

# **Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?**

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# Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?

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*“There is now scholarly consensus that severe alienation is abusive to children (Fidler and Bala, 2010), and is a largely overlooked form of child abuse (Bernet et al, 2010)”*<sup>1</sup>

*“Despite controversies among child and mental-health experts about the usefulness and scientific validity of the concept, parental alienation claims and court findings associated with them have virtually (between 2002 and 2016) exploded in Canada”*<sup>2</sup>

## Introduction:

Vigorous debate and controversy surround the scientific validity of parental alienation diagnoses and its associated assessment tools, particularly in connection with their application in the legal system.<sup>3</sup> While some experts contend that the concept has demonstrated scientific validity,<sup>4</sup> many academic researchers, mental health, and child experts as well as experts in the domestic and family violence fields are expressing concern.<sup>5</sup> In this article I explore how Canadian courts are responding to parental

1 Edward Kruk “The Impact of Parental Alienation on Children” *Psychology Today* posted April 25, 2013 on line.

2 Chapter 10.12.5 of Linda C. Neilson *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* (Ottawa: CanLII, 2017) on line.

3 L. Drozd (2009). “Rejection in cases of abuse or alienation in divorcing families” in Galatzer-Levy RM; Kraus L & Galatzer-Levy J. *The Scientific Basis of Child Custody Decisions*, 2nd Edition (John Wiley & Sons) pp. 403-416; C. S. Bruch (2001) “Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases” *Family Law Quarterly* 35 (527): 527-552; M.S. Pignotti “Parental alienation syndrome (PAS): unknown in medical settings, endemic in courts” 2103 104(2) *PubMed* 54-8; Holly Smith (2016) Parental Alienation syndrome: Fact or Fiction? The Problem With Its Use in Child Custody Cases in 11 *Mass. L. Rev.* 64.C. Dalton, G. & K. Waters Mathews; L. Drozd, Hon. F. Wong *et al.* (2006) *Navigating Custody and Access Evaluation in Domestic Violence Cases* (National Council of Juvenile and Family Court Judges); Hon. Jerry Bowles, Hon. Kaye Christian *et al.* (2009) *A Judicial Guide to Child Safety in Custody Cases* (National Council of Juvenile and Family Court Judges); Joan Meier “A Historical Perspective on Parental Alienation Syndrome and Parental Alienation” 2009 6 *Journal of Child Custody* 232-257.

4 For example, William Bernet and Amy J. L. Baker “Parental Alienation, DSM-5 , and ICD-11: Response to Critics” 2013, 41 (1) *Journal of the American Academy of Psychiatry and the Law* 98-104; Richard Warshak, “Current Controversies Regarding Parental Alienation Syndrome” (2001) 19 (3) *American Journal of Forensic Psychology* 29-59; Stanley Clawar and Brynne Rivlin *Children Held Hostage* (2<sup>nd</sup> edition, American Bar Association, 2013).

5 Published comments critical of *parent alienation syndrome theory* by internationally respected researchers and academics include: Robert Emery, Ph.D., Professor of Psychology in the Department of Psychology and Director of the Centre for Children, Families and the Law, University of Virginia: “*Despite influencing many custody proceedings, Gardner’s ideas fail to meet even minimal scientific standards.*” Source: Robert E. Emery (2005) “Parental Alienation Syndrome: Proponents Bear the Burden of Proof” *Family Court Review* 43(1) 8-13; Dr. Robert Geffner, Clinical Research Professor and adjunct faculty member for the National Judicial College, as well as author of numerous books on domestic violence and child abuse: “*While some parents resort to such behaviour, parent alienation syndrome is not*

alienation claims. The goal is to assess empirically whether or not the academic and professional concerns of critics have an empirical basis.

