refused to let him see the older child. Ms. Newton concurs with this account, but says that Mr. Bielaska maintained contact only out of his interest for her, not for [the older child.]
>
> Ms. Newton married Paul Newton in April, 1989. She lives with him, [the older child,] and her second daughter... (D.O.B. 3-2-89) in Canton, MI. Ms. Newton recently disclosed her belief that Mr. Bielaska is [the younger child's] father. A hearing date has been set for the Fall to review findings regarding [the younger child's] paternity. Ms. Newton has thus involved Mr. Bielaska further in her life via [the younger child] at the same time that she states a wish for Mr. Bielaska to leave her and her family (i.e., her daughters and husband Paul), alone. Mr. Bielaska angrily asserts that Mr. Newton will never be [the older child's] real father, no matter what Mr. or Mrs. Newton say.
>
> Mr. Bielaska states that his central concern is to maintain an ongoing role in the life of his daughter. Pursuant to this, he has requested joint custody of [the older child], and more frequent visitation with her than was recently granted by the Friend of the Court . . . . Mr. Bielaska, with some justification, worries that he is being phased out of [the older child's] life given the infrequency of visits.

> Mr. Bielaska did not challenge the quality of Ms. Newton's caregiving of [the older child,] nor did he question the presence of a bond between mother and daughter. He expressed animosity toward Mr. Newton (who [the older child] is purportedly instructed to call "daddy"), and questions the stability of the marital relationship. These objections seem to relate to concerns about being replaced by Mr. Newton, rather than to questions of his suitability as an adult in [the older child's] life.
>
> Ms. Newton states that her central concern is that of getting on with her life, which means caring for her husband and children, absent Mr. Bielaska. During our interview, she stated the hope that Mr. Bielaska would eventually desist in his efforts to see [the older child] in the face of frustrating obstacles (e.g., decreased visitation). Thus Mr. Bielaska's primary concern was given concrete affirmation by Ms. Newton. Indeed,she seemed to demonstrate this approach in her dealings with me as well, passively obstructing this evaluation in ways that brought it prematurely to a close.
>
> During the interview, Ms. Newton expressed no concerns about the quality of care provided for [the older child] by Mr. Bielaska. Rather, as already stated, she thought that [the older child] was upset by frequent moves between households. As I indicated above, Ms. Newton contended that Mr. Bielaska is really interested in her, not her daughter. She is puzzled that a man would be interested in caring for a young child.
>
> After the evaluation was closed, Ms. Newton contacted me about concerns that Mr. Bielaska has been sexually molesting [the older child.] She cited [the older child's] recent nightmares and a comment by her during potty training. (She said "Ed tickle me here" while pointing to her vagina.) I told Ms. Newton that such statements alone are not uncommon for children [the older child's] age. At the same time, I supported her interest in pursuing a full understanding of the situation. She was invited to come in to discuss the situation, but declined the opportunity to do so.

In the "Assessment" section, Berlin noted:

> Finally, obstacles to the completion of this evaluation seem pertinent to mention as they may complicate or interfere with custody and visitation arrangements. First, it was my impression that Mr. Bielaska and Ms. Newton share no history of working things out together, and thus are particularly hard pressed to work things out in the face of current animosities. Second, Ms. Newton communicated in word and action that she feels she has little to gain by cooperating with this evaluation, and through extension, with the Court. Both factors will likely provide ongoing challenges to making and maintaining arrangements for [the older child.]

[14] The transcripts are not before us.

[15] On September 22, 1989, a consent order incorporating a stipulation for paternity blood testing was entered by Judge Giovan. The order required the parties and the younger child to appear for testing on September 5, 1989. Defendant did not appear, and did not submit to blood testing until the court entered a second order in 1993. Plaintiff's paternity of the younger child was finally established in October 1993.

[16] It is unclear why the U-M/2-Faller group continued its evaluation (and videotaping) after this order was entered. An assessment of the younger child took place on December 13, 1993.

