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Children Resisting Contact & Parental Alienation: Strategies for Lawyers in High Conflict Parenting Cases

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Abstract.
An increasing number of high conflict separations involve children resisting contact with a parent, often with conflicting claims of parental alienation and family violence. These cases pose significant risks of harm to children, as well as major challenges for courts and family justice professionals. Parental alienation is controversial, and some critics, like the National Association of Women and the Law, condemn it as a "pseudo-scientific" concept that should not be used in family proceedings. However, parental alienation continues to be widely used by judges, lawyers and parenting evaluators in Canada, and has significant support in social science literature. While useful, alienation is often misused, including by abusive men. Assessment of cases of children resisting contact with a parent are often complex, with multiple interacting factors. Alienation needs to be distinguished from other parent-child relationship problems, including cases of realistic estrangement, where a child is resisting contact with a parent due to family violence or poor parenting, Further, a finding that there has been alienation is not determinative of the appropriate, proportionate response.

Between 2021 and 2023 there were 172 reported family law cases in Ontario involving allegations of parental alienation. The court made a finding of alienation in only 36% of the cases where there was a claim of alienation. In a significant portion of the 172 cases (60%) there were claims of both alienation and intimate partner violence (IPV), with a court finding that there was IPV almost always resulting in finding that there was not alienation. Most of the alienating parents (43=68%) were mothers, though fathers also engage in alienating conduct; alienation by father was often related to his perpetrating spousal abuse or coercive control. A finding of alienation often occurred when the court concluded that a mother had made (often repeated) unfounded allegations of abuse or spousal violence. Even when there was a finding of alienation, custody reversal was ordered in 9 out 63 cases (14%), cases where the courts found significant emotional harm to children from the conduct of the alienating parent.

A small but interesting recent retrospective study of Ontario cases (2010-2022) found 6 children who had been the subject of a custody reversal order; although all were opposed to the order when it was made, years later each reported that they understood why it was done, and that they were satisfied living with the previously rejected parent (Birnbaum & Bala, 2024).
In many cases of children resisting contact, it may be possible for lawyers and courts to support parents to change their behaviour to allow the children to have good relationships with both parents. In many less severe alienation cases parents can be helped to reduce their conflict and allow a child to have a relationship with

both parents, but in the most severe alienation cases contact with an alienating parent may need to be suspended to prevent emotional trauma to the child. In other alienation cases, it may be best for the child to give up attempts to legally enforce contact with a rejected parent. In cases of realistic estrangement or family violence, it may be necessary to suspend contact with an abusive parent.

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Key words. Parental alienation, children resisting contact, high conflict separation, estrangement

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Children Resisting Contact & Parental Alienation: Strategies for Lawyers in High Conflict Parenting Cases

Nicholas Bala, Rachel Birnbaum & Jessica Farshait*

I. INTRODUCTION: THE CHALLENGE OF HIGH CONLFICT CASES

Family lawyers and judges in Canada are dealing with a growing number of high conflict cases where children are resisting contact with a parent, with the rejected parent often claiming that the child has been "alienated." [1] The term parental alienation was first coined in the 1980s and was a relatively obscure psychological concept, but it has come into widespread use (and misuse), in part due to use of the internet and social media, and it is not uncommon for clients to directly raise the issue of alienation with their lawyers. High conflict cases where a child is resisting contact with a parent pose unique challenges to family justice professionals and the court system, as well as risk of emotional harm to children.

The question of why a child is resisting contact with one parent generally requires a multilayered assessment or a wide range of interacting factors. There are cases where ***child's resistance to contact*** (CRC)[2] can be characterized ***parental alienation***, that is primarily a response to emotionally harmful alienating behaviour or attitudes of the favoured parent. However, it is also clear that in many cases where a child is resisting contact with a parent, the allegations of parental alienation are not well founded, and the child's resistance to contact with one parent should be characterized as ***realistic estrangement*** due to abuse, poor parenting, problems in a stepfamily or other factors primarily related to the rejected parent There are also cases where a child is understandably ***aligned*** with one parent that does not involve rejection of the other. There are also cases that cannot be easily classified.

In many of cases of CRC, an effective legal response may be needed to promote the best interests of the child, but many of these cases should be resolved without an expensive, embittering trial. While knowledgeable mental health professionals can play a critical role as expert witnesses and in providing appropriate interventions, in some cases inappropriate responses from therapists or child protection services can exacerbate the situation and harm the child. Case management and clear judicial control is very important for high conflict cases.

While there is some variation in precise definitions used by different researchers,

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[1] A LexisNexis search of Ontario family cases raising "parental alienation" issues between 1995 and 2005, found about 5 reported cases a year, while in 2014 there were 41 cases and in 2015 there were 38 cases: Bala & Hunter, Children Resisting Contact & Parental Alienation: Context, Challenges & Recent Ontario Cases, 2016 CanLIIDocs 4594. In this study, using reported Westlaw cases, we found 69 cases raising parental alienation in 2021, 54 in 2022 and 49 in 2023. The increase in Canada reflects broader international trends: see Kline Pruett, M., Johnston, J.R., Saini, M., Sullivan, M., and Salem, P. (2023), The use of parental alienation constructs by family justice system professionals: A survey of belief systems and practice implications, *Family Court Review, 61,* 372-394.

[2] These are also referred to as cases of Parent-Child Relationships Problems (PCCP).

clinicians, and judges, it is broadly accepted that "parental alienation" refers to situations that arise post-separation where a child is resisting contact with one parent primarily due to the influence of a favoured parent, and that these cases must be distinguished from cases in which a child is "realistically estranged" due to their own experiences with the rejected parent,[3] and other situations where a child is favouring one parent. Despite the widespread use of the concept of parental alienation, and perhaps because of its not uncommon misuse, there is controversy over such issues as: how to reliably identify cases of alienation; the relationship of alienation to family violence; how to respond to alienation; and the consideration of the rights of children in alienation cases.

A significant portion of the discussion and writing about children resisting a relationship with a parent is polarized and often polemical. At one end of a spectrum is the position of National Association of Women and the Law (NAWL) that parental alienation is based on "junk science" and the use of this concept should be prohibited in family court. This position is supported by some feminist scholars who assert that family court judges consistently invoke alienation claims to take children away from protective mothers and place them in the care of fathers who have a history of child abuse and intimate partner violence,[4] and that court-ordered use of "camps" to reintegrate children with rejected fathers is harmful to children and violates their fundamental rights. [5] At the other end of the spectrum are researchers and practitioners

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[3] Fidler & Bala (2020), Concepts, controversies and conundrums of "Alienation:" Lessons learned in a decade and reflections on challenges ahead, *Family Court Review, 58(2),* 576-603. In *Bors v. Beleuta*, 2019 ONSC 7029, Van Melle J. approved of a definition of parental alienation proposed by Dr. Michael Stambrook (at para 119):

> It is a descriptive term that refers to a process. It is not a diagnostic label. It doesn't appear in any nomenclature about mental health disorders. It is a descriptive term that refers to a process where there is a systematic devaluation, minimization, discreditation of the role of, typically the other parent in a parental dyad. One parent systematically, through a variety of physical, emotional, verbal, contextual, relational set of maneuvers systematically reduces the value, love, commitment, relationship, involvement of the other parent by minimizing, criticizing, devaluing that parent's role. It can involve children having their sense of history being "re-written" by a parent's redefinition of history, reframing things, repetitively talking about things. It can involve sometimes very subtle and sometimes not so subtle suasion, coercion, direction, misrepresentation and so on. So parental alienation is a process, an interactional process where systematically one parent's role in, for the children is eroded over the course of time.

[4] See e.g Sheehy & Boyd (2020), Penalizing women's fear: Intimate partner violence and parental alienation in Canadian child custody cases, *Journal of Social Welfare and Family Law, 42(1),* 80-91; and Zaccour (2020), Does domestic violence disappear from parental alienation cases? Five lessons from Quebec for judges, scholars, and policymakers, *Canadian Journal of Family Law, 33,* 301-320; Meier, J., & Dickson, S. (2017). Mapping gender: Shedding empirical light on family courts' treatment of cases involving abuse and alienation. *Journal of Child Custody*, *Law and Inequality 35*(2), 311–33; and Neilson, L. (2018). Parental alienation empirical analysis: Child best interests or parental rights? Vancouver: The FREDA Centre for Research on Violence Against Women and Children. Available at www.fredacentre.com/wp-ontent/uploads/2018/02/Parental- Alienation_linda-Neilson.pdf

[5] Avalle, Smith, Wiedeman, & Garnica, (2022), How efficacious is Building Family Bridges? What the legal and mental health fields should know about Building Family Bridges and "parental alienation", *Journal of Family Trauma, Child Custody & Child Development, 19*, 1-15. Andreopoulos, E. & Wexler, A. (2022), The "solution" to parental alienation: A critique of the turning points and overcoming barriers reunification programs, *Journal of Family Trauma, Child Custody & Child Development*, *19*, 417-437; Mercer, J. (2022), Reunification therapies for parental alienation: Tenets, empirical evidence, commonalities, and differences, *Journal of Family Trauma, Child Custody & Child Development, 19,* 383-401; and Jaffe P., Scott, K., Heslop, L., & Hooda, S. (2023). *Sober second thoughts about the benefits and limitations of reunification therapy. Family Violence & Family Law Brief, 27.* London, ON: Centre for Research and Education on Violence Against Women and Children, Western University. ISBN 978-1-988412-72-6.

who argue that it is relatively easy to reliably identify alienation cases,[6] and that alienation is often a result of mothers making unfounded claims of child abuse or intimate partner violence.[7] Some of these alienation-oriented advocates argue that mothers are making ever of increasing unfounded claims of abuse,[8] and that there need laws enacted laws to more specifically recognize parental alienation and even making it a criminal offence.[9]

Decisions about the appropriate response to children resisting contact with a parent and alienation are often complex and must always be based on an assessment of the best interests of the child involved. Many parents engaging in alienating behaviours can be educated, cajoled or pressured by their lawyers or the courts into supporting their children's relationship with the other parent. However, for the most severe alienation cases, it may be in the child's best interests to change parenting arrangements. Judicial options for response to alienation include "custody reversal" and suspending contact with the alienating parent or, at the other end of the spectrum, deciding that is better for the children to give up on legal efforts at trying to establish a meaningful relationship with the rejected parent.

Similarly in some cases where there is realistic estrangement and perhaps a history of family violence it may be possible for family justice professionals to work with rejected parents to foster understanding of the negative effects of their behaviours and attitudes on the children and promote change which will allow for a restoration of a parent-child relationship. There are also cases of realistic estrangement, especially involving family violence, where it will not be appropriate or possible to restore a parent-child relationship.

This paper reviews some of the key concepts and controversies in the social science literature related to children resisting contact with a parent post-separation and parental alienation and, and discusses issues related to proof of alienation and legal responses to it. The paper considers the intersection of claims of Intimate Partner Violence (IPV) and Parental Alienation (PA), though it does not offer an in-depth consideration of the critical issues related the effects of IPV on children and appropriate responses to IPV in parenting cases.[10] The paper includes an analysis of the 172 reported Ontario family cases from 2021 to 2023 that raised parental alienation claims, and reports on a small retrospective study of Ontario children in more severe alienation who were subject to a custody reversal order.

The paper concludes by offering suggestions for lawyers about good practices for dealing with cases where children are resisting contact with a parent. The reality is that the law is a blunt social instrument. While a relatively small number of these cases need to result in a court order that restricts the involvement of one parent in the life of their child (at least for period of time), in most cases a child-focussed resolution can be achieved that does not result in the exclusion of either parent from the child's life. These resolutions may require court

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[6] Bernet, William, and Laurence L. Greenhill. "The five-factor model for the diagnosis of parental alienation." *J. Am. Acad. Child Adolesc. Psychiatry* (2022).

[7] Harman, J. J., & Lorandos, D. (2021). Allegations of family violence in court: How parental alienation affects judicial outcomes. *Psychology, Public Policy and Law*, *27*(2), 187–208; Harman,J. Giancarlo, D. Lorandos, B. Ludmer. (2023). Gender and child custody outcomes across 16 years of judicial decisions regarding abuse and parental alienation, *Children and Youth Services Review*, doi: https://doi.org/10.1016/j.childyouth.2023.107187;

[8] See e.g sites of the Parental Alienation Awareness Organization, https://www.paaousa.org and the Canadian Children's Rights Council

[9] See e.g https://mensdivorcelaw.com/brazil-outlaws-parental-alienation/

[10] For a discussion of these issues, see Jaffe, Bala, Medhekar & Scott, *Making appropriate parenting arrangements in family violence cases: Applying the literature to identify promising practices*, 2023 (Justice Canada) https://www.justice.gc.ca/eng/rp-pr/jr/mapafvc-cbapcvf/index.html

involvement, at least to have a judge urge the parents to take a child-focussed approach and often involve a co-ordinated response of mental health and social service professionals as well as the courts and lawyers.

II. PARENTAL ALIENATION: THE SOCIAL CONTEXT

"Parental Alienation *Syndrome*": Development and Critique

By the start of the twentieth century, courts recognized that during post-separation an embittered parent might try to "poison the mind" of their child towards the other parent, but it was only in the 1980s that the American psychiatrist Richard Gardner proposed the concept of Parental Alienation Syndrome (PAS), defining it as:

> a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent.[11]

Gardner believed that the alienating parent, almost always the mother according to him, was motivated by a concern with gaining sole custody and excluding the other parent from the child's life.[12] Gardner believed that alienation was often accompanied by the mother making unfounded allegations of sexual abuse against the father to reinforce her position.

While the idea of "parental alienation" is now widely accepted, Gardner's formulation of Parental Alienation Syndrome was controversial, as it focused only on the alienating parent and child, and suggested that a clinician could diagnose this "disorder" in a child.[13] Although some mental health professionals[14] adopted Gardner's model and advocated for inclusion of "parental alienation syndrome" as a mental disorder in the *Diagnostic and Statistical Manual of Mental Disorders 5,* the American Psychiatric Association decided not to include this condition, in part because it is not an empirically validated "syndrome," defined as a collection of symptoms that have a "commonly recognized, or empirically verified pathogenesis, course, familial pattern or treatment selection."[15]

Although parental alienation is a real phenomenon that occurs in high conflict separations, it is not accurate to describe it as a "syndrome" of the child. Rather, parental alienation should be considered as a possible characterization of a situation where child is resisting contact with one parent. It is always necessary to try to determine the reasons why a child is rejecting a parent. In some cases, the resistance to contact may be due to a history of parental abuse,

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[11] Richard A. Gardner, "Should Courts Order PAS Children to Visit/Reside With the Alienated Parent? A Follow-Up Study" (2001) 19 American Journal of Forensic Psychology 61 at 61.
[12] Richard A. Gardner, "Commentary on Kelly and Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome'" (2004) 42 Fam. Ct. Rev. 611 at 612.
[13] See e.g. Janet R. Johnston & Joan B. Kelly, "Rejoinder to Gardner's 'Commentary on Kelly and Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome'" (2004) 42 Fam. Ct. Rev. 622.
[14] William Bernet, "Parental Alienation Disorder and DSM-V" (2008) 36 American Journal of Family Therapy 349 at 349.
[15] Barbara Jo Fidler, Nicholas Bala & Michael A. Saini, *Children who Resist Post-Separation Parental Contact: A Differential Approach for Legal and Mental Health Professionals* (Oxford University Press, 2013) at p 42.

violence, or poor parenting, and may be classified as realistic estrangement rather than alienation.

A second, and related, criticism of Gardner's formulation of parental alienation syndrome was that it used "the terminology of a medical syndrome to explain the behavior of family social systems."[16] Rather than viewing parental alienation as a mental condition of a child, it is more realistic to understand it as condition that reflects the unique context of a post-separation family, using family systems theory that considers the role of all family members.[17]

Kelly & Johnston: A Multi-factorial Approach to the "Alienated Child"

Writing in 2001, the American mental health professionals Joan Kelly and Janet Johnston critiqued Gardner's theory of parental alienation syndrome as it "focuses almost exclusively on the alienating parent as the etiological agent of the child's alienation."[18] This is problematic in the context of high-conflict divorce or separation. In many high conflict cases one or both parents engage in parenting alienating behaviour (PAB) without the child becoming alienated. There are often additional factors that cause parental alienation other than the behaviours of the favoured parent. Factors such as a history of conflict within the marriage, the causes of the separation, differences in parenting styles, the child's age and temperament, and sibling relationships are all to be considered. The focus of inquiry must include consideration of children's responses to parental alienating behaviour, and take the "child, his or her observable behaviours and parent-child relationships" as the focal point of inquiry, rather than the just consideration of the behaviour of one parent.[19]

Kelly and Johnson defined an ***alienated child*** as "one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent."[20] Thus, determining whether a child is alienated or realistically estranged requires consideration of the conduct of the rejected parent, as well as of the child and the favoured parent. Clinicians taking this approach recognize that "effective assessment and intervention [of a child's rejection of a parent] requires a multi-pronged understanding and approach to the problem that incorporates the entire family system."[21]

The Continuum Parent-child Relationships

It is estimated that in the period following separation, up to a third of parents have a high conflict separation, falling to 5% -15% after 3 years,[22] and that 20 to 50 % of children whose

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[16] Joan B. Kelly & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 Fam. Ct. Rev. 249 at 258.