We begin the report with a discussion of critical comments and concerns reported in the academic and professional literature. The concerns and controversies are then connected to an empirical analysis of 357 Canadian trial and appeal cases<sup>6</sup> in which parental alienation was claimed or found by a court.<sup>7</sup> Excluding 15 cases that focused on professional complaints associated with parental alienation, we find that one hundred and forty one of the cases (41.5 %, almost one half) also involved claims of domestic violence and or child abuse.

Are the concerns of professionals and academics about the application of parental alienation theory in a legal context supported or refuted? Does the concept, as it is currently being applied by courts, comply with legal principles associated with fundamental human and child rights, due process, gender equality, rules relating to admission of expert evidence and analysis of legally mandated factors associated with the best interests of children? Does the concept operate in a gender-neutral fashion as those who adhere to the theory assert or does it produce systemic gender bias in the legal system as critics contend? Is the concept applied only in cases that do not involve abuse or violence in accordance with premises underlying the theory or is the concept deflecting attention from domestic violence, its effects on children and safety as the critics fear? Finally, is ‘parental alienation’ considered along with other best interest of the child criteria in a balanced fashion or is preventing nuanced assessments of other best interests of the child criteria?

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*a valid diagnosis and shouldn't be admitted into child custody cases.” Janet Johnson & Joan Kelly (2004): “In this reply to Richard Gardner, we outline our points of disagreement with his formulation of parental alienation syndrome (PAS), showing that his focus on the alienating parent as the primary cause of children’s negative attitudes and rejecting behaviour toward the other parent is overly simplistic and not supported by findings from recent empirical research. It follows that we strongly object to Gardner’s recommendations for legal and mental health interventions with alienated children as well as the use of the term PAS when referring to this problem.” Source: Janet Johnson & Joan Kelly (2004) “Rejoinder to Gardner’s “Commentary on Kelly and Johnston’s ‘The Alienated Child: A Reformulation of Parental Alienation Syndrome’” *Family Court Review* 42(4), 622-628. See also: R. Freeman & G. Freeman (2003) *Managing Contact Difficulties: A Child Centered Approach* (Department of Justice) at 2.4; S. J. Dallam (1999) “Parental Alienation Syndrome: Is it scientific?” in E. St. Charles & L. Crook (eds.) *Expose: The failure of family courts to protect children from abuse in custody disputes* (Los Gatos, CA: Our Children Our Children Charitable Foundation); J. S. Meier (2009) “Parental Alienation Syndrome and Parental Alienation: Research Reviews” in *Applied Research Forum* (National Online Resource Centre on Violence Against Women); Joan Meier ad Sean Dickson “Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation” (2017) 35 (2) *Law & Inequality: A Journal of Theory and Practice*, Article 10; P. Van Horn & B. M Groves (2006) “Children Exposed to Domestic Violence: Making Trauma Informed Custody and Visitation Decisions” in *Juvenile and Family Court Review* 57(1); Holly Smith (2016) Parental Alienation syndrome: Fact or Fiction? The Problem With Its Use in Child Custody Cases in 11 *Mass. L. Rev.* 64.C. Dalton, G. & K. Waters Mathews; L. Drozd, Hon. F. Wong *et al.* (2006) *Navigating Custody and Access Evaluation in Domestic Violence Cases* (National Council of Juvenile and Family Court Judges); Hon. Jerry Bowles, Hon. Kaye Christian *et al.* (2009) *A Judicial Guide to child Safety in Custody Cases* (National Council of Juvenile and Family Court Judges) at page 12; Joan Meier (2011) *Parental Alienation Syndrome & Parental Alienation: Research Reviews* (VAWnet].*

- 6 CanLII’s on-line case law reporting system often enables researchers, via the ‘cited by’ function, to identify subsequent case law involving the same family. The function is extremely helpful but it is not foolproof. While every effort was made to ensure that cases involving the same family were counted once when the family generated a series of cases, for example as a result of repetitive applications to courts or as a result of appeal judgments, in some instances subsequent applications by the same family may have been counted as a new case. The end result, however, is that the number of case law decisions involving parental alienation claims analyzed in this study is under, rather than over, reported.
- 7 In a number of cases experts or courts made findings of parental alienation despite the absence of a parental alienation claim.