[17] At trial when Dr. Faller's Curriculum Vitae was being discussed, the court said "The reason she was struck was because of the claim of bias?" Defense counsel stated "That's right."

One of the exhibits appended to Dr. Faller's de bene esse deposition, admitted at trial, was the deposition in another child sexual abuse case of the then president of the American Psychiatric Association, E. Benedek, which severely criticized Faller's techniques in assessing child sexual abuse.

[18] Dr. Church testified in her de bene esse deposition that she examined the younger child on November 29, 1993. She found no physical evidence of sexual abuse. Dr. Church testified the younger child told her "Ed touched my butt." Dr. Church testified she asked the younger child if the touch was inside or outside, and that the younger child replied in. Dr. Church testified the younger child told her she and the older child were in the bedroom on the bed coloring and that Ed came into the room and touched her butt. Dr. Church testified the younger child "was unclear as to whether this was over or under her clothing or what she was wearing," and that the younger child "was certain that her sister was unaware . . . and that her grandmother came in and told him to stop." Dr. Church testified the younger child denied any discomfort the following day.

On cross-examination, plaintiff's counsel elicited from Dr. Church testimony that she had obtained the children's histories from defendant, and that she was unaware that the children's visitations with plaintiff were supervised, that defendant's prior allegations of sexual abuse had been found unsubstantiated, that defendant had searched for his children with private investigators for two years, and that after locating them and again seeking custody, defendant again alleged sexual abuse. Dr. Church testified that had she known these things at the time she examined the children, she would have been more critical of what the children told her.

[19] Standardized psychological testing of defendant by both Dr. Wallace and the U-M/2-Faller group showed a preoccupation with sex on defendant's part.

[20] This is a misstatement; at the time the older child was 22 months old.

[21] Dr. Wallace went through an exhibit of photographs. One showed the baby's head with a significant cut or burn. There were many bathtub scenes. One picture showed the older child lying on a bed naked. The person in the bed with her is an adult clothed male caressing her. In another, the older child

and the younger child are naked on the couch with an adult male dressed in a sweater. One picture showed the older child standing outside naked, which Dr. Wallace testified was inappropriate for her age. Another showed the older child naked with a toy covering her vagina. There were many pictures of the children in the bathtub with no water in the tub.

[22] Defendant had talked to Dr. Wallace about her first sexual experience with plaintiff. She did not say plaintiff had raped her.

> She said that he wanted her and that he made her but it was not in the sound of a rape. It was in the sound of coming together of two people. She just said, we had sex and he wanted to.

[23] Wallace's written report states:

> Noteworthy is an incident which occurred during examination of [the older child.] During the second interview session, while drawing pictures representing various family members and her home environments, [the older child,] in a panicky manner, stated: "Oh oh, I forgot what Mommy told me to say" and then covered her mouth with her hands as if to show remorse for revealing the contents of a confidential conversation. She was clearly confused and hesitant to discuss topics, other than those for which she had been specifically coached by her mother.

[24] The age difference between the parties is five years and ten months. At trial plaintiff denied forcing himself on defendant the first time they had intercourse, and defendant's sister-in-law testified defendant came up with that account after watching a talk show on date rape, never having previously mentioned it. There was testimony at trial that defendant had a boyfriend prior to plaintiff, and that she had a picture of a man with a big penis painted on a fingernail while in cosmetology school. The parties' accounts of the physical altercation differed; each accused the other of hitting.

[25] There was no evidence at trial that either of these statements were true. To the contrary, several witnesses testified that the children were behind in their learning. Plaintiff's sister Kathy Celentano testified that during a Christmas visit in 1993, she discovered that the older child, a six year old, did not know how to count to three and could not read a book. It was undisputed that neither child went to school while in North Carolina, apparently the older child attended school for several weeks only. While there was evidence that the older child received all excellents on her report card after returning to Michigan, cross-examination of the teacher revealed that she was still learning the letters of the alphabet.

There was also testimony at trial that the older child was still in diapers at age three, contrary to defendant's statement that she was potty-trained at eighteen months.