[17] Benjamin D. Garber & Robert A. Simon (2023), Looking Beyond the Sorting Hat: Deconstructing the "Five Factor Model" of Alienation, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2023.2262359

[18] Joan B. Kelly & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 Fam. Ct. Rev. 249 at 249.

[19] Ibid.

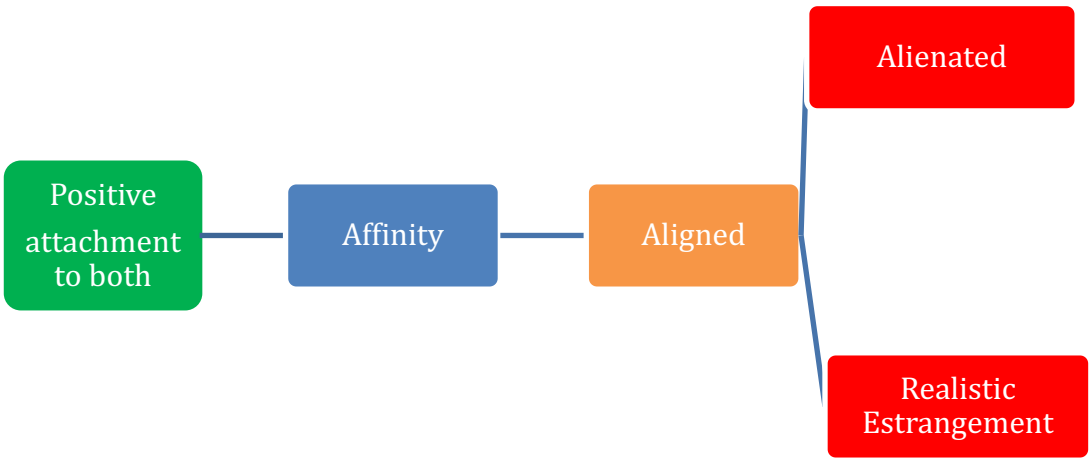
[20] Kelly & Johnston, "The Alienated Child", at 251.

[21] From an updated version of this analysis, see Sullivan, Pruett & Johnston (2024), Parent-child contact problems: Family violence and parental alienating behaviors either/or, neither/nor, both/and, one in the same? 62:1 *Family Court Review* 68, at 70

[22] As with many concepts related to family justice, the term "high conflict separation" is widely used but does not have a single widely accepted definition or method of identification. Birnbaum and her colleagues have developed

parents have a high-conflict separation experience will experience post-separation problems in maintaining a strong attachment to both parents.[23] It is essential to distinguish between different patterns of parent-child relationship issues. Kelly and Johnston conceptualized the types of relationships between parents and child post separation issues as occurring on a spectrum that where a child's attitude to the parent can be characterized as ***affinity, alignment, alienation*** and ***justified estrangement***,[24] There are also cases where post-separation one parent, most often a father, ceases to want contact with the child, perhaps due to his relocation or new relationships; while the "disappearing dad" is a significant social concern, often causing children to feel rejected, it is not regarded as a legal issue, as there is no effective court-imposed remedy that can address these cases.[25]

While the diagram below is helpful for understanding basic concepts in post-separation parenting, it must be appreciated that some cases cannot be fit neatly into these categories, and that family situations often change over time. Further, while the terminology used here is often used by family justice professionals, there continues to be debate about concepts and definitions, even more so about how to identify cases (or operationalize the terminology).[26]



Positive Attachment to Both Parents: Even if their parents separate, most children have a strong, positive attachment to both parents, and express love and affection for each. Children

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an instrument to identify and classify these cases and observe: "The term 'high conflict' … has been defined as families involved in high rates of litigation, who exhibit poor communication and display poor problem-solving…. Families involved in high conflict often spend an enormous amount of time and financial resources disputing with one another through the family justice system." Birnbaum, McCleary, Saini & Bala (2018), Dimensions of conflict for separated families index: An index for family courts, *Children and Youth Services Review*, *88*, 191-196. See also Smyth & Moloney. "Post-separation parenting disputes and the many faces of high conflict: Theory and research." *Australian and New Zealand Journal of Family Therapy* 40.1 (2019): 74-84.

[23] Janet R. Johnston et al., "Allegations and Substantiations of Abuse in Custody-Disputing Families" (2005) 43 Fam. Ct. Rev. 283; and Anita K. Lampel, "Children's Alignment with Parents in Highly Conflicted Custody Cases" (1996) 34 Fam. Ct. Rev. 229 at 232-35.

[24] Joan B. Kelly & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 Fam. Ct. Rev. 249 at 258.

[25] Furstenberg, F.F. and Harris, K.M., 2019. The disappearing American father? Divorce and the waning significance of biological parenthood. In *The changing American family* (pp. 197-223). Routledge.

[26] Garber, B.D. and Simon, R., 2024. Moving Toward Consensus: Joining Bernet and Baker, Emery, and Griffin to Better Understand the Dynamics of Parent-Child Contact Problems (PCCP). *Family Transitions*, pp.1-13.

may enjoy doing different activities with each parent, but generally want to have significant involvement with both. Although having a strong relationship with both parents requires that a child spends significant time with each parent on a regular basis, it does *not* require an equal parenting time arrangement.

Affinity with one parent occurs when the child, due to their "temperament, gender, age, shared interests, sibling preferences of parents and parenting practices", may prefer to reside or spend more time with one parent, but is not rejecting the other parent.[27] Affinity is distinguished from alienation because, although the child has a preference for spending more time one parent, they still wish to have a good relationship with the other, and the preferred parent is supporting this continued relationship. Affinity, may, for example reflect an adolescent boy's desire to spend more time with a father who is actively involved in the sports that the boy plays.

As children move towards adolescence, it is a part of normal development for peer relationships, school and extra-curricular activities to become more important. As they grow older, some children who have been in an equal parenting time arrangement at a younger age may want to change to having a "home base" and spending more time at the residence of one parent, perhaps the parent who lives closest to school or various activities or friends, or the parent who is most supportive of certain activities. While children should not be getting the message from one parent that it is "their right" to decide whether or not to see the other parent, as they grow older, they should have a significant voice in their living arrangements, and a parent who may be seeing less of their children whose interests are changing should not view this as a situation of "parental alienation." Indeed, inappropriate responses to children's changing needs and interests may contribute to a child's estrangement from a parent.

Alignment occurs when there is an "an alliance with one parent," and the child only wants limited contact with the other parent, and expresses feelings of "anger, sadness and love" towards that parent.[28] This alliance often occurs because the child has "chosen sides" in a separation, based on their opinion of which parent is "in the wrong" for having caused the separation, such as due to infidelity, or because there was a great deal of conflict in the family prior to separation. The child may have already preferred the aligned parent prior to the separation and this preference may be intensified by the separation. Although aligned children do not wish much contact with the other parent, they are not alienated because they still express love and other positive emotions towards the other parent and their extended family.

Realistic estrangement is different than parental alienation because the child has a valid reason to not want a relationship with the rejected parent. There may be a history of abuse or violence in the spousal relationship that results in a child fearing the rejected parent, or the rejected parent may have significantly deficient parenting abilities, or serious addiction or mental health issues.[29] In some cases, the child may reject a parent who is instigating conflict with the other parent. For example, in the Ontario case of *Giroux v. Giroux*, the judge found that the children, aged 11 and 17 years, no longer wished to have a shared time residential schedule and transferred sole custody to the father because mother was instigating constant conflict with the children and father regarding drop off times and locations.[30] At times she

[27] Joan B. Kelly & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 Fam. Ct. Rev. 249 at 258, at 252.
[28] Ibid.
[29] Ibid.
[30] *Giroux v. Giroux*, [2013] O.J. No. 349 at para 5.

refused to allow the children to visit with their father, which caused "considerable stress" for the children.[31] The judge characterized the mother as the "author of her own misfortune. By her own actions she has 'driven a wedge' between herself and her children."

Parental alienation is characterized by an unjustified reluctance or refusal by a child to visit the rejected parent, primarily due to the influence of the favoured parent in the context of a high conflict separation.[32] Children are more suggestible than adults, and repeated denigrating comments from a parent may result in distortion of a child's perceptions and memories, or even in reports from a child about events that did not actually occur.[33] When an alienated child is interviewed about their reluctance or refusal to visit the rejected parent, their reasons for not wanting to do so often sound rehearsed and may include statements or (mis) information that could only have been provided by the favoured parent. Often the alienated child will appear to feel no reluctance or guilt about their rejection of their parent, and they may even give the appearance of obtaining satisfaction from the rejection of the parent. In true alienation cases, the favoured parent is undermining the child's relationship with the other parent, at least subconsciously.

There are ways in which an alienated parent can further intensify the rejection. For example, rejected parents (who are usually fathers) may lack the ability to show empathy towards their child, demonstrate warmth, and appreciate and respect their child's point of view, or try to induce a sense of guilt in the child.[34] As well, some rejected parents may maladaptively respond to their rejecting child by emotional retaliation which may then deepen the cycle of alienation. [35]

The development of alienation in a child is often age related. One of the notable aspects of alienation is that a child may have a good relationship with a parent for a significant period of time after separation that then deteriorates, sometimes fairly quickly. Younger children may be able to transition between hostile parents without feeling intense loyalty conflict and may have superficially good relationships with both of the parents. An important dimension of alienation is that the child becomes an active agent in resisting contact with a parent. An important dimension of alienation is that the child becomes an active "independent agent" in resisting contact with a parent, developing their own strategies to demonstrate "resistance." As children reach the pre-adolescent stage (9 to 11 years), their perceptions of relationships develop, and they may find it harder to transition between hostile parents and feel that it is better for them to "pick a side in the war" between their parents. Older siblings may then influence younger siblings. As alienation develops, the child may be extremely rude, angry, defiant or "sulky" when in the care of the rejected parent.

An important aspect of PA cases is the favoured parent engaging in a course of Parental Alienating Behaviours (PAB). A common form of PAB is when a favoured parent makes negative comments about the other parent ("badmouthing") to the child in order to attempt to cause the child to share this negative opinion. Another type of PAB is for the alienating parent to tell the child that the other is to "blame" for the separation and family breakdown.[36]

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[31] *Giroux v. Giroux*, [2013] O.J. No. 349 at para 5.
[32] Ibid.
[33] Principe & London (2022), How Parents Can Shape What Children Remember: Implications for the Testimony of Young Witnesses, *Journal of Applied Research in Memory and Cognition*, *11*(3), 289.
[34] Janet R. Johnston, "Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child" (2005) 38 Fam. L.Q. 757 at 770-71.
[35] Johnston, "Children of Divorce", ibid. at 771.
[36] See e.g. *Britt v. Britt*, [2000] O.J. No. 527 (Sup. Ct.) (QL) [*Britt*].

Other types of PABs include involving the child in parental disputes and litigation, so that the child will feel pressured to "choose a side." This type of alienation can range from the subtle—showing the child court reports and documents—to the more explicit—such as the alienating parent asking the child to write letters to the judge,[37] or having the child attend at the courthouse in order to participate in the litigation process. [38] A related form of PAB is to involve the child in the financial issues regarding separation.

Some alienating conduct is more indirect, such as arranging "fun activities" during planned time with the other parent and offering the child a "choice" about whether to "cancel" the visit.

Not infrequently PAB involves causing a child to have unjustified fear of the other parent, especially around times of transition. In one case the alienating father would cue the child to fear returning to the mother's house at the end of his access visit; he would arrive at the mother's house for the drop-off and then he would spend up to half an hour "calming down" the child by walking him up and down the street in front of the mother's house.[39] The father would also "ready" the child for his return to the mother hours, or even the day before, access was to end which would cause the child to become upset at the upcoming transition.[40] Of course, if the rejected parent has actually been abusive or violent, protective behaviour of the favoured parent may be appropriate.

It is not uncommon in the course of separation for parents on occasion to say some negative things to the child about the other parent, or in some situations to fail to support the child's relationship to the other parent. While parents should be discouraged from engaging in such behaviour, it is the intensity, frequency and context of such behaviour and the susceptibility of the child that may result in a child becoming alienated.

Alienating parents usually have unresolved feelings of anger, grief, or betrayal about the end of the spousal relationship, and often have distorted perceptions about their relationships. Many parents who continue to engage in serious alienating conduct are personality disordered. As discussed below, not infrequently the "successful alienator" is an overprotective "enmeshed" mother, but in a significant number of cases, parental alienation is precipitated by an abusive partner, often the father.[41] Male perpetrators of domestic abuse often have a pattern of denigrating their spouse's parenting and other abilities, and often criticize the mother's ability to care for the home in front of the children. Children may become allied with the parent whom they perceive as more powerful and express a strong preference for living with that parent if the couple separate.[42]

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[37] See e.g. *Figliano v Figliano* (2007), 35 R.F.L. (6th) 71 (Ont. Sup. Ct.) at paras. 81-87.

[38] Ontario judges will usually not allow the child to testify and be subject to cross-examination in a high conflict parenting case, though court may use a judicial interview or other methods to learn the views of children. See e.g. *Bailey v. Bailey*, [1996] O.J. No. 4891 (Ct. J. (Gen. Div.)) (QL) [*Bailey*]; *Magee v. Morrison*, [1995] O.J. No. 4687 (Ct. J., Gen. Div.)) (QL) [*Magee*].

[39] *J.B.H. v T.L.G.* [2014] OJ No 2742 at para 228

[40] Ibid at para 360.

[41] Garber, B.D. (2011), Parental alienation and the dynamics of the enmeshed parent–child dyad: Adultification, parentification, and infantilization. *Family Court Review*, *49*(2), pp.322-335.

[42] Ibid.

Effects of parental alienation

There are significant methodological limitations to almost all research about the long-term effects of harmful parental behaviour on children, including engaging in parental alienating behaviour, high conflict and intimate partner violence, as it is impossible to do control group studies or randomized trials, and there is often an interaction of genetic, environmental and other factors related to harmful parental behaviour, as well variation in its effects on children, even in the same family. There is, however, a growing body of research that clearly links parental alienation to a range of negative effects on children and their development.[43]

Children who have been alienated may have assume some emotional care for their alienating parent, a concept called "parentification,"[44] which "interferes with the child's development, peer relationships, and his or her ability to maintain a healthy relationship with his or her other parent."[45] Parentified children are more likely to have feelings of guilt and social isolation, depression, and suicidal ideation. Alienated children have been reported as having problems with behaviour, information processing and emotional regulation.

Adults who were alienated as children often report that they have experience low self-esteem, substance abuse, depression, difficulty in forming stable intimate adult relationships and other social problems.[46] As well, these adults, many of them describe how, as children, they secretly wished that the courts had enforced access to the rejected parent.[47]

Judicial recognition of the significance a parent's undermining of the child's relationship with the other parent is found in the 2021 Ontario decision in *S. v. A,* where the court made a finding of alienation and ordered a custody reversal. Justice McGee explained that[48]

> when a parent is unwilling to support the development and maintenance of a child's relationship with the other parent, and [that parent] has no insight into the resulting emotional harm caused to their child… Whether passively permitted or actively encouraged, a child who rejects a parent is parallelly empowered to reject other important people in his life. He is taught to avoid difficult feelings instead of how to cope with them and to work through them. He suffers an emotional impairment that deprives him not only of the love and protection of a parent, but of a wide array of complex social relationships.

"Reunification Therapy" & Clinical Interventions

Related to the mental health literature on the nature, causes and effects of parental alienation and children resisting contact with a parent, is a significant literature on interventions to address these cases. Since lawyers often propose that there should be a clinical intervention to respond to these cases, and it is not uncommon for courts to order or recommend some form of mental health response, it is important for lawyers to appreciate the likely effectiveness of different forms of intervention, some of which may actually increase

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[43] Miralles, P., Godoy, C. and Hidalgo, M.D. (2023), Long-term emotional consequences of parental alienation exposure in children of divorced parents: A systematic review, *Current Psychology*, *42*(14), pp.12055-12069.
[44] Benjamin D. Garber, "Parental Alienation and the Dynamics of the Emeshed Parent-Child Dyad: Adultification, Parentification, and Infantilization" (2011) 49(2) Family Court Review 322 at 334.
[45] Ibid at 325.
[46] Amy J.L. Baker, *Adult Children of Parental Alienation Syndrome: Breaking the Ties that Bind* (New York: W.W. Norton & Company, 2007).
[47] Ibid.
[48] *S v. A*, 2021 ONSC 5976, at para 30 -31.

children's resistance to contact. Lawyers also need to know about the resources that are actually accessible in their community and within the financial resources of the parents in their cases.