## What the Critics Are Saying

The concerns of critics about parental alienation theory relate to: 1) concerns about research credibility,<sup>8</sup> including limited evidence of representativeness of study samples, small sample sizes,<sup>9</sup> absence of longitudinal research,<sup>10</sup> lack of controls for the influence of scientifically verified and professionally accepted factors known to negatively affect child wellbeing such as parental conflict, abuse, exposure to violence, substance abuse and mental health issues on the one hand and scientifically verified child resilience factors that protect children from harm - such as parent-child attachment and parental-child warmth on the other;<sup>11</sup> 2) gender bias; 3) deflection of attention from scrutiny of parenting practices and parent-child relationships to a focus on blame for interference with

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- 8 Rebecca Thomas and James Richardson (2015) “Parental Alienation Syndrome: 30 years On and Still Junk Science” 54(3) *Judge’s Journal*; Daniel Krauss (2016) *Psychological Expertise in Court* (Routledge). Experts testifying in Canadian courts regularly cite Dr. Amy Baker. It is important to note that Amy J.L. Baker’s research on parental alienation is not her PhD research conducted at the Teacher’s College of Columbia University, (Teacher’s College, Graduate School of Education, Health & Psychology) that led to her PhD degree in 1989. Her PhD research, which would have been supervised by tenured academic professors, was titled *The child’s attachment to the mother in infancy and toddlerhood: a comparative study*. Presumably, her interest in exploring Richard Gardner’s controversial parental alienation syndrome theory emerged in the years following her graduation from the university.
- 9 Sociologist, Stanley Clawar’s research is commonly cited by parental alienation advocates in support of assertions of the scientific research validity of parental alienation theory. The claim is made that Clawar and Rivlin’s empirical research documenting parental alienation and its associated child and parental behaviors is based on analysis of more than 700, now 1000 cases. However, scrutiny of the empirical basis for the claims made by Clawar and Rivlin reported in Stanley Clawar and Brynne Rivlin *Children Held Hostage*, second edition (2013: American Bar Association) “Appendix: Research Techniques and Sample Characteristics” reveals that the Clawar and Rivlin’s analysis is derived from client files seen in professional practice and subsequently analyzed by the authors. In the absence of research samples and research controls, we have no way of knowing the degree to which the authors’ conclusions can be extended beyond their clinical sample to the general public and we have no way of knowing the extent to which the authors considered and controlled for scientifically verified and professionally accepted adversities other than parental alienation that affect child well being . Clawar and Rivlin’s conclusions should be considered therapeutic theory drawn from clinical practice rather than scientific research.
- 10 Although Dr. Amy Baker has testified in Canadian courts, for example, *Hukerby v. Paquet* [2014] S.J. no 791, that her research is longitudinal and other parental alienation advocates have advised courts that Dr. Baker’s conclusions are based on ‘long-term’ research, her research was actually both qualitative and retrospective. For particulars, see: Amy J. L. Baker (2006) “The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study” 33(4) *American Journal of Family Therapy*; Amy J. L. Baker (2007) *Adult Children of parental alienation syndrome: Breaking the ties that bind* (W.W. Norton Professional). A longitudinal study is a research design that involves repetitive observations and assessments of the same variables over a period of time. For example, a longitudinal study of parental alienation would use a validated instrument to identify a sample of children who were alienated from a parent. It would then follow and reassess the children at various points throughout their lives into adulthood. A well designed longitudinal study would also implement experimental controls in order to distinguish the effects of parental alienation from the effects of other adversities on children. In contrast Dr. Baker’s parental alienation theory was based on forty interviews with adults who self-reported as adults that they had been alienated from a parent when they were children. The 70 % of alienated children experience depression figure being cited to Canadian courts is based on the percentage of 40 research participants who self reported having experienced both alienation and depression. Without validated mental health testing for depression at the time the depression was experienced, we have no way of knowing whether or not the self reports of depression met validated mental health diagnostic criteria for depression. Because the research did not include scientific sampling methods or research controls, it is not possible to reliably conclude that the experiences of participants in the study were caused by parental alienation and not by something else. For example, if 70 % of children whose parents separate or divorce report experiencing depression, a finding that 70 % of adults who claim alienation report having experienced depression may tell little about the effects of alienation.