[26] Dr. Wallace, administered the MMPI and various other tests. The U-M/2-Faller Group also tested defendant and determined her IQ was 84, placing her on the low-average range of intellectual

functioning. However, the evaluator noted this score was "clearly below her actual level of intellectual functioning," and attributed this in part to psycholodynamic reasons, including her approach to testing, which alternated between "quite mature and organized," and "adolescent and schoolgirlish."

The U-M/2 evaluator detected, similar to Dr. Wallace, a "pronounced tendency... to ignore or avoid material... she finds disturbing, prominent among which are sex and agression." The evaluator noted defendant's preoccupation with sex and recommended defendant enter therapy.

[27] Medical records submitted by plaintiff support these arguments.

[28] Campbell's deposition testimony was critical of Schulte's technique and conclusions.

[29] In this regard, the written opinion stated:

> During the hearing, Dr. Wallace was called as a witness as part of the plaintiff's case. She reviewed the factors to determine what was in the children's best interests under the statute and recommended to the court that permanent custody be awarded to the father, the plaintiff in the case.
>
> Dr. Wallace emphatically insisted that she was appointed to make a recommendation only on the custody issue and not whether sexual abuse had actually occurred or not. Her testimony suggested that, if that was the case, she would have reviewed additional materials, would have conducted other or more sexual-abuse-oriented interviews (especially with the children), and, generally, would have approached the issue in a different manner. Toward the end of her testimony, she opined, however, that there was no sexual abuse by the father in this case.
>
> A "red flag" went up, however, when Dr. Wallace was unable to produce an original or a copy of [the older child's] drawing (plaintiff's Exhibit 4, Sub-Exhibit 12, I believe) from her records (although a copy of the drawing had been attached to her Report (plaintiff's Exhibit 4).). This situation occurred immediately after the Doctor had finished testifying that no good professional in the field would allow such an important document out of his/her possession without a court order! She then admitted that she didn't know whether she initially had been sent the original drawing, a duplicate original or a copy of the drawing. After a few minutes, she reluctantly admitted that she must have sent the one that she had back to Karen Schulte.
>
> This drawing by [the older child] ... was one of the key points in Dr. Wallace's evaluation. It was her opinion that it had been forged and she believed that the mother had done it. She said the child ... was not the one who wrote her name on it and may not have been the one to draw it. Dr. Wallace admitted that, during her interview with [the older child], she did not ask the child those questions. This court has read Karen

Schulte's deposition and heard her testimony-which this court believes - that the child, in her presence, did both write and sign the drawing (which depicts [the older child] touching her father's penis).

[30] Regarding the children, the written opinion stated:

> The court also takes cognizance of the fact that these children are aware of explicit sexual terms and of the private parts of both males and females at an age that children usually do not know of these things. They can not only relate the instances of abuse in some detail, but they can also demonstrate it on their bodies, demonstrate it on dolls, draw it on paper, and specifically identify it when drawn on computer.
>
> Significant is the fact that at times the children feel a sense of shame when discussing these instances. They seemed reluctant to talk about them and, when they did, often talked in low hushed tones.
>
> Also, significant is the fact that [the older child] said that her father on one occasion forbid [sic] her to tell her mother about it or that "he would get angry with her mother." As I understood the evidence, [the older child] first told her Aunt Erin Orley about this particular instance, where the warning was made by the father. [We note that Erin Orley did not testify at trial.]
>
> The evidence indicates that [the older child] was truthful when she said (among other things) that five times her father had inserted his index finger inside of her vagina (which she labeled "bottom"), that once he laid on top of her and asked her how she liked it, and at another time had her touch his soft penis.
>
> The evidence indicates that [the younger child] probably was truthful when she said that her father had touched her vagina (which she also called "bottom") with his index finger. Her definite statements, her hyperventilating, her need for water, her low tones, her violent shaking of her head "no" when asked whether she was lying, all point to some sexual violation of her - and, in all probability under all the circumstances of this case, by her father. Her statements that her "pappa" (her paternal grandfather) heard what was happening and told the father to stop is unbelievable, and her belief in this regard may have come from dreams, fantasies, a very active imagination, or otherwise. Similarly, [the younger child's] statement of a touching of her by Claudia is unbelievable.
>
> The court, in an effort to get the parties to settle this matter, had indicated early in the trial that it seemed [e.g., from the evidence presented so far] that the parties loved their children dearly and that the children loved their parents dearly. The court had deduced this from the children's behavior in the office of Dr. Wallace, from the testimony of the paternal grandparents, etc. No fear of their father was shown by the children; instead,