While the broad term "reunification therapy" is often used to describe interventions that respond to PA and CRC, there is a lack of agreement among mental health professionals what this means, and there are a wide range of clinical responses or interventions to cases that may be characterized as responding to parental alienation. This is a particularly challenging type of therapeutic work, and it should be undertaken only by professionals with specific training in dealing with this type of case and understanding of the dynamics of alienation, intimate partner violence and high conflict separations, though there are few restrictions on professionals who claim that they provide "reunification therapy or counselling." Although there is a significant literature describing the interventions that these professionals provide in these cases, and some studies on short-term outcomes, there are significant methodological limitations to the research about the interventions and a paucity on outcomes for parent-child relationships.

One important distinction is between mental health services provided without a change in parenting arrangements, with the child continuing to spend significant time with the favoured parent, and services intended to support a change in parenting arrangements or "custody reversal."

Another important distinction is between interventions that are intended to address "parental alienation," and those that may be appropriate for cases where there is uncertainty about the nature or reasons for a child's resistance to contact. In this latter category are some "early interventions" that do not require a court finding and may be arranged based on the consent of both parents. Although there is a lack of research on the outcomes of this type of intervention, which usually involves both parents and the children, when provided by a skilled clinician or team, it seems to hold considerable promise as a child focussed way to resolve a case in a way that results in a child having a good relationship with both parents.[49]

In some cases where the court makes a finding of alienation but does not reverse custody, the court may order some form of "reunification therapy." Sometimes a mental health professional will provide counselling to the rejected parent or to the child, or more commonly some form of joint counselling to the child and the rejected parent. This approach may be effective for responding to cases of justified estrangement, where a rejected parent needs to alter their behaviour and interactions with the child. However, without a custody reversal, these approaches are unlikely to be effective in dealing with cases of alienation, since these cases inevitably involve both parents, and require some form of therapeutic intervention that involves both of the parents, and the child (or children).[50]

In less severe alienation cases, family-based therapy is valuable because "alienated children need a family-focused intervention that includes all parties…determined to be contributing to the dynamics."[51] There are therapeutic approaches that try to engage both of the parents and their children in some form of counselling to improve their interactions. These

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[49] See Greenberg, L.R., Doi Fick, L. and Schnider, H.R.A., (2016), Catching them before too much damage is done: Early intervention with resistance-refusal dynamics, *Family Court Review*, *54*(4), 548-563; and Lyn R. Greenberg, Barbara J. Fidler, Michael A. Saini, Evidence-Informed Interventions for Court-Involved Families: Promoting Healthy Coping and Development (Oxford University Press, 2019).

[50] See e.g. Benjamin Garber, *A Collaborative, Cognitive-Behavioral Reunification Protocol Serving the Best Interests of the Post-Divorce, Polarized Child* (2021).

[51] Janet R Johnston, Marjorie Gans Walters & Steven Friedlander "Therapeutic Work with Alienated Children and their Families" (2001) 39(3) Family Court Review 316 at 316.

approaches may have success in improving the relationship between the rejected parent and child, in particular if the child perceives that the favoured parent supports this effort and both parents are committed to making this effective.[52] This support from the favoured parent may be a result of a genuine belief that it beneficial for the child to have a relationship with the rejected parent, though it may reflect a desire to engage in order to prevent a court-ordered custody reversal.

In developing a therapeutic intervention for an alienated child, their age, developmental stage and mental and emotional health need to be considered.[53] Generally, older children are more entrenched in their alienation and thus more difficult to engage in the therapy. Therapists should assist children in understanding that they do not have the power to refuse all contact with a parent; children should be helped to share their own feelings with both parents, although they be expected to be respectful and civil in their interactions. Older children, age 12 to 15, who are ordered to have contact with a parent may feel enraged at their perceived lack of power and how the rejected parent and the courts are not respecting their feelings and opinions. For this age group, therapists should assist the child in differentiating themselves from their parents' conflict.

Another form of clinical intervention is intended to provide transitional support for alienated parents reunited with their children after a custody reversal has been ordered by a court. These interventions could involve community-based counselling for the rejected parent and child, or an intensive multiday program. The small research literature about such programs has largely focussed on intensive multiday (usually 4 days) programs, such as *Family Bridges*,[54] involving the American psychologist Richard Warshak and *Turning Points* offered by New York based social worker Linda Gottlieb.[55]

Ontario psychologist Yvonne Parnell now offers a 4-day intensive psycho-educational program, Building Family Bridges, based on the approach developed by Richard Warshak,[56] This type of program is often offered in a resort setting, to allow parents and children to have recreational opportunities. [57] Given the level of intensive professional involvement, and often

[52] See e.g. Saini, M. (2019). Strengthening coparenting relationships to improve strained parent–child relationships: A follow-up study of parents' experiences of attending the overcoming barriers program. *Family Court Review*, *57*(2), 217-230.

[53] Janet R Johnston, Marjorie Gans Walters & Steven Friedlander "Therapeutic Work with Alienated Children and their Families" (2001) 39(3) Family Court Review 316.

[54] See Warshak, R.A., 2019. Reclaiming parent–child relationships: Outcomes of Family Bridges with alienated children. *Journal of Divorce & Remarriage*, *60*(8), pp.645-667.

[55] Harman, J.J., Saunders, L. and Afifi, T., 2022. Evaluation of the Turning Points for Families (TPFF) program for severely alienated children. *Journal of Family Therapy*, *44*(2), pp.279-298.

[56] https://www.buildingfamilybridges.com

[57] The fact that these programs are often offered in resort settings may have resulted in some critics referring to them as "camps." See e.g Hannah Dreyfus, "A Court Ordered Siblings to a Reunification Camp With Their Estranged Father. The Children Say It Was Abusive," *Propublica,* May 18, 2023

What makes the "camp" terminology inappropriate for the type of reunification counselling discussed here is that it involves a stay in a resort of a few days *with the alienated parent,* and may confuse this type of intervention with controversial residential "camps" with longer term stays *without parents* used for adolescents with behavioural or offending issues.

travel, these programs are expensive.[58]

Research on these intensive transitional programs has significant limitations, as, for example, there are no control groups, and involvement generally requires a judicial decision that this is an appropriate case, at least for custody reversal. The available research suggests that these programs are generally effective (80% or more) at supporting a stable custody reversal. Although in theory the programs provide for the possibility of later engagement with the alienating parent to allow that parent to also have a healthy relationship with the child, these parents are often unwilling to engage in a custody reversal.

The research about these intensive programs has been heavily critiqued, especially by feminist scholars and advocates, who argue that removal of children from the care of a custodial mother, especially one who has been the victim of family violence, may endanger the psychological well-being of children and violate their rights. There are small number of highly publicized cases of older children and young adults reporting that they were psychologically abused in these programs and were very relieved to have returned to the care of their allegedly alienating mothers.[59]

The Feminist Critique of Parental Alienation

The National Association of Women and the Law (NAWL) has recently endorsed the position that parental alienation is an "unscientific pseudo-concept" whose use should be prohibited in the family courts, as there is a lack of research to establish that it can be reliably or validly identified and is often used by violent fathers to gain custody of children from abused mothers.[60] This position has international support[61] and is reflected in recently enacted legislation in a few American states.[62]

There was a family-based program that addressed cases of children resisting contact called the "Overcoming Barriers Camp," which operated with some success for a few years, that involved *both of the parents and the child* attending a summer camp setting together for a period of days: Saini, M., 2019. Strengthening coparenting relationships to improve strained parent–child relationships: A follow-up study of parents' experiences of attending the overcoming barriers program. *Family Court Review*, *57*(2), .217-230. That program ceased to operate as it was unsustainable for the professionals involved.

[58] In *Barrett v Huver*, 2018 ONSC 2322, at para 44, there was evidence that a "multiday intensive" of Families Moving Forward, including accommodation, costs were in the range of (CAD) $25,000-$40,000. Costs have certainly increased since then.

[59] Avalle, Smith, Wiedeman & Garnica (2022), How efficacious is Building Family Bridges? What the legal and mental health fields should know about Building Family Bridges and "parental alienation", 19 *Journal of Family Trauma, Child Custody & Child Development,* 1-15*;* Andreopoulos & Wexler (2022), The "solution" to parental alienation: A critique of the turning points and overcoming barriers reunification programs, *Journal of Family Trauma, Child Custody & Child Development* 417-437; Mercer (2022), Reunification therapies for parental alienation: Tenets, empirical evidence, commonalities, and differences, *Journal of Family Trauma, Child Custody & Child Development, 19(3/4),* 383-401; and Jaffe P., Scott, K., Heslop, L., & Hooda, S. (2023). *Sober second thoughts about the benefits and limitations of reunification therapy. Family Violence & Family Law Brief, 27.* London, ON: Centre for Research and Education on Violence Against Women and Children, Western University. ISBN 978-1-988412-72-6.

[60] https://nawl.ca/pa-letter/ (posted Jan. 23, 2024).

[61] The NAWL position relies heavily on the work of Reem Alsalem, *Report of the Special Rapporteur on Custody, Violence Against Women and Violence Against Children* (United Nations Human Rights Council, April 2023). That report is sometimes cited for the proposition that the "United Nations" has condemned the use of the concept of parental alienation. It is, however, the work of a Special Rapporteur, and *not* endorsed by the United Nations. Canadian courts have demonstrated skepticism about automatically placing weight on such reports by Special

Many of the prominent critics of the use of the concept of parental alienation are feminist legal scholars and domestic violence advocates who lack confidence in the ability of parenting evaluators and family court judges to understand and respond to IPV. While we share the concerns of NAWL that abusive or inadequate parents often make unjustified claims of parental alienation (PA) to explain their rejection by their children, we share the views of many family justice professionals, including Canadian judges, that PA is a useful concept. Most of the researchers and practising mental health professionals who write on high conflict separations and many family justice professionals accept that parental alienation is a valid concept.[63] Although in a majority of cases the parent claiming to be alienated is the father, many mothers are also rejected by their children due to alienation by fathers, who in some cases have also abused the mothers.[64] While there is a significant overlap between issues of intimate partner violence (IPV) and alienation, there are many alienation cases that do not involve claims of IPV.

There is no doubt that courts and family justice professionals face real challenges when dealing with conflicting claims of IPV and PA. Concerns about the safety of children might suggest that courts should always "err on the side of caution" and reject alienation concerns whenever it is claimed that the child's rejection of a parent is due to that parent's violence or abuse, and the *Divorce Act* s. 16(2) specifies that the court *shall* give *primary consideration* to the child's physical, *emotional and psychological safety*, security and *well-being*." However, the unfortunate reality is that children who are alienated may also suffer long-term emotional harms if they remain in the care of an alienating parent with mental health issues, [65] and engaging in alienating parental behaviours is often characterized as a form of emotional abuse or family violence.[66]

Rapporteurs. As observed by Stratas J, in *Canada v. Boloh* 2023 FCA 120, where he rejected the views of a Special Rapporteur:

> [50] Different international authorities are of different value, and, in particular, international court decisions in adjudicative contexts ….deserve far more weight than the non-adjudicative individual opinions of other international actors, such as [a] letter from the UN Special Rapporteur.

[62] In the USA a number of states have enacted versions of what is known as *Kayden's Law* or *Piqui's Law* that prohibits or restricts expert evidence about parental alienation, and prohibits courts from ordering "reunification therapies… which cannot be scientifically proven" to be "safe, effective and have therapeutic value." See e.g. https://www.nationalsafeparents.org/kaydens-law.html .

It is understandable that a naïve politician would want to enact a law that requires that family court interventions are "*scientifically proven"* to be "safe, effective and have therapeutic value." This standard may well be appropriate for decisions about issues like a Covid vaccination, but the vast majority of orders made in child protection and family cases could not begin to meet these standards. The reality is that it is impossible to the randomized "double blind" research that this type of standard implies, including the ordinary type of parenting orders, such as ones for shared parenting or even supervised visitation for abusive parents. See Benjamin Garber (2023), The emperor has no clothes: A systemic view of the status and future of child custody evaluation (CCE), 61:4 *Family Court Review* 747-761.

[63] Johnston, J. R. & Sullivan, Matthew J. (2020). Parental alienation: In search of common ground for a more differentiated theory. *Family Court Review*, 58(2), 570-592; and Kline Pruett, M., Johnston, J.R., Saini, M., Sullivan, M., and Salem, P. (2023). The use of parental alienation constructs by family justice system professionals: A survey of belief systems and practice implications. *Family Court Review, 61,* 372-394.

[64] See e.g. Rowlands, G.A., Warshak, R.A. and Harman, J.J., 2022. Abused and Rejected: The Link Between Intimate Partner Violence and Parental Alienation. *Partner Abuse*, *14*(1), pp.37-58.

[65] Miralles, P., Godoy, C. and Hidalgo, M.D., 2023. Long-term emotional consequences of parental alienation exposure in children of divorced parents: A systematic review. *Current Psychology*, *42*(14), pp.12055-12069.

[66] See e.g. Kraft J. in *Y.H.P. v. J.N.,* 2023 CarswellOnt 16173, 2023 ONSC 5766, at para. 59:

It is clear that most reports of IPV are well founded, and indeed that many genuine victims of IPV do not disclose their abuse. Advocates for abused women are right to point out there has too often been a tendency for authorities to discount reports of IPV. However, it must also be appreciated that *some* of those who report being victims of IPV or that their children have been abused by the other parent are inaccurate or even intentionally dishonest, perhaps due to personality disorder or their own childhood trauma. The rate of unfounded or intentionally false allegations of IPV and child abuse is likely higher in family court than in other contexts, [67] though it must also be emphasized that, as detailed below, most claims of PA are not accepted by the family courts.

Like so many issues related to parenting disputes and the "best interests of children," a determination that there has been parental alienation requires an often-complex set of factual findings specific to a case. While there are approaches to parenting evaluations that can help establish whether the child has been the subject of parental alienation,[68] there is no psychological test that can reliably determine the presence or absence of parental alienation, or for that matter the credibility of parents, coercive control or the best interests of a child. Although parental alienation and IPV are sometimes offered as alternative, mutually exclusive explanations for a child's rejection of a parent, both may be present in some cases. Despite the challenges in determining whether there has been parental alienation, and if so, deciding how to respond, in our view Canadian courts and family justice professionals have been justified in using the concept. It is, however, also important to appreciate that individual cases are often multi-layered and complex, and simplistic or unjustified use of labels and responses does not advance understanding or a resolution that advances the best interests of an individual child.

III. RESEARCH ON CANADIAN CASES OF PARENTAL ALIENATION

Recent studies of reported Canadian family law decisions provide a broad picture of the types of cases that raise parental alienation issues, though there are limitations to this type of research. The case law reports on judicial assessments of critical issues, like whether a claim of

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> Considering my finding that the mother has engaged in a practice of parental alienation against the father, I find that her conduct amounts to family violence and seriously impacts her ability to care for and meet the needs of [the child].

See also e.g. *K.R.L. v. N.P,* 2021 BCPC 324**,** C. Malfair Prov. J. at para 41; and Sullivan, Pruett & Johnston (2024), Parent-child contact problems: Family violence and parental alienating behaviors either/or, neither/nor, both/and, one in the same? 62:1 *Family Court Review* 68-85.

[67] See e.g. Avieli, H. False Allegations of Domestic Violence: A Qualitative Analysis of Ex-Partners' Narratives. *J Fam Viol* **37**, 1391–1403 (2022). https://doi.org/10.1007/s10896-021-00342-w; Moloney, Webb & Smyth (2021), Allegations of child sexual abuse in the Family Court of Australia: Response to Parkinson, 58 *Australian Journal of Social Issues* 331-342; Michael Saini", Taina Laajasalo, Stacey Platt, Gatekeeping by Allegations: An Examination of Verified, Unfounded, and Fabricated Allegations of Child Maltreatment Within the Context of Resist and Refusal Dynamics (2020) 58 Fam Ct Rev 417- 431; Bala, Mitnick, Trocmé & Houston, "Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?" (2007), 13 *Journal of Family Studies* 26-56; Houston, Bala & Saini, "Crossover Cases of High Conflict Families Involving Child Protection Services: Ontario Research Findings And Suggestions For Good Practices" (2017) 55(3) *Family Court Review* 362-374; and Feld, Glock-Molloy & Stanton, When Litigants Cry Wolf: False Reports of Child Maltreatment in Custody Litigation and How to Address Them (2021) 24 N.Y.U Journal of Legislation and Public Policy 111.