parental ‘rights’; 4) deflection of attention from scrutiny of child risk and safety factors, particularly in family violence cases;<sup>12</sup> 5) deflection of attention from thorough analysis of the best interests of children criteria set out in the applicable statutes; 6) the silencing of children contrary to internationally recognized rights of children identified by Hon. Donna Martinson in *B.J.B. v. D.L.G.*, 2010 YKSC 44 (favourably cited by the British Columbia Supreme Court in *A.A.A.M. v Director of Adoption*, 2017 BCSC 2077 );<sup>13</sup> 7) the inappropriate assignment of parental blame for normal behaviors of adolescents; and 8) non-adherence to legal principles associated with expert evidence and best practice guidelines for parent-child evaluators.

## Parental Alienation & Children: A closer look at the Concerns of Critics

In addition to concerns about the lack of scientific support for parental alienation concepts, critics are concerned about the inappropriate application of parental alienation concepts in custody and access cases that involve domestic or family abuse/violence,<sup>14</sup> including the potential misuse of parental alienation theory to discount parent and child safety issues or to deflect attention from empirically verified and legally mandated best interests of the child criteria.<sup>15</sup> Research examining parent-child evaluations submitted to family courts reveals that evaluators who lack specialized knowledge of domestic violence pay inadequate attention to adult and child safety and to parenting practices that harm children.<sup>16</sup> We shall return to this issue in the domestic violence section of this article. A related concern is that application of the theory could undermine children’s access to documented factors that

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- 11 In the absence of research controls it is impossible to distinguish the influence of one factor on children from the influence of other factors. Refer to notes 9 and 10. See also Dr. Scott Huff’s (2015) PhD dissertation titled *Expanding the Relationship between Parental Alienating Behaviors and Children’s Contact Refusal Following Divorce: Testing Additional Factors and Long-Term Outcomes*. Doctoral Dissertation University of Connecticut is available on line.
- 12 Nancy Erickson “Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse” 2013 6(1) *Family & Intimate Partner Violence Quarterly* 35-78; Daniel Saunders and Kathleen Faller “The Need to Carefully Screen For Family Violence When Parental Alienation is Claimed” 2016 46(6) *Michigan Family Law Journal* 7-11; Rita Berg “Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts” (2011) 29 (1) *Law & Inequality: A Journal of Theory and Practice* on line.
- 13 See also Donna Martinson (2013) *The Family Law Act and Family Violence: Independent and Impartial Parenting Assessments* (British Columbia Association of Social Workers) on line at <http://www.bcasw.org/wp-content/uploads/2013/12/Independent-and-Impartial-Parenting-AssessmentsDec15.pdf>.
- 14 National Council of Juvenile and Family Court Judges (2008) *A Judicial Guide to Child Safety in Custody Cases* (Reno, NV: NCJFCJ), (2006) *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence A Judges Guide* (Reno, NV: NCJFCJ; Michael Davis, Chris O’Sullivan et al. (2011) *Custody Evaluations Where There Are Allegations of Domestic Violence: Practices, beliefs, and Recommendations of Professional Evaluators*; Daniel Saunders et al. (2011) *Child Custody Evaluators’ Beliefs About Domestic Abuse in Relation to Custody Outcomes*; Daniel Saunders (2015, presentation) [Child Custody Evaluations and Domestic Violence: New Research and Implications for Practice](http://www.griffith.edu.au). (Griffith.edu.au); Daniel Saunders (2017) Evaluating the Evaluators: Research-based Guidance for Attorneys Regarding Custody Evaluations in Cases involving Domestic Abuse” 47 *Michigan Family Law Journal*; Linda C Neilson (2001) *Spousal Abuse, Children and the Legal System Final Report for Canadian Bar Association Law for the Futures Fund* (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research, March 2001) at: [http://www.unb.ca/fredericton/arts/centres/mmfc/\\_resources/pdfs/team2001.pdf](http://www.unb.ca/fredericton/arts/centres/mmfc/_resources/pdfs/team2001.pdf).
- 15 Ibid. See also Holly Smith (2016) [Parental Alienation syndrome: Fact or Fiction?](#) The Problem With Its Use in Child Custody Cases in 11 *Mass. L. Rev.* 64; Daniel Saunders (2016) “The Need to Carefully Screen for Family Violence When Parental Alienation is Claimed” 46(6) *Michigan Family Law Journal* 7-11.
- 16 Michael Davis, Chris O’Sullivan et al. (2011); Daniel Saunders et al. (2011); Daniel Saunders (2015, presentation) (2017) note 14.