> they ran and hugged him. Subsequent evidence, especially that appearing in the U of M tapes, showed that, when the children were asked about it (not in the presence of their father), that they had a very definite and real fear of their father and dreaded going to visit him, much less staying with him! [The younger child], however, did admit that she looked forward to seeing her father during the Christmas season, because she got toys.
>
> It is further significant that these accusations were stated to different persons on different occasions - including the mother, the aunt (Erin Orley), and the interviewers (including Karen Schulte and the two U of M interviewers) over a six-month period. Indeed, there were some recantings, but two experts (including Dr. Campbell) stated that this might occur for a number of reasons, including stress or threats, but does not, of itself, rule out the truth of the allegations.

[31] The trial court's conclusions are quoted in footnote 30. While the inferences seem legitimate when portions of the tape are viewed in isolation, we find them unwarranted and unsupportable when the tapes are viewed in their entirety and considered against the backdrop of this case. One must assess the behavior and statements in the context of the entire interview, including the persistent and sometimes badgering questioning of the children. Should this case be the subject of further appellate review, we urge the Supreme Court to view the tapes in their entirety despite their length.

[32] The U-M/2 Faller "social work evaluation," an exhibit to Dr. Faller's de bene esse deposition, states in pertinent part that records reviewed were Dr. Church's and Karen Schulte's (not the U-M/1 Meryl Berlin report) and that "Ms. Schulte's evaluation of [the older child] was extremely comprehensive."

[33] Schulte invited plaintiff's participation at one point, but he declined, expressing concern regarding bias on Schulte's part.

[34] On several occasions during the tapes, despite the fact that the interviews were conducted in a fashion that did not lend itself to the children being positive about plaintiff, the children spoke positively about him and indicated a willingness and desire to visit with him and his wife.

[35] While we question Dr. Wallace's certainty that Exhibit 12 was a fabrication, and her characterizations of some of the photographs, her conclusion regarding Exhibit 12 was not without support or reason, and her concerns about the photographs in general were sound. We find scant support for the trial court's comments regarding her testimony (see footnote 29). The exchange regarding the original of Exhibit 12 has little to do with the merits, and the discussion regarding Dr. Wallace's determining whether abuse had actually occurred seems more an issue of semantics than substance.

[36] The trial court did not consider the best interests factors under the amended statute, and thus did not address factor (k), domestic violence, a new factor under the amended statute. Prior factor (k) is, under the amended statute, now factor (l).

[37] We do not address the March 25, 1994 order (see footnote 2), except to the extent that our decision requires that the provisions regarding visitation be revisited.

[38] The court found in favor of the mother for the reason that she had "spent endless hours under difficult circumstances trying to serve the mental health needs of the children, although she has neglected some of their physical health, e.g. dental needs."

There was no evidence that plaintiff had ever neglected to provide these necessities for his daughters and there was evidence, recognized by the court, that defendant had neglected the children's medical and dental needs. Claudia Bielaska, a nurse, testified the children were not taught basic hygiene and that she tried to teach the children, for example, to wipe themselves after using the toilet. Plaintiff testified that when the children were ill and visited, defendant gave no information on their condition and sent no medications with them. Plaintiff introduced medical records at trial tending to support that defendant had missed medical appointments and had not had the children inoculated. Further, it is not clear that defendant was addressing the mental health needs of the children -- focussing on therapy -- as much as seeking validation.

[39] Plaintiff's appellate counsel was substituted in that day by order dated March 24, 1994.