[68] See e.g. Benjamin D. Garber & Robert A. Simon (2023) Looking Beyond the Sorting Hat: Deconstructing the "Five Factor Model" of Alienation, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2023.2262359

IPV is valid, and may not always be correct. Further, reported cases often fail to provide all of the information that a researcher wants.

Canadian Cases: 2004-2020

A team led by American psychologist Jennifer Harman analyzed 500 reported Canadian cases decided between 2004 and 2020 in which the court made a finding of parental alienation.[69] The study did not include the larger cases in this period where alienation was raised, but not found. In this study, most of the cases involved alienating mothers (64%), though in a significant portion of cases (34%), the father was the alienating parent.

Almost half of the cases involved claims of IPV or child abuse (48%), which were investigated by a third party, such as child protection services, the police or a court appointed expert. Not surprisingly, given that the focus of the research was on cases where alienation was founded, there was a finding of violence or abuse in only 11% of cases where the issue was raised, though in only 2% of the cases did an investigator conclude that an unfounded allegation was made "maliciously."

There was a court-appointed expert in 69% of cases; when the expert expressed an opinion on alienation, it was usually followed by the court (83% of cases where expressed), but not always, suggesting that judges have an independent role and are not simply adopting the views of experts. Although a finding of alienation sometimes resulted in a "custody reversal," this was *not* the most common response, with primary care to fathers increasing from 23% of the cases where the mother was the alienating parent to 33% of those cases, while where fathers were found to be the alienating parent, primary care for the mother increased from 41% to 45% of cases.

Quebec Cases: 2027-2020

A study by psychologist Amylie Paquin-Boudreau and her colleagues analyzed all reported Quebec decisions between 2017 and 2020 (n=164) that raised the issue of parental alienation.[70] The court found alienation in only 40/164 (24%) where the issue was raised. While there were more findings of alienation against mothers (n = 24) than fathers (n =16), the rate of findings of alienation against fathers was higher (34 %: n =16/47) than the rate of findings of alienation against mothers (21 %: n = 24/115); this suggests that courts were somewhat more likely to find claims of alienation made by mothers to be credible.

The issue of Intimate Partner Violence was also raised in 21% of the cases (n =35/164); the court made a clear finding that there had been IPV in 12 cases but rejected the claim of IPV as unfounded in 4 cases, suggesting that courts were not systematically dismissing the claims of female victims of IPV.

Of the 40 cases where the court concluded that parental alienation occurred, a custody reversal was ordered in only 8 cases (20%), 7 a transfer from the alienating mother to the rejected father, and 1 from the alienating father to the rejected mother.

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[69] Harman, J., Giancarlo, C., Lorandos, D. and Ludmer, B., 2023. Gender and child custody outcomes across 16 years of judicial decisions regarding abuse and parental alienation. *Children and Youth Services Review*, *155*, p.107187. The Harman et al results are broadly consistent of an earlier study of Canadian cases, though that earlier study included all cases where alienation was raised, not only those where alienation was found. See Bala, Hunt & McCarney (2010), "Parental Alienation: Canadian Court Cases – 1989 to 2008" (2010), 48(1) *Family Court Review* 164.

[70] Paquin-Boudreau, E., Poitras, K., & Bala, N. (2022). Family court responses to claims of parental alienation in Quebec. *International Journal of Law, Policy and the Family,* 36(1). https://doi.org/10.1093/lawfam/ebac014;

Ontario Cases: 2021-23

The authors of this paper undertook an analysis of the 172 reported Ontario cases from January 1, 2021 to December 31, 2023 that raised the issue of parental alienation.[71] Most of the parents had legal representation, though mothers were more likely to have lawyers (89%) of than fathers (75%). The Office of the Children's Lawyer (OCL) provided legal representation for the child in 24 cases (14%) of the cases.

The court concluded that parental alienation occurred in 63 cases (36%) where the issue was raised, with mothers (68%: 43/63) more likely to be found alienating parents than fathers (32%: 20/63). This clearly suggests that although parental alienation is an often-mentioned issue in high conflict cases, it is not infrequently raised in cases where there is actually justified rejection, or at least an understandable reluctance by children to visit with a parent.

There claims of both IPV and PA in 60% (n=103/172) of cases, revealing significant overlap between the issues. In the 63 cases where the court found alienation, there was a claim of IPV in 47 of the cases, and a finding of IPV in 15 of these cases. In the 109 cases where the court did not find alienation, there was a claim of IPV in 56 cases, and a clear finding of IPV in 28 of these cases, and another 15 half cases where the court did make a clear finding. This is broadly consistent with the results of other studies which reveal that the court's conclusion that the claim of IPV was founded was usually consistent with a rejection of the alienation claim.

The court made a clear finding regarding parental alienation in 98% of cases, and there was no significant statistical difference in whether the court made a finding about alienation depending on whether the allegation of alienation was against the mother, the father, a same-sex partner, both parents, or some other person, like a grandparent. However, there was a statistically significant difference in judicial findings that alienation had occurred. In the 123 cases where the mother was the alleged alienating parent, the court made a finding of alienation in only 32% of cases, whereas for the 33 cases where the father was the alleged alienating parent, parental alienation was found by the court in 58% of the cases.[72] This finding clearly suggest that courts are not discriminating against mothers in regard to findings of alienation.

One of the issues that has been raised by NAWL and other advocacy groups is that the courts are not only making a finding of parental alienation against mothers, but also often changing primary care from mothers to fathers as a result of these findings. In this study of reported Ontario cases from 2021 to 2023, there were relatively few cases where the court made a complete reversal of custody after a finding of alienation (9/63=14%) and there was no statistically we found no significance between custody reversals based on whether the alienating parent was the mother or father.[73]

IV. **ASSESSING CHILDREN RESISTING CONTACT IN THE COURTS**

The *Divorce Act,* amended in 2021, establishes that a parent's willingness to support the child's relationship with the other parent is a factor in making decisions about parenting:[74]

> s.16(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

[71] The study focused on decisions about parenting and excluded costs decisions.
[72] χ^2 (1, 156) = 7.455, p = .006.
[73] Fisher Exact Test, FET, p = .116; significance level Alpha = .05.
[74] *Divorce Act* RSC, 1985, c. 3 (2nd Supp.)

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

s16 (6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

While these provisions establish that, in most cases, parents have a positive obligation to support a child's relationship with the other parent and to facilitate the exercise of parenting time (formerly called access),[75] they clearly do not establish a presumption of shared parenting.[76] Further the *Act* specifies that the views of the children involved are important, and that family violence is the "primary consideration" in parenting case where the violence is directed at the child or at the other parent (i.e., is child abuse or intimate partner violence)"

s.16(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(j) any family violence and its impact on, among other things,

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child…

16(2) When considering the [best interests factors], the court shall give ***primary consideration*** to the child's physical, emotional and psychological safety, security and well-being.

The effect of these provisions (and prior jurisprudence) is that a court faced with the issue of a child resisting contact often needs to make an determination of the reasons for this situation, such as parental alienation, realistic estrangement due to child abuse or intimate partner violence, or a hybrid situation, though the court might also conclude that the child is not in fact resisting contact, but only has an affinity for one parent and wants to spend less time with the other parent without actually rejecting them.

As explained by Mitrow J in *CT v MMM*:[77]

Before a court can find parental alienation, it is necessary to examine whether there has been "realistic estrangement" and whether a rejected parent's behaviour is a contributing factor to a damaged parent-child relationship; even where a favoured parent engages in problematic behaviour, a child may not be "alienated" where there are independent reasons to explain the child's feelings.

In that case the judge refused to make an interim order for a custody reversal based on the father's claim of parental alienation. While that claim had some support from a therapist

[75] *Ayotte v. Bishop*, [1996] O.J. No. 4810 (Ct. J. (Gen. Div.)) [*Ayotte*] at para 1.
[76] For a rejection of a presumption of shared parenting and a discussion of the significance of family violence in parenting cases, see *Barendregt v Grebliunas,* 2022 SCC 22.
[77] *C.T. v. M.M.M.,* 2023 ONSC 7247, at para. 82, additional reasons at 2023 ONSC 4552

involved in the case, the court was concerned that the father failed to prioritize the children's intense commitments for competitive sports, and that his past examination of the daughter's vagina for infection significantly contributed to their refusal to see him. The clinician of the OCL reported that the children had formed independent opinions to not want to see their father, who abandoned his claim for custody reversal after this interim decision.

While it may ultimately be necessary for a court making a parenting order to decide whether or not the child is alienated, in many less severe cases it may be understandable that the court lacks the evidence to make a clear determination, and indeed in some cases it may be preferable for the court to case manage the high conflict situation and support a resolution that does not require a clear determination that either parent is an "abuser" or an "alienator."

In some cases, it may be either impossible or unhelpful for a court to reach a definite conclusion about the reason that a child is resisting contact with a parent. In the British Columbia case of *KFM v KGT,* the trial extended over 43 days, with the father was claiming that his son had been alienated from him by his mother and seeking an order for equal parenting time. The mother argued that it was a situation of realistic estrangement due to the father's emotional and physical abuse of the child. Justice Brundrett did not fully support the position of either parent, observing:[78]

> The facts in this case do not lend themselves to a clear finding one way or the other with respect to parental alienation or … estrangement. I therefore find it unhelpful in this particular case to focus on who is to blame for the breakdown in [the child's] relationship with his father. I would focus instead on a child-centered approach and the fundamental consideration of best interest factors in s. 37 of the FLA.
>
> I would therefore reject an approach in this case that adopts alienation as a legal conclusion that places blame on one parent for disruption in the parent-child relationship. I do recognize that there is a pattern of resistance and refusal behaviour by [the child] toward the claimant, that the child is aligned with the [mother], and that he appears to have sometimes expressed disproportionate hostility toward the [father] without reasonable justification. I also recognize that the parenting regime has sometimes operated unfairly for the [father], like when he was falsely accused of assault and lost his contact with the child for several months. …there are a multitude of factors at play, and the best focus is on [the child's] long-term interests.
>
> I find in this case that a careful assessment of the context and the characteristics involved in the best interests of the child is called for to determine the parenting issues here, rather than a judicial finding assigning blame for the attachment disruption — a finding that is only likely to lead to further litigation and conflict.

The court ordered that the mother would retain primary care and decision-making, with an increase in the father's time from the prior arrangement, but not equal parenting time.

Expert Evidence

The report of a neutral court-appointed mental health professional who has conducted an evaluation of both parents and their children often has significant weight in assisting the judge in determining whether there has been parental alienation. Although the courts are clearly not bound by these opinions, the failure of a parent to participate in a court-ordered

[78] 2023 BCSC 1347, at 261-264. For a similar "holistic" approach, see *JI v AA,* 2023 ONSC 2942, per Fryer J.

evaluation is likely to lead to an adverse inference against that parent. In *Hormillosa v Tosani-Levine,* Smith J explained:[79]

> The crux of the Father's position is that the Mother is the cause of the damaged relationship with his children. On the evidentiary record before me, the Court does not find that the children have been alienated from their Father.
>
> Although expert evidence about parental alienation is not necessary [for a court to find that it has occurred], the Father nonetheless had the opportunity to participate in a parenting assessment, where his allegations of parental alienation could have been fully explored…. Had the Father been truly concerned with parental alienation, as alleged, the Court believes that he would have proceeded with the court ordered assessment.

Although the opinion of a court-appointed expert often has significant weight, the court may disregard it if the judge concludes that it is based on erroneous factual assumptions or that the expert lacked the qualifications to deal with a specific case. In *RE v SJL,* the court rejected a mother's application to relocate from Prince Edward Island to British Columbia. The mother placed significance reliance on the views of the court-appointed expert who did not accept that she was alienating the child but rather concluded that she was the victim of spousal violence and supported her relocation. In rejecting the expert's opinion and refusing to allow the mother to relocate, Cann J. wrote:[80]

> Expert opinions which are formed in part on the basis of factual assumptions lose validity if the factual assumptions prove unfounded. Moreover, in a forensic context, the decision to simply choose to accept a version of the truth, especially in the face of concerns of parental alienation having been raised, gives rise to concerns of a lack of objectivity of methodology (to be contrasted with impartiality), which substantially weakens the probative value of the opinion….
>
> Further, cross examination of [the court-appointed expert] regarding his qualifications in respect of assessing parental alienation concern me. Independent of his approach to the information-gathering aspect… I am able to attribute minimal weight to his conclusions. The paucity of his training and education specific to parental alienation did not become evident until he had been qualified to give opinion evidence (without objection or cross examination by opposing counsel). …

In Ontario, the court may appoint an independent expert under the *Children's Law Reform Act* s. 30, with the requirement that the parents pay for the parenting plan evaluation (also called a parenting assessment), with costs that are often in the range of $15,000 - $30,000, beyond the capacity of most parents to pay. These experts are often psychologists, but may be psychiatrists or social workers, and usually provide an opinion about whether or not there is parental alienation and make a recommendation to the court.

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[79] 2023 ONSC 4120, at para. 28-29

[80] 2023 PESC 1, at para 50-54. See also e.g., *K.K. v M.M.,* 2022 ONCA 72 where the psychiatrist Dr. Sol Goldstein erroneously concluded that the mother had alienated the two children and they were placed with their father after an interim hearing. The doctor was ultimately subjected to professional discipline for his poor quality work, but as a result of the reliance on this report by the judge at the interim stage, the children were placed with their emotionally abusive father for almost seven years and had limited contact with their mother. At the eventual trial, the children were placed in the primary residential care of the mother.

Courts in Ontario may also request that the Office of the Children's Lawyer (OCL) become involved in a case to provide a "clinical investigation," without charge to the parents. The OCL reports are usually prepared by social workers and may include a recommendation about an opinion about parenting arrangements, but the present operating procedures of the OCL do not permit these clinicians to offer an opinion about whether or not there has been "parental alienation,"[81] limiting their utility to the courts in this type of high conflict case.

In 2021-23 there were 87 cases (51) where a court-appointed neutral expert appointed in Ontario cases that raised parental alienation claims. In 42 of these cases the professional included an opinion about whether parental alienation occurred, with a conclusion that it had occurred in 16 cases, and that alienation had not occurred in 26 cases; the court completely accepted the court-appointed expert's recommendations in 19 of these cases, and partially accepted them in another 15.

There were 30 cases in which one party retained a mental health professional to express an opinion about the case. In some cases, this was a critique of the evaluation of the court-appointed experts. There were 43 cases in which a therapist or counsellor testified. The opinions of experts who are not court-appointed is generally afforded less weight than that of an independent court-appointed assessor, since they will generally not have the broad range of information that is available to a court-appointed parenting expert.[82]

The Child's Views: Voice of the Child Report & Judicial Interviews

In high conflict cases involving alienation claims, there is usually significant evidence about the child's views, as the child has expressed a strong preference for not seeing one of the parents. This evidence may be available from a parent, or if a court-appointed expert has undertaken an evaluation, that expert will be able to report on the child's views and may be able to express an opinion about whether those views are independent or a result of the influence or manipulation of the favoured parent.

In Ontario, the court may request involvement of the Office of the Children's Lawyer to prepare a Voice of the Child Report, with a social worker interviewing a child on a couple of occasions and reporting on the child's perspectives and preferences, but without attempting to assess whether the child is alienated. Although potentially valuable for high conflict cases where there are no alienation claims, Voice of the Child Reports may have less value when alienation is a central issue, and they were only provided in 20 out of 172 (12%) cases in Ontario in 2022-23.

In some high conflict cases, especially when the parties have conflicting positions about the child's views, a judicial interview may be valuable, though there can be challenging for judges. Judges conducting interviews in these cases must avoid indicating to the child what they will decide, though the judge should tell the child that the decision will be based on the judge's determination of the child's best interests, which raises the prospect that the interview may become antagonistic. In Ontario judicial interviews are rare when alienation is at issue. There are, however, cases where the judge and child may find it helpful to have a meeting. In *M.S.R. v D.M.R,* the court received a substantial amount of evidence, including in a report form a court-appointed expert, that the 13.5-year-old boy had been alienated from the mother. The

[81] Birnbaum & Bala (2024 under review), Parental Alienation Cases: Experiences of Ontario Legal and Mental Health Professionals, *International Journal of Policy, Law & the Family.*
[82] See e.g. *C.T. v. M.M.M.,* 2023 ONSC 7247,

parents both requested that judge meet the child, and he agreed to do so. [83] Justice observed that the purpose of "interview was not to gather evidence" but that it was Thomas "appropriate" for him to meet so that the boy knew that [84]

> I was aware of his views; and to discuss the trial process and the difference between having a voice and deciding an issue. It is my hope the judicial interview process will enhance the likelihood that J.S. would accept my decision…. During the interview I told J.S. I would be happy to meet with him and explain my reasons to him once I made a decision. He indicated he wanted to have this further meeting.