support child resilience – empirically verified factors that protect children from lasting harm from negative family experiences – such as parental warmth, positive parenting and warm, safe, stable bonds with non-abusive caregivers.<sup>17</sup> Indeed there is some evidence now that when scientific research on child resistance to parental contact is conducted, using the assessment tools advocated by parental alienation theorists along with experimental research controls for other factors, such as parental warmth, exposure to abuse and or parental conflict, many factors, in addition to and sometimes in opposition to those proposed by parental alienation theorists explain child resistance to contact. For example, Dr. Scott Huff reports in his doctoral dissertation at the University of Connecticut: “These findings are notable in that alienating behaviors were not predictors of outcomes in any of the analyses, contrary to previous work on parental alienating behaviours (Baker & Verocchio, 2012; Bena-Ami & Baker, 2012).” Dr. Scott Huff’s (2015) PhD dissertation titled *Expanding the Relationship between Parental Alienating Behaviors and Children’s Contact Refusal Following Divorce: Testing Additional Factors and Long-Term Outcomes* is available on line. In other words, child resistance to parental contact is far more complex than parental alienation advocates contend.

In contrast to the academic and professional controversies surrounding the assertions of parental alienation advocates, there are pockets of scientific research on child development and well being that do have broad acceptance across scientific and professional communities. First, several decades of research demonstrates consistently that children benefit from maximum contact with both parents **unless** contact exposes children to high levels of stress, for example, as a result of parental conflict.<sup>18</sup> This concept has been enshrined in legislation and has been, for the most part, reflected in Canadian custody and access case law.<sup>19</sup> The second is that high levels of repetitive parental conflict and/or domestic violence in the home can produce toxic levels of child stress and persistent fear. These child stress responses can result in long term emotional and developmental harm to children.<sup>20</sup> Conclusions about the negative effects on children of domestic violence in the home are consistent across research methods (qualitative and quantitative) and even across disciplines (social science, medicine, psychiatry, child development, neurobiology).<sup>21</sup> The operative factors are child stress on the one hand and the presence of resilience factors – factors that enable children to recover from or to resist harm - on the other. Factors that insulate children from harm – resilience factors - include social and community support for the family; safe, stable, stress-free, supportive attachments with non-abusive caregivers; parental warmth; child self sufficiency and personality factors such as easy child temperament and positive outlook.<sup>22</sup> In short, if we seek to promote the best interests and well being of children we will

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17 Cecilia Martinez-Torteya et al. “Resilience Among Children Exposed to Domestic Violence: The Role of Risk and Protective Factors” 2009 80(2) *Child Development* 562-577; Sandar Graham-Bermann et al. “Factors discriminating among profiles of resilience and psychopathology in children exposed to intimate partner violence (IPV)” (2009) 33 *Child Abuse and Neglect* 648-660.