Notwithstanding the child's very clearly stated "detest" for his mother, the court found the boy to be alienated and ordered a custody reversal from the father to the mother, with the mother and boy to participate in the Family Bridges program, and a minimum 90-day period of no contact with the father.

Role of Child Protection Services (CPS)

It is becoming increasingly common for the CPS (also known as the Children's Aid Society in Ontario) to become involved in high conflict separation cases where there are allegations of domestic violence or alienation, as one or both parents report about emotional, sexual or physical abuse by the other parent.[85] In some cases another professional who works with the child, such as a physician or teacher may report about suspected abuse or neglect, or the police may contact the CPS to report concerns arise out their being called to the home to deal with family violence issues. In 2021-23, the CPS was involved in 101 cases (59%) where parental alienation was raised, mainly in an investigative or supportive role.

It is clear that a Family Court judge dealing with high conflict parenting dispute does not have the jurisdiction to *order* that the CPS investigate or provide services.[86] The Court may, however, be required to report to the CPS if the judge believes that child may be subject to emotional abuse as a result of the conflict. In practice the agencies are generally responsive to such judicial reports and may send counsel or a report to the Family Court, [87] though there remain concerns that CPS is often not doing enough to co-ordinate its response with other agencies or recognize the emotional harm caused by high conflict separations and parental alienation.[88]

There are also cases in which the CPS has brought a protection application due to concerns about alienation and emotional abuse arising from a high conflict separation. In *Jewish Family and Child Services of Greater Toronto v. A.K.*[89] the father was alienating the

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[83] 2022 BCSC 1398,

[84] 2022 BCSC 1398, at apar 216-221.

[85] See e.g. Houston, Bala & Saini, "Crossover Cases of High Conflict Families Involving Child Protection Services: Ontario Research Findings and Suggestions For Good Practices" (2017) 55(3) *Family Court Review* 362-374.

[86] *Fiorito v. Wiggins,* 2015 ONCA 729.

[87] *MAB v MGC,* 2023 ONSC 3748.

[88] Birnbaum & Bala (2024 under review), Parental Alienation Cases: Experiences of Ontario Legal and Mental Health Professionals, *International Journal of Policy, Law & the Family.*

[89] 2014 ONCJ 227. See also e.g. *Catholic Children's Aid Society of Hamilton v. V. A, N. E. and M. E.*, 2022 ONSC 4684,

children from their mother; as a result, the children became verbally and physically abusive towards her. The CPS concluded that the children were in a "state of emotional crisis," and apprehended them, a decision upheld by Sherr J., with the plan of placement in foster care and undertaking of therapy to allow them to eventually be placed in the care of their mother.

While these agencies are not in a position to the provide expert evidence about whether a child has been alienated, the role of these agencies is especially influential if they conclude that a parent has been making unfounded allegations of child abuse against the other parent, as this is consistent with a finding of parental alienation.[90]

Role of the Police

The police are often involved in high conflict family cases, as a parent or neighbor may contact the police during an argument. In 2021-23 the police were involved in 112 (58%) of the 172 cases (65%) where parental alienation was raised, with 71 of these cases resulting in criminal proceedings being commenced. While a criminal conviction may be significant for a parental alienation case in terms of proving that there has been family violence, the fact that charges were not laid, or a criminal proceeding resulted in an acquittal or recognizance, does not establish that there has not been abuse or violence for the purposes of the family proceeding.

Judicial Notice: Not Necessary to Have an Expert

While an expert opinion about alienation can be very helpful to a judge, it is clearly not essential for an expert to testify for the court to make a finding whether or not alienation has occurred.[91]

In *A.M. v C.H.* the parties had an 11-day trial, with evidence from various counsellors who worked with family members and from CPS workers who investigated the mother's largely unfounded reports of child abuse by the father. The trial judge concluded that there had been parental alienation and that it was in the best interests of the 14-year boy to have custody transferred from the alienating mother to the father. The mother appealed on several grounds, including that the trial judge made a finding of alienation without proper expert evidence. In dismissing the appeal, Pardu JA wrote: [92]

> In finding that the mother alienated the child from the father, the trial judge was not purporting to make a psychiatric diagnosis of any syndrome or condition. Rather, he was making factual

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Child and Family Services for York Region v L.H. [2013] O.J. No 4188 where the children were originally placed with the mother under a *CFSA* supervision order but then, due to her alienating behaviour, but court ordered that they would reside with their father while still under a supervision order and the mother's access would be at the discretion of CAS.

[90] See e.g. *A.M. v C.H.* 2019 ONCA 764.

[91] In *Williamson v Williamson,* 2016 BCCA 87, the British Columbia Court of Appeal suggested that "admissible expert evidence" is necessary to make a finding of alienation and address the issues that the cases raise. However, later trial decisions in that province have recognized that obtaining such evidence is beyond the means of many parents, and decisions about the best interests of the child may have to be made without such evidence. See e.g *R.J.S. v. D.M.S*, 2018 BCPC 372; *S.M.A v. S.J.N.*, 2022 BCPC 22,

[92] *A.M. v C.H.,* 2019 ONCA 764, at para 32 – 36 (emphasis added); see also *Fiorito v. Wiggins*, 2015 ONCA 729; and *Bouchard v. Sgovio*, 2021 ONCA 709 (Ont.C.A.).

findings about what happened in this family. This is the stuff of which custody trials are made, and as conceded, no expert opinion was required to enable him to do so.

Those factual findings logically led to certain remedies being appropriate or not. *The trial judge did not need expert evidence before choosing the remedy that was in the best interests of the child.*

Further, judges deciding custody cases do so in places as diverse as Cochrane, Ontario and downtown Toronto. It cannot be assumed that comprehensive parenting capacity assessments are universally available or affordable. Even competent assessors may not have the luxury of lengthy time to evaluate family dynamics and appropriate remedies…

Some expert assessments may be very helpful to a trial judge, but they are not a prerequisite to making the order the trial judge thinks is in the child's best interests, based on all of the evidence at the end of the trial. In fact, the trial judge is obliged to make that order, regardless of whether expert evidence is adduced.

It is accepted that judges may take judicial notice of behaviours that are commonly associated with alienation. A frequently source cited in the Canadian courts for "red flags of alienation" was provided by Dr. Barbara Jo Fidler, a leading expert, in her testimony in the 2009 case of *AGL v. KBD,* where she set out common characteristics of the child, the favoured parent, and the rejected parent. Justice McWatt quoted Dr. Fidler at length:[93]

Child Behaviours

- View of parents one-sided, all good or all bad; idealizes one parent and devalues the other.
- Vicious vilification of target parent; campaign of hatred.
- Trivial, false and irrational reasons to justify hatred.
- Reactions and perceptions unjustified or disproportionate to parent's behaviours.
- Talks openly to anyone about rejected parent's perceived shortcomings.
- Extends hatred to extended family and pets (hatred by association).
- No guilt or ambivalence regarding malicious treatment, hatred, etc.
- A stronger, but not necessarily healthy, psychological bond with alienating parent than with rejected parent.
- Anger at rejected parent for abandonment; blames him/her for divorce.

[93] This list was first quoted by McWatt J. in *L.(A.G.) v. D.(K.B.*) (2009) 93 O.R. 409 (Sup. Ct. J.). It is often cited by the courts across Canada; for recent examples, see e.g. *MS v KA* 2022 ONSC 6570, See for example: *P.R.M. v. L.G.*, 2016 MBQB 242, 2016 CarswellMan 551 at 179; *Malhotra v. Henhoeffer*, 2018 ONSC 6472, 2018 CarswellOnt 18560, affirmed as *A.M. v. C.H.*, 2019 ONCA 764, 2019 CarswellOnt 15391, cited above; *M.(L.) v. B.(J.)*, 2016 NBQB 93, 2016 CarswellNB 340; *Droit de la famille - 211179*, 2021 QCCS 2765, 2021 CarswellQue 10457; *Cantave v. Cantave*, 2014 ONSC 5207, at 58; and *Maharaj v. Winfred-Jacob*, 2016 ONSC 7925, at 138 - 145. See also *Green v. Green,* 2021 NSCA 61**,** leave to appeal to SCC dismissed Feb. 22, 2024

This list was slightly updated in Fidler B. & Bala, N. (2020), "Concepts, Controversies, and Conundrums on 'Alienation': Lessons Learned in a Decade and Reflections on Challenges Ahead" *Family Court Review*, 58(2), 576-603, which is also cited by the courts; see *Catholic Children's Aid Society of Hamilton v. V. A, N. E. and M. E***,** 2022 ONSC 4684

- Speech is brittle, a litany; obsessed; has an artificial quality; affect does not match words; no conviction; unchildlike, uses adult language; has a rehearsed quality.
- Stories are repetitive and lacking in detail and depth. Mimics what siblings report rather own stories.
- Denial of hope for reconciliation; no acknowledgement of desire for reconciliation.
- Expresses worry for preferred parent, desire to care for that parent; or, defensive denial that child is indeed worried about parent.

Alienating Parent Behaviours

- Allows or insists that child makes decisions about contact.
- Rarely talks about the other parent;
- Uninterested in child's time with other parent after visit;
- No photos of target parent; removes reminders of the other parent.
- gives a cold shoulder, silent treatment, or is moody after child's return from visit.
- Refusal to hear positive comments about rejected parent; quick to discount good times as trivial and unimportant.
- Tells child fun things that were missed during visit with other parent.
- No encouragement of calls to other parent between visits; rationalizes that child does not ask.
- Indulges child with material possessions and privileges.
- Sets few limits or alternatively is rigid about routines, rules and expectations.
- Refuses to speak directly to parent; refuses to be in same room or close proximity. Does not let target parent come to door to pick up child.
- No concern for missed visits with other parent.
- Makes statements to professionals and then denies what was said.
- Body language and nonverbal communication reveals lack of interest, disdain and disapproval.
- Engages in inquisition of child after visits.
- Rejected parent is discouraged or refused permission to attend school events and activities.
- Telephone messages, gifts and mail from other parent to child are destroyed, ignored or passed on to the child with disdain.
- Distorts any comments of child that might justify accusations.
- Doesn't believe that child has any need for relationship with other parent.
- When child is with other parent and calls and is quiet or non-communicative, parent wrongly assumes pressure from target parent, or that child is not comfortable with

target parent; evidence of bad parenting; does not appreciate that child is uncomfortable talking to alienating parent about target parent.

- Portrays other parent as dangerous, may inconsistently act fearful of other parent in front of child.
- Exaggerates negative attributes of other parent, and omits anything positive.
- Delusional false statements repeated to child; distorts history and other parent's participation in the child's life; claims other parent has totally changed since separation.
- Projection of own thoughts, feelings and behaviours onto the other parent.
- Does not correct child's rude, defiant and/or omnipotent behaviour directed towards the other parent, but would never permit child to do this with others.
- Convinced of harm, when there is no evidence.
- False or fabricated allegations of sexual, physical and/or emotional abuse.
- Denigrates and exaggerates flaws of rejected parent to child says other parent left "us," divorced "us" and doesn't love "us."
- Over-involves child in adult matters and litigation.
- Child required to keep secrets and spy or report back on other parent.
- Child required to be messenger
- Overt and covert threats to withdraw love and affection from child unless other parent is rejected.
- Extreme lack of courtesy to rejected parent.
- Relocation for minor reasons and with little concern for effects on child.

Parental Behaviours of Target Parent that Make Alienation More Likely

- Harsh, rigid and punitive parenting style.
- Outrage at child's challenge to his/her authority.
- Passivity or withdrawal in face of conflict.
- Immature, self-centred in relation to child.
- Loses temper, angry, demanding, intimidating character traits, but not to level of abuse.
- Counter-rejecting behaviour.
- Lacks empathic connection to child.
- Inept and unempathetic pursuit of child, pushes calls and letters, unannounced or embarrassing visits.
- Challenges child's beliefs and/or attitudes and tries to convince them otherwise.
- Dismissive of child's feelings and negative attitudes.
- Attempts to induce guilt in child.
- May use force to reassert parental position.

- Vents rage, blames alienating parent for brainwashing child and takes no responsibility.

While this list is a helpful tool, not all of these factors will be present in every case where there is parental alienation, and it is necessary to consider the frequency and intensity of these behaviours as well as their presence. There is also little empirical research to assist mental health professionals in their analyses of the different factors or behaviours and the challenges of exploring these individual factors or behaviours from a systems perspective (i.e., child-parent; child, parent A versus parent B).

V. LEGAL RESPONSES TO PARENTAL ALIENATION

The discussion which follows considers a range of judicial responses that may be used where the court concludes that there has been parental alienation, recognizing that the response will be affected by the legal context, which may include: at an initial urgent application, at the temporary order or trial stage; an application for enforcement of a previously made parenting order; an application for variation of a previously made order; or in a relocation application.

There may be a sequence of responses as a case evolves, or new evidence is brought before the court in proceedings that may start with an interim application and end with a variation or enforcement proceeding. Further, some of these responses may be appropriate when a child is resisting contact with a parent even if the court does not conclude that there has been parental alienation.

To make the discussion manageable each potential judicial response is considered in isolation. However, it must be appreciated that more than one may be used in a case, such as an increase in the parenting time with a rejected parent and court mandated counselling and perhaps a police enforcement clause. The responses include, in roughly increasing order of intrusiveness:[94]

- process responses such as having single judge case management, often with the hope of encouraging the parents to address the issues on a consensual basis, and the possibility of dealing with urgent motions;
- order some form of "reunification counselling" without changing the parenting arrangement;
- increase the role of the rejected parent in the child's life by increasing the parenting time and/or parental decision-making responsibilities;

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[94] The Ontario Court of Appeal in *A.M. v. C.H.* 2019 ONCA 764 sets out four option as a response to parental alienation, though as discussed here, the list omits some possible responses:

1. do nothing and leave the child with the favoured parent;
2. reverse decision-making and primary residence and place the child with the rejected parent;
3. leave the child with the favoured parent and order therapy and counselling; or
4. provide a neutral, transitional, placement for the child and order therapy, so as to facilitate a placement with the rejected parent at a later date.

See also detailed discussion of possible legal responses in Zechariah Martin(2023), Remedies for Parental Alienation in Canadian Family Law, 42 *Canadian Family Law Quarterly* 85.

- an order that the judge hearing the case will remain seized, to monitor compliance with court orders;
- find the alienating parent in contempt of court;
- order police enforcement of the parenting time order;
- reverse decision-making and primary residence to place the child with the rejected parent, often suspending contact with the alienating parent ("custody reversal");
- order that the alienating parent pay costs to the alienated parent, perhaps on an elevated scale; and
- do nothing, leaving the child with the favoured parent, hoping that the situation may improve at some future time.

In deciding how to respond to the finding of alienation the court will consider such factors as the severity of the child's alienation, the parenting capacities of both parents, and the child's age and likely response to a court order.

Process: Case Management, Urgent Motions and Rule 1(8)

The Ontario courts are increasingly recognizing that high conflict parenting cases require judicial control and timely effective responses to violations of court orders, whether by abusers who are violating restraining orders or alienating parents violating orders for parenting time.

One method to increase the effectiveness of judicial responses to high conflict cases is to have single judge case management. Judicial continuity increases the likelihood of the judge being able to get a sense of how the parents are interacting. Judicial continuity will help a judge identify cases that should be settled, and gain sufficient trust from warring parents to be able to get some of them to focus on the interests of their children, and resolve their disagreements without embittering and expensive litigation.[95]

Urgent Motion for Continuing Parenting Time (Access)

The *Children's Law Reform Act* s. 20(4) provides that if parents separate, they both continue to both have a right to share in decision making, unless there is "consent, implied consent or acquiescence" to some other arrangement, and further provides that "entitlement to parenting time continues unless suspended by a court order or separation agreement. The effect

[95] Bala, N., Birnbaum, R. and Martinson, D., 2010. One judge for one family: Differentiated case management for families in continuing conflict. *Can. J. Fam. L.*, *26*, p. 395.