18 Linda C Neilson "Spousal Abuse, Children and the Courts: The Case For Social Rather than Legal Change". 1997 *Canadian Journal of Law and Society* 12(1): 101-145; republished in J. Banfield (ed.) *Readings in Law and Society* (North York: Captus Press 1999).

19 Ibid. See also Linda C Neilson (2017) Chapter 11 “Assessing child best interests in Domestic Violence Context” in [Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases](#) (Ottawa: CanLII) on line.

20 Linda C Neilson (2017) Chapter 6 “Children: Impact of Domestic violence & Evidence of children” in [Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases](#) (Ottawa: CanLII) on line.

21 Refer, for example, to the lengthy list of references on this issue in Linda C Neilson (2017) at “Supplementary Reference Bibliography: Effects of Domestic Violence on Children” in [Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases](#) (Ottawa: CanLII) on line.

22 Center on the Developing Child, Harvard University “Resilience” on line at <https://developingchild.harvard.edu/science/key-concepts/resilience/>.

protect children from exposure to toxic stress<sup>23</sup> and from other parental and social adversities while taking into account and supporting factors that enhance child resilience such as safe, stable, supportive relationships with non abusive adults.<sup>24</sup>

One of the most dependable public sources of well-respected scientific information on child risk and resilience factors associated with child development can be found at Harvard University's Centre on the Developing Child – on line at <https://developingchild.harvard.edu/>. Refer particularly to the materials on toxic stress as well as the materials on child resilience as well as the on line publication *Three Principles to Improve Outcomes for Children and Families*. Another dependable collection of scientific materials on factors that negatively or positively affect children, is the well-known and respected collection of Adverse Childhood Experiences (commonly referred to as ACEs) studies on child adversity and child resilience.<sup>25</sup> These studies document scientifically verified risk and resilience factors associated with child risk of harm on the one hand and with child well being and positive development on the other. These are the scientific factors to consider in connection with legislated statutory best interest of the child criteria.<sup>26</sup>

Does parental alienation theory respond to current scientific knowledge of the importance of reducing child stress and supporting child resilience or does it lead us in the opposite direction? Let us take a closer look at this issue through a lens of how the concept is applied by Canadian courts.

## Research Method

A number of Canadian<sup>27</sup>, American,<sup>28</sup> and Australian authors<sup>29</sup> have scrutinized legal decisions when parental alienation claims are made, for example, John-Paul Boyd analyzed parental alienation cases in British Columbia; Nicholas Bala et al. conducted a Canadian analysis of cases from 1989 to 2008 and subsequently an international analysis of parental alienation cases. Nonetheless, with the exception of American researchers, Joan Meier et al. and Holly Smith, whose research documents major concerns

23 Read and view materials on “Toxic Stress” developed by the Center on the Developing Child, Harvard University, on line at <https://developingchild.harvard.edu/science/key-concepts/>. See also Lynn Schafran “Domestic Violence, Developing Brains, and the Lifespan New Knowledge from Neuroscience” 2014 *Judges’ Journal* on line at <https://www.legalmomentum.org/resources/domestic-violence-developing-brains-and-lifespan-new-knowledge-neuroscience-judges-journal>.

24 Mary Armstrong et al. “Pathways Between Social Support, Family Well Being, Quality of Parenting, and Child Resilience: What We Know” 14(2) *Journal of Child and Family Studies* 269-281; Center on the Developing Child, Harvard University “Key Concepts” “Resilience” on line note 23.

25 Alberta Family Wellness ACES on line at <https://www.albertafamilywellness.org/what-we-know/aces>; CDC-Kaiser ACE Study in the United States, Centers for Disease Control and Prevention information on line at <https://www.cdc.gov/violenceprevention/acestudy/about.html>.

26 See also Lynn Schafran “Domestic Violence, Developing Brains, and the Lifespan New Knowledge from Neuroscience” 2014 *Judges’ Journal* on line note 23.