In *Bouchard v. Sgovio,* 2021 ONSC 1055, Hughes J wrote, at para 53 (affd 2021 ONCA 709) [Emphasis added]

> 53 It takes many years of training and experience to be able to identify the sophisticated nature of the manipulation typically engaged in by parents with tendencies toward alienating their children, and it takes considerable insight and discernment to differentiate between those cases that present as possibly justified estrangement vs. alienation. In order to do so, it is often necessary to scrutinize parental behaviour over many months, even years. It is not possible to accurately do so by observing what amounts to a snapshot in the family's lifetime, or by giving the dominant parent more audio time. We must guard against our human nature to start to believe a certain narrative simply because we hear it repeated often. *Hence the encouragement from our Court of Appeal for judges to seize ourselves of these high conflict and excruciating cases.*

of this provision is that, in the absence of criminal charge resulting in a suspension of the right to contact with a child as a condition of bail release (or sentencing), a parent with *de facto* care should be allowing the other parent to spend time parenting time with the other.

If after separation, the parent with *de facto* primary care refuses to allow the other parent to have reasonable parenting time with the child, the parent being denied contact can bring an "urgent motion" (without a prior case conference) under the *Family Law Rules,* R. 14(4.2) for an order for some parenting time (access). [96]

In *O.M. v. S.K.* six months after their legal separation the parties had commenced family proceedings but continued to reside in same dwelling. With competent counsel, they negotiated a shared parenting regime that required to mother to vacate the matrimonial home in exchange for a financial settlement.[97] A few days after signing the agreement, and without leaving the house, the mother reported to the police and CPS that before the signing the father had physically and emotionally abused her and that he had physically and sexually abused child. The father denied all of the allegations and claimed that the mother was manipulating and alienating the child. The mother and father made competing, urgent parenting applications, based on "two diametrically opposed versions of events," without any opportunity for cross-examination or independent evidence before the hearing. Justice Bell concluded that the mother's evidence was not "credible or reliable based on the internal inconsistencies," and observed that:[98]

> A finding of parental alienation can be made at the interim stage and on a written record, particularly when the evidence overwhelmingly points to this conclusion. The urgency raised by parental alienation necessitates early and decisive intervention by the court:
>
> > If there is anything everyone agrees on, whether it be lawyers, experts or judges, it is essential that a parental alienation case be dealt with quickly. As a practical matter, if it is to be dealt with quickly it must be resolved by way of a motion, long before trial (*Hazelton v. Forchuk*, 2017 ONSC 2282 (Ont. S.C.J.), at para. 2).

While the judge concluded that the child, likely because of her young age, was not "exhibiting the behaviours of an alienated child," she held that by not allowing the father any parenting time the mother was "depriving [the child] of her relationship" and had engaged in "parental alienation." The judge was ordered that the father was to have interim sole custody, with mother having visits 3 times a week.

There is, however, a "high threshold" for a court to make a finding of alienation at an interim hearing. In *JC v RP* the parents separated when their daughter was very young and eventually agreed to an equal parenting time arrangement.[99] When the daughter was 14 years of age, she had a major argument with her mother and went to live with her father, refusing to have any meaningful contact with mother, her younger half-sibling or her maternal grandparents. The father brought a motion for sole decision-making authority and for mother's parenting time to be only as child wished, as well as child support, and the mother brought a motion for interim order requiring child to participate in reunification therapy, claiming that the father and stepmother had alienated the daughter from her. A clinician from the Office of the Children's Lawyer did not specifically address the alienation claim but reported that the

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[96] *Clement v Clement,* 2010 ONSC 1113; see also *Cataldo v Cataldo*, 2014 ONSC 6344.
[97] 2020 CarswellOnt 8535, 2020 ONSC 3816.
[98] 2020 CarswellOnt 8535, 2020 ONSC 3816, at para. 45
[99] 2022 ONSC 2751.

daughter acknowledged a past positive relationship with the mother but her own reasons for not wanting to live with her mother and not missing her younger sibling. Justice Broad dismissed the mother's motion, observing:[100]

> There are admittedly troublesome aspects to certain of the statements in the text messages from the father and step-mother [undermining the girl's relationship with the mother.]... However, they are not sufficient to satisfy *the high threshold required to support a finding of parental alienation, particularly on an interim motion on a paper record.*
>
> The situation is complex and the exact causes of the child's current rejection of the mother are far from clear. [The OCL Clinical Investigator] made the following insightful observation in her Report:
>
> > When considering the evidence gathered during the investigation, there was a clear pattern of verbal conflict and each [parent] seemed to be using the conflict as evidence that would support them in the family court litigation.
>
> Based upon the conflicting evidence, it appears likely that the parents share responsibility for the breakdown in the relationship between the child and the mother. The father may not sufficiently recognize the importance of the child maintaining a strong and healthy relationship with the mother and his responsibility to take positive steps to actively encourage it. On the other side, the mother may not recognize her own role in causing damage to the relationship through her conduct towards the child.
>
> I am not satisfied on the record before the court that parental alienation on the part of the father has been proven.

Justice Broad suggested that there needs to be "overwhelming" evidence to make a finding of alienation if there has been no prior finding in the proceedings. [101]

Judicial Enforcement of Orders Rule 1(8): *Bouchard v Sgovio*

If a parent has an order providing for specified parenting time that the other parent is violating, the parent whose rights are being violated may seek an "enforcement order" under Rule 1(8) of the *Ontario Family Law Rules.*

In its 2021 decision in *Bouchard v. Sgovio*[102] the Ontario Court of Appeal upheld the decision of the motion judge under Rule 1(8) in response to the alienating father's violation of the prior parenting order to grant temporary custody to the mother and order that the children participate with the mother in the Building Bridges program. Two years before, the parents entered into parenting agreement that was made into final order on consent (parenting order), which provided that their two children would receive weekly counselling and forbade the parties from involving children in conversations about legal issues. The father did not comply with that order, the mother brought a motion for compliance under Rule 1(8). The motion judge found that there was ample evidence based in the father's own evidence that he was breaching the parenting order by withholding one child from the mother as a strategy for resolving outstanding property issues. A temporary consent order was granted that the mother's care of the children was to resume, and that the children were to attend counselling. The motion was further adjourned to permit the father's compliance and the children's progress in therapy to be monitored. At the resumption of the motion, although there was no expert

[100] 2022 ONSC 2751, at para 63-66. Emphasis added.
[101] 2022 ONSC 2751, at para 66.
[102] 2021 ONCA 709

evidence about alienation, the motion judge found that the father was alienating the children, and that he was actively obstructing the therapeutic efforts. The motion judge concluded that it was in the best interests of the children to be enrolled in the therapeutic program to address the parental alienation, and that a temporary parenting order should be given to the mother while the children were enrolled in the therapeutic program.

The Court of Appeal upheld the decision, with Paciocco JA writing:[103]

> As long as the judge is satisfied that there has been a failure to obey an order 'in a case or a related case' subrule 1(8) is triggered and the relief provided for therein can be ordered:... even though, with the notable exception of r. 1(8)(g), each of the itemized forms of relief in r. 1(8) can be described as purely procedural, r. 1(8) has not been interpreted as being confined to purely procedural remedies….
>
> The rule therefore provides broad discretion to courts to make orders it considers necessary to fully address a party's failure to comply, a flexibility that is of particular importance when the orders address the well-being of children.

In *Bouchard v. Sgovio,* the Court of Appeal upheld a broad judicial power to address alienating behaviour that results in a violation of a parenting order.

"Reunification therapy" without change in parenting

There is a range of mental health interventions that can be considered to be "reunification therapy" (or "reunification counselling") and provided without a change in parenting. As discussed above, there is no standardized approach to this type of intervention, though the most effective approaches in terms of decreasing a child's resistance to a relationship with a parent generally adopt a "family systems" approach and involve both parents and the child(ren.) Without a change in parenting (custody reversal), the support of the favoured parent is likely necessary for any type of counselling to be effective, though this support may be the result of judicial education or encouragement, or even the threat of more intrusive responses.

The courts have accepted that they have the jurisdiction to order parents and children to attend counselling, even without their consent, having accepted that this is not court ordered medical treatment which would require consent.[104] The authority to make these orders is found in the *CLRA* s. 28(1)(b) and (c)(vii), and can also be made as part of a sentence for contempt or enforcement under Rule 1(8). These orders were made in 8 of the 63 cases (13%) in our Ontario study in which alienation was found. The courts generally seem to recognize that this type of response is only likely to be effective in less serious cases of alienation, or it may be appropriate if there is high conflict between the parents but no finding of alienation. In *Testani v Haughton,* Justice David Jarvis declined to make an order for counselling, having found that the child's resistance to visits with his father was due to the abuse inflicted on the mother, suggesting that the following considerations should apply in making an order for "reunification therapy:"[105]

1. Such orders are to be made sparingly.
2. There must be compelling evidence that the therapy will be beneficial.

[103] 2021 ONCA 709, at para 49.
[104] See e.g *AM v CH,* 2019 ONCA 764.
[105] 2016 ONSC 5827, at para 18

3. The request must be adequately supported by a detailed proposal identifying the proposed counselor and what is expected.

4. Resistance to therapy is an important but it is not the determining factor whether such an order should be made.

5. Where a clinical investigation or an assessment is underway, no order should be made pending their conclusion.

6. Wherever practical, appropriate direction should be given to the counselor/therapist and a report made to the court.

It may be appropriate for a court to consider an order for counselling as part of a sentence for contempt in violation of an order for parenting. In the New Brunswick case of *J.M. c. B.C.,* the parents had agreed to a week-about shared parenting arrangement for their two daughters, affirmed in a court order made almost two years after separation.[106] Soon after the court order, the mother stopped complying, saying that the girls no longer wanted to go to their father's home, and their mental health was deteriorating as a result of the mother's attempting to force them to go, to the extent that she reported that the girls were suicidal.

The mother brought an application seeking sole decision-making authority and restricting the father's time with the girls, but that application was dismissed, with costs awarded against the mother. About a year after the non-compliance began, the father brought a contempt motion. After the contempt proceeding commenced, the parents agreed at a case conference for the girls to start counselling and the girls began to see their father, with one of the children resuming a shared parenting time arrangement. The mother agreed to plead guilty to the contempt and conceded that a fine would be appropriate. However, Justice Boudreau-Dumas declined to impose a fine, noting that the mother still had not paid the previous cost orders. Instead, the judge ordered the mother to attend therapy sessions focusing on the acceptance of the parents' separation and the need for compliance with the order for the father's parenting time. The judge also ordered the mother to "take concrete and positive action on a weekly basis so that the [father's] parenting time with the [other child] resumes," and provided various examples of "concrete and positive actions," including having the girls call their father regularly, and requiring the girls to participate in various activities with the father such as dinners, movies and bowling. The judge also ordered the mother to pay the father $500 in costs.

Such measures are more likely to be effective than imposition of a purely punitive sanction, and the court in *J.M. c B.C* may have been encouraged by the apparent progress since the commencement of the contempt proceeding. [107] It should, however, be appreciated that mental health interventions and similar measures to restore a relationship with an estranged parent are unlikely to be effective unless actually supported by the favoured parent. Having consistent single judge case management for high conflict family cases, including after the court makes an intervention order, may encourage such engagement and result in more effective responses, ultimately reducing the stress on children from prolonged proceedings and unresolved parental conflict. [108]

[106] 2021 NBQB 262. The girls ages were not included in the decision, but they were each at least 10 years old.
[107] See commentary questioning the effectiveness of this type of order, Franks & Zalev, *This Weeek in Family Law,* May 2, 2022, Fam. L. Nws. 2022-16
[108] Bala, Birnbaum & Martinson, *Differentiated Case Management for Family Cases: 'One Judge for One Family'* (2011) 26 Can J Fam L 339-394.

Increased Parental Role for Rejected Parent

While Ontario courts will generally not order shared parenting or shared decision-making if there is hostility and poor communication between the parents, in some parental alienation cases judges will order an increased role in decision-making or more time for the rejected parent. These types of orders are intended to give the parent who is not favoured more opportunity to have a good relationship with the child, as well as "sending a message" to the favoured parent that there may be a custody reversal if there is continued resistance to support of the child's relationship with the other parent.[109] In 2021-23, this type of orders was made in 29 of 63(46%) of Ontario cases where alienation was found.

In *Ciarlariello v Iuele-Ciarlariello*, the mother was the primary care giver for four boys, and attempted to alienate them from their father, including making unfounded allegations of abuse to the CPS. The two older boys, aged 10 and 12 years, were especially resistant to contact with their father. Each parent was seeking custody, though the father did not put forward a detailed plan and his work schedule and living arrangements would have required significant adjustment to allow him to assume full care for the four boys. Justice Ingram observed that the mother wanted an "order for sole custody in her favour. Due to her unwillingness to show cooperation in regard to access, to award her sole custody would be to reward her for her behaviour." [110] The court ordered joint custody; although the mother retained primary care, a detailed plan of care and reunification therapy was put in place, including involvement of the local CPS, and the judge included a term in the order that: [111]

> If the mother fails to follow the terms of this order, the father may apply by motion for a finding of contempt or an immediate change of custody of the children. To this end, the father shall have available a detailed plan of the accommodation and daily care provisions for the children.

Supervised Parenting Time

By the time a judicial finding has been made that the child has been alienated, the child may have been rejecting access with the rejected parent for a significant period of time. In these situations, judges must be sensitive to the fact that reintroducing to the rejected parent may need to be done carefully, and if possible, with therapeutic support.[112]

In some cases, it may be appropriate for the restoration of a relationship with a rejected parent should only be undertaken with some form of supervision by a mental health professional, which may be viewed as a form of "reunification therapy." There are significant downsides to supervised contact, including its expense and the difficulty in maintaining a natural relationship in this environment as well as the limitations that it may impose on the amount of time that can be spent with the children. In an alienation case, ordering supervision of contact with the rejected parent may also suggest to the child that fears of that parent are justified.

There are cases in which contact with an alienating parent should be supervised. In *J.B.H.*

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[109] See e.g *Garland v. Brouwer*, 2011 ONSC 6437, 14 R.F.L. (7th) 380, and *Sinclair v. Sinclair*, 2013 ONSC 1226, 31 R.F.L. (7th) 29.
[110] [2015] O.J. No. 918, 2014 ONSC 5097, at para. 185.
[111] [2015] O.J. No. 918, 2014 ONSC 5097, at para. 218, clause 14.
[112] *B.R. v. EK*., [2007] O.J. No. 278 (Sup. Ct.) (QL) [*B.R.*] at para. 9.

v T.L.G. [113] there were concerns about the father's mental health. The father had made unfounded allegations of neglect, physical and sexual abuse by the mother to the CPS, none of which had not been substantiated. The father showed an "alarming lack of insight into child development" and there were concerns that his conduct might alienate the child from his mother. The mother had insight into her own behavior and continued to promote the father's relationship with the child. The father was completely oblivious to the impact his own behaviour had on the child. The court ordered custody to the mother with only supervised access only to the father for three hours once per week.

Post-Order Judicial Control

It is not uncommon in high conflict cases for the judge who makes a decision to order that they will remain seized of the case, and that any applications for enforcement or variation will be returned to the same judge, provided that judge is available to deal with the matter. This is especially appropriate in a case where the court finds that there has been alienation, but decides not to reverse custody, but imposes conditions on both parents and expects some degree of continuing co-operation, including the possibility of reunification counselling.[114] The judicial continuity is intended to both promote engagement with the order and allow for an expeditious, efficient response to non-compliance by a judge who is knowledgeable about the case and has indicated that non-compliance might result in a change in custody.[115]

Contempt of Court

A parent whose rights under a parenting order, for example for specified parenting time, have been violated may make an application to find that the party violating the order in contempt of court.[116] As Justice Quinn put it in *Gordon v. Starr*[117]

> . . *An order is an order, not a suggestion. Non-compliance must have consequences.* One of the reasons that many family proceedings degenerate into an expensive merry-go-round ride is the all-too-common casual approach to compliance with court orders. [Emphasis added]

Despite such judicial statements fact that family court orders are not suggestions or recommendations, securing compliance with parenting orders is often very challenging, and contempt is not often sought as a response to a violation of a parenting order. In the 63 alienation cases in our Ontario study, only 6 involved contempt proceedings.

The 2015 Supreme Court decision in *Carey v Laiken* establishes that to have a finding of contempt, the parent whose rights have been violated must establish that the other parent knowingly and wilfully disobeyed the order.[118] Even though this is a civil process, the

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[113] *J.B.H. v T.L.G.,* 2014 ONSC, [2014] O.J. 2742 at para 280.
[114] See e.g *Valettas v. Chrissanthakopoulos*, [2013] O.J. No. 3577; and *N.S. v. C.N.*, [2013] O.J. No. 1120 and [2013] O.J. 3351.
[115] See e.g. *Hajji v. Al-Jammou,* 2020 ONSC 6403 (Ont. S.C.J.); and *K.F.M. v K.G.T.,* 2023 BCSC 1347
[116] *Carey v. Laiken*, 2015 SCC 17; see also Canadian Judicial Council, (2001). *Some Guidelines on the Use of Contempt Powers,* online: <https://www.cjc-cm.gc.ca/cmslib/general/Contempt_Powers_2001_with_Header.pdf>. at 10.
[117] (2007), 42 R.F.L. (6th) 366 (Ont. S.C.J.), at para 23.
[118] Ibid at 11.

standard of proof is beyond a reasonable doubt because a finding of contempt of court may result in imprisonment.[119] There is a the three part test for contempt, requiring a finding that (1) the order was clear and unequivocal; (2) the party violating the order had actual knowledge of the order; (3) and that the breach was intentional and unjustified.

A finding of contempt may result in an order for counselling for the parents and child, an order for compensatory parenting time ("makeup time") or payment of costs incurred by the parent seeking enforcement of the order, or more punitive responses such as a fine or even a jail sentence. The Canadian Judicial Council, however, suggests that sentencing for contempt should be used with "particular restraint" because it is in the best interests of children that their parents are not obligated to pay fines or be imprisoned due to a finding of contempt.[120] Judges are aware that "the law of contempt . . . is a blunt instrument that is not particularly well suited to the complex emotional dynamics of access disputes."[121]

The challenges of legal enforcement of a parenting order are illustrated by the 2022 Ontario case of *McCarthy v Murray*.[122] The parents separated and agreed to a consent order for a joint custody regime with equal parenting-time when the child was 7 years old. When the girl was 9 years old, the child's time with the father was significantly reduced by the mother, who often told the father that their child "doesn't want to see you right now," though some weekend visits with the father took place. The mother also unilaterally changed the child's school arrangements. The father brought the matter back to court, which resulted in a series of court appearances and orders by two different judges requiring compliance by the mother with the prior shared parenting arrangements and making cost orders against the mother. The mother continued to say that the daughter did not want to see the father as required by the parenting order. The father then brought a motion for contempt and other relief that was heard by Braid J. when the girl was 11 years of age. While the court found that the mother had disobeyed courts orders, Braid J. emphasized that in family cases, a finding of contempt is a "last resort," and dismissed the contempt application, observing: [123]

> Although a child's wishes should be considered by a court prior to making an access order, once the court has determined that access is in the child's best interests, a parent cannot leave the decision to comply with the access order up to the child. A parent has a positive obligation to ensure a child who allegedly resists contact with the access parent complies with the access order. Parents are not required to do the impossible in order to avoid a contempt finding. They are, however, required to do all that they reasonably can.
>
> I find that the mother is in breach of these terms of the court orders. However, I decline to make a finding of contempt. The mother should consider herself on notice that any further unilateral decisions by the mother concerning the child will likely lead to a contempt finding by this court.

This judicial restraint in making findings of contempt or ordering police involvement is consistent with the approach of some recent decisions from the Ontario Court of Appeal which

[119] Ibid.
[120] Canadian Judicial Council *supra* at 10-11.
[121] *Paton v. Shymkiw* (1996), 114 Man. R.(2d) 303, at 308 (Q.B. Fam. Div.).
[122] *McCarthy v. Murray,* 2022 ONSC 855 (Ont. S.C.J.) per Braid J.
[123] *McCarthy v. Murray,* 2022 ONSC 855 (Ont. S.C.J.) at paras 32-52.

accept that a finding of contempt is a "discretionary exercise," and recognize that coercive state involvement in a parenting dispute will often not promote the interests of the child involved. [124]

It is not uncommon, and often wise, for judges making a finding of contempt to refrain from imposing an immediate penalty, but rather require the contemptor to pay the costs of the proceedings, make specific directions to attempt to ensure compliance, perhaps by requiring reunification therapy, and indicate that further violations may result in more serious sanctions or a custody reversal. [125] This may reduce the tendency for a non-compliant parent to feel like a martyr and blame the other parent for this situation, and may direct a parent towards compliance. Maintaining judicial case management after a finding of contempt with a threat of an interim variation in custody may be the most effective method of gaining compliance with terms for access and engagement in therapy,[126] though in more severe alienation cases a parent often has significant personality disorders and may not respond even to the clearest judicial messages.

An example of a potentially effective use of the contempt power to enforce a court-ordered parenting regime is provided by the recent Nova Scotia decision of Jollimore J. in *Bose v Bose.*[127] The parents separated when the child was about 1½ years of age, when the mother moved out of the home with the child and denied the father any contact with the child for 10 months. At trial, the judge made a detailed order for the father to have parenting time, alternate weekends overnight and two non-consecutive weeks in the summer, which the mother often breached. After 8 months of limited, sporadic compliance with the order, the father began contempt proceedings. Despite being represented by counsel and being warned by at least one judge about the potential consequences for non-compliance with the order, for the five months after the contempt proceedings were commenced the mother effectively prohibiting the father from having any contact with the child. Just before the first appearance at the contempt proceeding, the mother permitted the father to see the child, but still refused to comply with all of the terms of the order.

In the contempt proceedings, the mother vaguely claimed that the order was unclear and that she did not really understand the order. Justice Jollimore found that most of the breaches the mother's breaches were intentional and unjustified, and found the mother in contempt. Although the issue of the judicial discretion to avoid a finding of contempt despite the breaches was not explicitly addressed, the court was very concerned about the frequent and significant breaches of the parenting order and that this was an appropriate case for making a finding of

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[124] As Justice Jamal (then on the Ontario Court of Appeal) explained in *Moncur v. Plante* (2021), 57 R.F.L. (8th) 293 (Ont. C.A.), at para.10:

> . . . *Exercising the contempt power is discretionary.* Courts discourage the routine use of this power to obtain compliance with court orders. *The power should be exercised cautiously and with great restraint as an enforcement tool of last rather than first resort.* A judge may exercise discretion to decline to impose a contempt finding where it would work an injustice. As an alternative to making a contempt finding too readily, a judge should consider other options, such as issuing a declaration that the party breached the order or encouraging professional assistance. [Emphasis added]

Moncur v. Plante (2021), 57 R.F.L. (8th) 293 (Ont. C.A.); *Chong v. Donnelly*, 2019 ONCA 799 (Ont. C.A.); and *Hamid v. Hamid* (2023), 91 R.F.L. (8th) 447 (Ont. C.J.)

[125] *Valettas v. Chrissanthakopoulos* [2014] O.J. No. 4835 (S.C.), per Price J. For a commentary that questions whether courts should "encourage good parental behaviour," see Felicity Kaganas, "Regulating Emotion: Judging Contact Disputes" (2011) 23 Child & Fam. L.Q 63-93.

[126] *Valettas v. Chrissanthakopoulos* [2014] O.J. No. 4835 (S.C.), per Price J.

[127] 2023 NSSC 229. This decision was the subject of favourable comment in *2024-04 Franks & Zalev - This Week in Family Law*

contempt.

At the penalty hearing, Jollimore J. provided a very useful explanation of the important role of the contempt proceedings to ensuring respect for the rule of law:[128]

> The focus of a contempt proceeding is far greater than the impact of [the mother's] denial of parenting time because obeying the law and following court orders are foundations of social order.
>
> Respect for court orders means following them. If a decision is thought to be wrong, it should be appealed. If the circumstances on which a decision is based have changed, it should be varied. Until stayed, overturned, or varied, court orders must be followed. Since the parenting decision was made in February 2022, [the mother] has not applied to stay it, sought to appeal it, or asked to vary it.
>
> [The mother's] penalty is both to secure her compliance with the Corollary Relief Order and to protect the administration of justice…
>
> Securing compliance with the order means ensuring that [the mother] does not continue to thwart [the father's] parenting time.
>
> Denouncing [the mother's] conduct and deterring both her, specifically, and others, generally, from defying court orders is particularly important where this order relates to parenting time for a young child. The denial of parenting time for a young child can negatively impact a child's relationship with a parent and the child's own well-being.
>
> [The mother's] penalty must reflect her offence. It must be in proportion to the offence's gravity and [the mother's] degree of responsibility, recognizing any aggravating and mitigating factors.

Justice Jollimore found that that the mother's breaches began immediately after the Order was released; and that the mother responded to the contempt motion by cutting off all contact between the father and the child, and accordingly, Jollimore J. held that the mother should be sentenced to one month in jail for her contempt. However, she gave the mother one last chance to avoid prison by suspending the mother's sentence on condition that she complied with the final Order, attended a parental education course "designed to include a component to educate parents about the damage done to children by continuing levels of conflict and animosity between parents", and facilitated the child attending therapy to help reunify him with the

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[128] 2023 NSSC 257, at para 5-10. For a similar approach of delaying imposition of a penalty for contempt see *E.M.B. v. M.F.B.*, 2024 ONSC 162. In that case, the court delayed sentencing for over a year, during which the mother complied with the prior order for alternate weekends parenting time of the 7-year-old daughter with the father. Mandhane J observed (at para. 24):

> I am encouraged that the Mother has settled into the alternating weekend schedule such that the Father has been having consistent parenting time for over a year now. This shows that — when properly motivated by the looming threat of sanction — the Mother is able to comply with court orders. Her recent compliance does not, however, speak to someone who has gained new insight into her behaviour and the harm it is having on her Child. … the Mother had limited insight into the damage caused by her breach of court orders. Both of them found that she had an inflated sense of herself as a Mother and an overly negative view of the Father. In this regard, she has a distorted sense of reality. The fact is both parents are flawed and yet they are both decent parents who love the Child.

The court ordered "make-up time" of extra weekends as the penalty for contempt. She also modified the parenting order to increase the father's parenting time to alternate weeks in the summer and require counseling for the child and use of a parenting co-ordinator. Justice Mandhane rejected the father's request for the "nuclear option" of a custody reversal, as the child was doing very well in her mother's care, and the judge was concerned that denying the mother primary care would turn the girl against her father; she noted that his proposal for such a plan did not include counselling support.

father.

There is much to commend this approach to the mother's serious, blatant, and repeated breaches of the parenting order, which were effectively preventing the child from having a strong relationship with his father. The decision will hopefully secure the mother's compliance with the order and allow the father and son to develop their relationship in the crucial pre-school years of his life. The decision may be cited as a warning to defiant parents in other cases.

Police Enforcement Order

In most Canadian provinces legislation allows a judge to include a provision in a custody or access order directing the police to apprehend and deliver the child to the person entitled to parenting time (or access).[129] Ontario's CLRA s. 36 provides for such orders, with 36(7) requiring that the court set an expiry date, which will be within 6 months unless the court is satisfied that a "longer period is necessary." In 2021-23 there were 12 such orders made in the 63 (19%) Ontario cases where alienation was found.

The courts accept that an order for police involvement "...is an order of last resort...to be made sparingly and in the most exceptional circumstances."[130] Judges and rejected parents hope that the fact that a police enforcement order is made will result in compliance with an access order.[131] If the police are actually required to enforce an order for parenting time, it can be very disruptive or even traumatic for children. Officers try to exercise sensitivity in enforcing parenting orders, hoping that their presence will ensure parental compliance. Even with an order, police are understandably reluctant to physically force a child to comply. Although some children, especially younger ones, might enjoy the presence of a "friendly" police officer, police involvement is often viewed as intimidating by children, and may result in further rejection of a parent.

Custody Reversal: The "Last Resort"

The most intrusive judicial response to alienation is the transfer of primary care (or custody) from the alienating parent to the rejected parent. A change of custody in alienation cases is often accompanied by a suspension of contact with the alienating parent, at least initially for a period like 90 days. [132] This "cooling off" or "blackout" period is often needed to

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[129] See e.g., *Children's Law Reform Act*, R.S.O., 1990 ch. 12, s. 36

[130] *Allen v. Grenier*, [1997] O.J. 1198, 145 D.L.R. (4th) 286 (Gen. Div.); see also *Hajji v. Al-Jammou,* 2020 ONSC 6403 (Ont. S.C.J.).

[131] See *R.L.H. v. G.L.B*., 2002 ABQB 302 at para. 47: "While I understand counsel's position on not wanting to involve a seven-and-a-half-year-old child with police authorities over the question of access, I believe that the police enforcement clause is the only way that this [father] will live up to the obligations he has under this Court Order to produce the child." The judge hoped that the threat of police enforcement would help ensure compliance by the custodial parent, without the actual need for such enforcement.

[132] There is variation in custody reversal cases about the length of a "cooling off" or blackout period" when all contact with an alienating parent may be suspended: e.g 60 days, *V.S. v. I.M.B.,* 2021 ONCJ 705; 90 days, *G.(J.M.) v. G. (L.D.)*, 2016 ONSC 3042 or 120 days b *Y.H.P. v. J.N., 2023* ONSC 5766.

Richard Warshak (2010). Family Bridges: Using insights from social science to reconnect parents and alienated children, *Family Court Review, 48(1),* 48-80 suggests a 90 day period, but observes (at fn 95) :

allow the child's relationship with the rejected parent to be restored without the influence of the alienating parent. Although it is hoped that the child will eventually have a good relationship with both parents after this type of order, the alienating parent is often unwilling (or unable) to have a relationship with the child after such an order is made.[133]

A variation in custody is sometimes referred to as a "last resort," but if courts wait too long to respond in this way, it may be ineffective. In the most severe cases, a timely decision to vary custody may be the only way to effectively address the alienation, and in some cases, it will be the least detrimental alternative for the child. In other cases, however, despite severe alienation and the failure of other interventions, the court may conclude a change in custody is not appropriate and recognize there is no effective way for a court order to allow the re-establishment a child's relationship with a rejected parent. In Ontario in 2021-23, in 9 of the 63 cases (14%) where the court found alienation, custody reversal was ordered; this was 2/20 (10%) of the cases where the father was the alienating parent and 7/43 (16%) of the cases where the mother was the alienating parent.

If an application is made to vary custody in response to alienation, the court must be satisfied that this action is in the "best interests" of the child(ren). It is usually necessary for the parent seeking the variation in custody to provide expert testimony to establish that the child has been alienated, and that the emotional distress to the child from the change in primary parenting is likely to be limited in duration. However, judges may make this order without expert evidence.[134] While the courts are reluctant to vary custody, as it is disruptive to children, use of this option is becoming increasingly common. Such action is usually only taken after the alienating parent has proven resistant to less intrusive responses, and the judge has concluded that a change in custody is the only effective way to end the emotional harm caused by the alienating custodial parent.

Decisions to transfer custody in cases of alienation often explicitly recognize the immediate disruptive effect such an order will have on the child(ren). However, a common theme is that this concern should be subordinated to the longer-term objective of maintaining the child's emotional health, hopefully with a relationship between the child(ren) and both

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> "Ideally, the resumption of contact is tailored to each family based on an evaluation of the child's progress and an evaluation of the formerly favored parent's willingness and ability to modify behaviors that would make it difficult for the child to maintain the gains. Optimal timing depends on a number of factors, such as the favored parent's ability to modify behaviors that create difficulties for the children, the children's vulnerability to feeling pressured to realign with a parent, the duration of the alienation or estrangement prior to the Workshop, and the favored parent's past conduct and compliance with court orders. If a time period had to be stated in advance, based on my clinical experience, in general I suggest considering a period of 3–6 months before regular contacts resume, to allow a child to consolidate gains and work through the numerous issues that arise in living with the rejected parent free from the influence of the favored parent. But, contacts in a therapeutically monitored situation may optimally occur sooner. Three months is about the length of time that children in therapeutic boarding schools and residential treatment centers initially go without seeing a parent. This has not been subjected to systematic empirical research, and it would be difficult to conceive of a study that could do so, given all the variables that must be controlled, such as the Workshop leaders, the site of the Workshop, the age and gender of the children and of the rejected parent, the extent to which the favored parent and the rejected parent have contributed to the problem, the exact nature of the court orders, etc.."

[133] See e.g Birnbaum & Bala (2024 under review), A Retrospective Study of Outcomes of Custody Reversal in Parental Alienation Cases, *University of New Brunswick Law Journal*; and Warshak, Richard A. "Reclaiming parent–child relationships: Outcomes of Family Bridges with alienated children." *Journal of Divorce & Remarriage* 60.8 (2019): 645-667.

[134] See e.g *AM v CH,* 2019 ONCA 764.

parents. In the British Columbia case of *A.A. v. S.N.A.,* the trial judge recognized that he faced a "stark dilemma" in whether to leave the child with a "highly manipulative" and "intransigent" mother who would never permit her child to have any sort of relationship with her father, or to transfer custody to the father, who had little contact with the child for over a year. Despite the finding of alienation, the trial judge decided not to award custody to the father due to a concern that "the immediate effect of that change will be extremely traumatic."[135] In reversing this decision and awarding custody to the father, the British Columbia Court of Appeal observed: [136]

> the trial judge wrongly focused on the likely difficulties of a change in custody - which the only evidence on the subject indicates will be short-term and not "devastating" - and failed to give paramountcy to M.'s long-term interests. Instead, damage which is long-term and almost certain was preferred over what may be a risk, but a risk that seems necessary if M is to have a chance to develop normally in her adolescent years.