27 Nicolas Bala, Suzanne Hunt and Carolyn McCarney “Parental Alienation: Canadian Court Cases 1989-2008” (2010) 48(1) *Family Court Review* 164-179; Nicolas Bala et al (2013) “Bala :Parental Alienation Study; Canada, United Kingdom and Australia 1984-2013”; John-Paul Boyd *Alienated Children in Family Law Disputes in British Columbia* (Canadian Research Institute for Law and the Family: 2015); Margaret Michelle McKelvey *Parental Alienation in Ontario: What is Parental Alienation, and What Should be Done About it?* LL.M thesis, University of Toronto;

28 Joan Meier and Sean Dickson “Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation” 35(2) *Law & Ineq.* 311.

29 Rae Kaspiew “ [Empirical Insights into Parental Attitudes and Children’s Interests in Family Court Litigation](#)” 29 *Sydney Lw Review* 131.

associated with gender bias and child safety,<sup>30</sup> few have focused specifically on the concerns of parental alienation critics. This article attempts to address that void in Canada.

In order to assess empirically the validity (or lack of validity) of the concerns of critics, I conducted document searches of Canadian case law, using the terms “parental alienation” “child alienation” and “alienation” on two Canadian case law websites: Canadian Legal Information Institute (CanLII) and LexisNexis, Quick Law. The CanLII search generated 831 family law cases decided in the last 10 years; the Quick Law case law search generated 500 cases decided since 2008.<sup>31</sup> It is important to note that a related, alternative term, ‘parental gatekeeping’ is beginning to appear in the case law.<sup>32</sup> See, for example, *Y. v. F.T.*, 2017 ONSC 4395. The case law on the two web sites, ranked automatically by each website in accordance with relevance,<sup>33</sup> was then cross checked to ensure inclusion of missing cases ranked highly for relevance. The case law cross-check generated an additional eleven cases. The original goal was to assess empirically the first 300 cases generated by CanLII in accordance with relevance. In the end, however, new cases citing the generated cases were added and, as the article was being written, new “parental alienation” cases were added each week (until the first week of November 2017). When it was possible to link multiple cases involving the same family the cases were linked, followed over time, and counted as one case. Thus the final sample of 357 cases underrepresents the total number of cases included in the empirical analysis and is biased in favor of inclusion of recent cases.

## Parental Alienation Cases: Overview of the pattern of reported decisions

Fifteen of the 357 parental alienation cases involved claims against professionals, for example, claims against child protection authorities or police for not investigating parental alienation or claims against parent-child evaluators for faulty methodology and or conclusions. Three hundred and fifty four cases involved parental alienation complaints by anyone (including a parent, a third party, a child protection authority, an expert or a judge) against a mother or father, including twelve cases in which parental alienation claims were made against both the mother and a father. Two hundred and forty four of the cases (68.9 %) involved parental alienation claims against mothers, 110 of the cases (31.1 %) involved parental alienation claims against fathers.<sup>34</sup> If we focus only on cases in which one parent made a

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30 Joan Meier (2014) *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations* research proposal (George Washington University); Holly Smith (2016) “Parental Alienation syndrome: Fact or Fiction? The Problem With Its Use in Child Custody Cases” 11 *Mass. L. Rev.* 64.

31 These figures were generated in September 2017. While neither website offers an assurance that every family law court decision will be captured and reported cases do not include negotiation and settlement outcomes, there is no reason to believe that the cases reported on the two websites are biased or unrepresentative of the type of decisions Canadian judges make.

32 The concepts are similar in that all three concepts ask us to focus our attention on behaviors associated with the conflicts between parents.

33 Having the two web sites rank cases by relevance has advantages and disadvantages. The disadvantage is that a computer’s assessment of relevance may not be in line with an academic assessment of legal relevance. An advantage, however, arises in connection with the representativeness of the cases included in the study and more particularly, the prevention of any unconscious bias on the part of the author in the choice of cases.