In *Rogerson v. Tessaro*,[137] the Ontario Court of Appeal upheld a lower court's decision to transfer custody of twin boys, aged five years at the time of trial, to their father, based on evidence that the mother was persistently attempting to undermine the relationship between the children and father. The appellate court acknowledged that the remedy of changing custody was a "drastic one," but it approved the trial judge's structuring of the order as it was gradual, and thus likely to "cause as little disruption as possible for the children."[138]

Another example of a custody reversal decision is the 2021 ruling of McGee J in *S v. A.,* a decision affirmed by the Court of Appeal. [139] The parents separated when the two boys were 4 months and 33 months. The mother had primary care, and consistently undermined the father's relationship with the boys, including making unfounded allegations of abuse to the CPS and the police. There were various efforts at counselling to address the issues between the parents, and ultimately two court appointed neutral assessors were involved. A trial occurred 5 years after separation; after 39 days of hearings, McGee J. found that the mother had been "pretending to support the boys' relationship with their father while taking extraordinary steps … to destroy any prospect of that relationship."[140] The court found that the mother engaged in alienating behaviour, including making unfounded allegations of abuse by the father and violating court orders. Justice McGee made a finding of contempt, and more significantly, concluded that it was in the best interests of the children for them to in the care of their father while a counsellor would work with the father and children to restore their relationship, and the mother would only have limited supervised contact until the matter was reviewed by the court.

Justice McGee observed: [141]

> Children are entitled to develop the best relationship possible with each of their parents, independent of the relationship between their parents…

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[135] *A.A. v. S.N.A*., [2007] B.C.J. 870 para. 75, 77, 84-85, (C.A.) Preston J. A.
[136] *A.A. v. S.N.A.,* [2007] B.C.J. 1474 (C.A.) para. 27. The courts ultimately decided that the variation in custody would only be effective if all contact with the mother was suspended for a year; see A.A. v. S.N.A.*,* [2009] B.C.J. 558 (B.C.S.C.).
[137] [2006] O.J. 1825 (C.A.).
[138] *Ibid*., at para.8
[139] *S. v. A.,* 2021 ONSC 5976 (Ont. S.C.J.), affirmed 2021 ONCA 923 (Ont. C.A.).
[140] *S. v. A.,* 2021 ONSC 5976 (Ont. S.C.J.), at para. 12, affirmed 2021 ONCA 923 (Ont. C.A.).
[141] *S. v. A.,* 2021 ONSC 5976 (Ont. S.C.J.), at para 29-33, affirmed 2021 ONCA 923 (Ont. C.A.).

> In my view, a reversal of primary care is the most difficult of parenting decisions. It is an option that must be approached with caution, and each case must be considered on its own facts. *A reversal is not a vindication of which parent is right or wrong*. It is a finding as to which parent can best provide physical, emotional, and psychological safety and security to a child in distress. Which parent will best protect the child from the conflict and place the child's well-being above the litigation "win." [Emphasis of the Court.]

While the mother was ultimately ordered to pay costs on a full recovery basis, the cost of the litigation resulted in her bankruptcy and the costs award will never be fully recoverable.[142]

In the most severe cases where a child has been refusing all contact with the rejected parent and there is a prospect that the child might run away (inevitably with at least the tacit support and often with the covert aid of the alienating parent), there must be more planning and detailed judicial control over the transition process. In cases of severe alienation where this type of remedy is being contemplated, the favoured parent may be required to bring the child to the courthouse, or another suitable location, before the court's decision is announced, or at least required to transfer the child and possessions to the other parent within hours of the decision being rendered. There have been some tragic cases where an alienating parent has had a short period to transfer care and has killed the child, sometimes in a murder suicide, in response to an order reversing custody.[143]

Plans then need to be made for supervision of the children at the courthouse, for telling the children what the judge has ordered, and supporting their transition. In some cases, a child's lawyer or therapist may be engaged to tell the child about the decision. It will be very important for the rejected parent and advisors involved to plan for the possible use of support services, as children's attitude and behavior at the time of the transition and immediately following can be difficult to handle. In severe cases where children refuse contact and threaten to run away or harm themselves or someone else, a transitional support program such as Family Bridges, discussed above, may help the family safely adjust to the court orders.

A custody reversal with a suspension of contact with the alienating parent is dramatic, and there is a lack of sound research about its value. However, a recently completed retrospective study by Birnbaum and Bala attempted to contact all children in Ontario cases reported between 2010 and 2022 where the court found parental alienation, almost half of which involved a custody reversal.[144] Only 6 out of the 138 children in these cases were located and agreed to be interviewed; all 6 had been subject to a custody reversal order. Although at the time of the trial all 6 of the children were opposed to the order being made, with hindsight they appreciated why the court made the order and were satisfied with the decision that had been made. While none of them had contact with the formerly favoured, alienating parent, this was generally due to the decision of that parent not to have a relationship with the child after the court reversed primary care.

Costs awards and other financial penalties

When a court finds that a parent has been engaging in alienating behaviour and refusing to comply with terms of a court order concerning parenting, there is a significant likelihood that costs will be awarded against that parent. These awards are intended to sanction the parent who

[142] *S v A,* 2023 ONSC 5579

[143] https://sites.google.com/site/centralohiopa/resources-for-parental-alienation

[144] Birnbaum & Bala (2024 under review), A Retrospective Study of Outcomes of Custody Reversal in Parental Alienation Cases, *University of New Brunswick Law Journal.*

is responsible is for the costs of ensuring compliance with court orders and encourage parents to refrain from behaviour that will negatively affect their children.

In *AF v. JW* the parties engaged in litigation over 6 years about custody of their children. The court found that the mother had engaged in alienating conduct; initially she was permitted to retain custody, but under conditions that required her to co-operate with reunification therapy. At a review hearing it was established that she was continuing to alienate the children, and custody was transferred to the father, with the mother to have only limited, supervised contact. The court awarded the father close to full indemnity costs of $400,000, observing that "the father acted reasonably throughout these proceedings…. he was a father who was merely attempting to have a relationship with his children." Justice Harper concluded that the mother "falsely represented to her children and anyone who would listen [that the father was] a man to be feared and one who is incompetent as a father. I found none of her allegations to be true. This type of litigation driven by a false obsession cannot be condoned."[145]

In *MAB. v. MGC* the parents never cohabited but had a child together, who was in the primary care of the mother. She made repeated unfounded allegation of abuse against the father and failed to comply with court orders for parenting time. At trial, the mother was self-represented and the father had a lawyer; the mother was successful in obtaining child support and primary care and decision-making, but the father obtained scheduled parenting time and court mandated mental health interventions. The father obtained a more favourable result than in his severable settlement offer. Justice Chappel concluded that the mother acted "extremely unreasonably and in bad faith" and hence awarded the father full recovery costs of $138,157, observing: [146]

> Bad faith can be established by evidence that the party intentionally failed to fulfill an agreement in order to achieve an ulterior motive, or intentionally breached a court order with a view to achieving an improper purpose… It can be made out by evidence that the party has made unsubstantiated allegations of abuse by the other party, has made significant false representations to the court relevant to the best interests of a child, or has engaged in conduct aimed at alienating a child or otherwise undermining their relationship with the other party without justification….

Courts will also award costs against parents who are found to have falsely alleged parental alienation. In *Seed v. Desai*, the judge found that the custodial mother would continue to have custody and was "entitled to generous partial recovery costs" given that the "respondent's insistence on pursuing unfounded allegations of parental alienation…warrant cost sanctions."[147]

Courts have made it clear that they will not respond to a finding of alienation by reducing child support, and a tort claim cannot be brought by one parent against the other for alienation

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[145] [2013] O.J. No. 4785. In *S v A,* 2021 ONSC 5976, there was a nine-week trial, one of the longest family trials in Ontario history, primarily dealing with parenting issues. The mother, who was represented by two lawyers at trial, was found to have acted in "bad faith," including such behaviors such as a surreptitious baptism of the child, a pattern of sabotaging court orders, a series of false allegations of child abuse against the father, and frightening of the children about their father, which the court concluded was clearly harmful to the children.[145] The court ordered a custody reversal with a 90 suspension of contact with the mother. The mother was ordered to pay costs on a full recovery basis, $677,000, although unfortunately the cost of the litigation resulted in her bankruptcy and the costs award will never be fully recoverable. *S v A,* 2023 ONSC 5579

[146] *MAB v MGC,* 2023 ONSC 3748, at para. 49.

[147] *Seed v. Desai*, [2014] O.J. No. 3754 at para 13. See also *F.S. v. M.B.T.,* 2023 ONCJ 102.

of the child.[148] There are cases of a judge reducing spousal support payable to an alienating mother; while this may seem like a just result, it is unlikely to affect parental behaviour,[149] and does not seem consistent with the laws governing spousal support.

When Is It Better To Take No Action?

In some cases, children are very resistant to any efforts to change their attitudes towards seeing an alienated parent, whether by counseling or by using judicial sanctions imposed on a custodial parent to enforce contact. Older adolescents may be especially resistant to interventions, even in the context of custody reversal, and may be especially difficult to manage after the custody reversal or may threaten self-harm or suicide if custody reversal is ordered by the court. It can be very difficult an alienated parent to come to terms with this type of rejection,[150] but in some of these cases, the rejected parent may decide to give up the effort to seek to enforce parenting time or access. The decision may reflect the emotional or financial exhaustion of the rejected parent, or an assessment that it is better for the child not to seek to enforce an access order.

In some cases, a judge may decide that it is not appropriate to order or enforce parenting time or may make comments suggesting that continuing efforts to enforce access might not be in the child's best interests, despite (or because of) the alienating conduct of the custodial parent. [151]

If a court determines that a child's rejection of a parent is due to alienation (and not justified rejection), it may nevertheless conclude that it would be contrary to a child's best interests to force a child to have a relationship with the rejected parent. In these situations, it may be appropriate to try to arrange for the rejected parent to have a "final" visit with the child, even if the child seems reluctant to attend. That meeting might be facilitated by a mental health professional or the child's lawyer, with the intent of allowing the rejected parent to explain to the child why the effort to use the legal process to enforce contact is being discontinued, and to express the hope that a relationship may be resumed at some point in the future.[152] These sentiments may also be put in a letter to the child. The rejected parent may also be permitted to continue to correspond with the child and send gifts, which the favoured parent should be required by court order to share with the child. Leaving the lines of communication open in whatever manner possible, such as occasional cards or gifts, may pave the way for a future reconciliation, a better alternative than providing no trail of resolution for the grown child. The rejected parent might also have a social media page, perhaps one that that only the child has access to, for posting pictures and news.

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[148] *Frame v Smith,* [1987] 2 SCR 99. Some have argued that this decision should be revisited; see discussion of Zechariah Martin (2023), Remedies for Parental Alienation in Canadian Family Law, 42 *Canadian Family Law Quarterly* 85.

[149] See *Bruni v Bruni,* 2010 ONSC 6568, per Quinn J. This order did not affect the attitude of the mother or the children who continued to reject the father for the next decade; see *Bruni v Bruni,* 2019 ONSC 3506

[150] Tavares, A., Crespo, C. & Ribeiro, M.T. What Does it Mean to be a Targeted Parent? Parents' Experiences in the Context of Parental Alienation. J Child Fam Stud 30, 1370–1380 (2021). https://doi.org/10.1007/s10826-021-01914-6

[151] For recent examples of a court declining to force older adolescents into "reconciliation therapy," see *Gee v. Gee*, 2023 ONSC 2992; and *R.L. v. M.F*, 2023 ONSC 2885.

[152] See Richard Warshak, "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence" (2003), 37:2 Fam. L.Q. 273, at 282; and M.J. Sullivan & J.B. Kelly, "Alienated Children in Divorce: Legal and Psychological Management of Cases With An Alienated Child" (2001), 39 Fam. Ct. Rev. 299, at 311.

While a decision not to enforce access may relieve the child of the immediate pressure of being caught between two parents, the child may well still feel abandoned under such circumstances, notwithstanding any stated wishes and protestations of rejection. In these cases, there is the hope that if the "door is left open" the children may eventually seek to restore a relationship with the rejected parent, perhaps in late adolescence or early adulthood.[153]

VI. CONCLUSION: THE ROLE OF LAWYERS

Being involved in a case where children are rejecting a parent is very challenging for lawyers, as well as their clients. While there is an important role for advocacy in these cases, there is also a role for lawyers in providing guidance to parents. Although some of these cases will require a judicial decision is needed to resolve the case, there are also cases where the parents may be encouraged and supported to arrive at a negotiated resolution that allows both parents to have a continuing role in their children's lives. Referrals for parenting education and counselling can help some parents to resolve cases where parents are less entrenched and children at lower risk without a lengthy, costly court battle, even if there has been some alienating conduct or abuse by one or both parents. Good family lawyers need to know when they should be aggressive litigators and when they should push back against clients who are taking positions that are unrealistic or not child focussed.

Parents who are being denied contact with their children in defiance of court orders are understandably deeply frustrated with the ineffectiveness, delay and expense of the justice system, and this may spill over in anger or disappointment with their own lawyer, even if their representation is excellent. Parents who are being rejected by their children are often deeply emotionally wounded by this experience and may be challenging clients for this reason as well.

It is important for lawyers with clients who are losing contact with their children to be ready to respond in a timely and effective fashion. Although various forms of alternative dispute resolution and negotiation are often the best for resolution of family disputes, when alienation is a concern there may be a need for quick resort to the courts, even only to have a judge at a conference make clear to an alienating parent the legal and emotional consequences of failing to comply with access orders.

It is also important for counsel for rejected parents to be realistic with their clients, including assessing the extent to which the conduct of their client may have caused or contributed to the deterioration in the relationship: is this a case of alienation, or is realistic estrangement or perhaps a hybrid case? It is also important to be realistic about the limits of the law, and in some cases discuss whether not enforcing parenting time or contact with the child may be the least detrimental alternative for the child, as frustrating as this may be for the client.

Lawyers representing a parent who is alleged to be alienating a child also have a challenging and important role. In some cases, the difficulties relating to access may be due to issues of domestic violence or abuse, and effective measures may be required to protect the victim and children. If there are concerns about family violence, can they be adequately addressed by allowing some form of supervised parenting time or other intervention?

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[153] For a discussion of when and how to cease enforcement efforts, see Chapter 9, Richard Warshak, *Divorce Poison: How to Protect Your Family from Bad-mouthing and Brainwashing* (2010, Harper: New York). There is a need for more research on the long-term effects of enforcement of court orders in high conflict cases, and of ceasing to seek enforcement.

In some cases, however, it may be clear to counsel that the evidence will support a finding that their client is alienating their children from the other parent. Clients who are alienating their children from the other parent need to be informed of the legal consequences, including findings of contempt, cost consequences and the potential for a change in custody; this latter threat is often the biggest concern for parents, and the most likely to motivate a change in their behaviour. Counsel for parents who are alienating children also need to be aware of the harm that this may cause children and educate their clients about the effect of their conduct on their children. The *Divorce Act*[154] now makes clear that that counsel for a parent has an obligation to advise a parent about the importance of compliance with court orders and about the harmful effects of conflict and family violence on children.

When a parent "succeeds" in alienating their children from the other parent, they are actually harming them. As observed by Justice Smith in a case where two boys, aged 16 and 17 years, were refusing to visit their mother due to the influence of their father:

> The [father's] statements in an e-mail show that he believes that he has won some imaginary battle by alienating and controlling the children and depriving the [mother] of a relationship with them. However, his actions have, in fact, harmed his children and hopefully they will realize this someday when they are older and be able to re-establish a relationship with their mother.[155]

As the judge noted, the father's "success" in alienating his children from their mother was ultimately a failure to meet his responsibilities as a parent. Parents who are "successful" in alienating their children from the other parent have emotionally harmed their children to such an extent that the child has decided that it is safer to retreat into a "black and white" world of one good parent and one bad one. While an alienating parent may have "won" their battle with the other parent, they have lost the war by failing to raise healthy and happy children.

Good family lawyers educate their clients about the harm that their alienating or abusive conduct is doing to their children and may be able to persuade them to change their behaviour. Too often, however, lawyers fail to meet this responsibility, or alienating or abusive parents decide to represent themselves because they do not appreciate the sound advice that they are receiving from their counsel.

[154] *Divorce Act,* as amended by S.C. 2019. C. 16, s. 7.7.
[155] *Cantave v. Cantave* [2014] OJ No 4142 at para 66.