34 Note that in twelve of the cases, claims were made against the mother and the father and that fifteen of the original 357 cases were excluded because the claims were against third parties.



parental alienation claim against the other parent – excluding cases in which neither parent made the claim, such as when parental alienation arose in a report or was the result of a judicial finding without a reported claim<sup>35</sup> or when the claim was made by a child protection authority - we find that 65.4 % of the parental alienation cases involved claims by fathers against mothers, and 34.6 % claims by mothers against fathers. When we look at child protection cases, cases in which a parental alienation claim was advanced by a child protection authority rather than by either parent, we find that most of those cases, 15 of the 19 cases, involved claims against mothers.

One hundred and forty two of the cases (41.5 %, almost one half)<sup>36</sup> involved assertions of domestic violence or child abuse. In most (76.8 %) of the domestic violence/child abuse claim cases the parental alienation claim was advanced by the alleged perpetrator of domestic violence or child abuse, including a small minority of cases (3) in which the alleged perpetrator of domestic violence or child abuse was the mother. In 33 of the 142 cases (23.2 %) of the cases, the parental alienation claim was advanced by the parent, almost always the mother, who claimed parental alienation as well as domestic violence or child abuse, as a result of children aligning with the alleged perpetrator against the mother.<sup>37</sup> In a handful of cases children initiated the case seeking to be heard or to be freed from parental control or from further court direction.<sup>38</sup>

Let us begin our analysis of the manner in which the concept is being applied in Canadian cases by scrutinizing, in Part One, some of the more general assertions of critics (gender bias, inappropriate deflection of attention from child best interests, non-adherence to evidence rules, inattention to child rights, assignment of parental blame for ‘normal’ adolescent reactions to parental authority). Next, in Part Two, we shall examine whether or not the specific concerns and criticisms of family violence experts have an empirical basis. Finally, in Part Three we offer conclusions and recommendations, including comments on how parental alienation analysis can contribute to the best interests of child analysis without gender bias or harm to children.

## PART ONE

### Gender Bias – the assertion of critics

Many academic researchers, including myself, have expressed concern that gender bias seems to permeate parental alienation concepts. Many others have reported extensively on explicit gender bias and statements condoning child abuse found in the original theorist, Richard Gardner’s, parental

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35 Both sets of figures – when a parent made a claim and when parental alienation arose without claim – are reported because some of the cases seemingly without a claim by a parent may have been the result of an earlier parental claim that was not mentioned in the judgment.

36 Fifteen cases that involved claims against assessors or professionals and that did not also include a claim against either a mother or father were removed from the total.

37 Manipulation and/or alignment of children with the perpetrator against the parent targeted by domestic violence is reported regularly in the domestic violence literature. Refer, for example, to the literature cited in Linda C Neilson (2017) chapter 6 and chapter 10.12 of [\*Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases\*](#) (Ottawa: CanLII) on line.

38 For example, *N.L. v. R.R.M.*, 2016 ONCA 915; *L. (N.) v M. (R.R.)*, 2016 ONSC 809..

alienation syndrome publications.<sup>39</sup> The criticisms and concerns are well documented so I shall not repeat them here other than to state that Gardner's controversial assertions about women, children and parental alienation form the basis of current parental alienation theory. A number of authors, including Joan Meier and colleagues who are conducting a major study of parental alienation cases in the United States, are beginning to document empirically extensive gender bias in the application of parental alienation concepts in the American legal system.<sup>40</sup> Do we see the same pattern in Canada? Does Canadian case law refute or support critics' concerns about gender bias?

## Gender Patterns in an empirical analysis of Canadian Parental Alienation Case Law

As we saw earlier, most (68.93 %) alienation claims are made against mothers; 110 of the cases (31.07 %) involved parental alienation claims against fathers.<sup>41</sup> Nonetheless these figures do not in and of themselves suggest gender bias because we should expect more claims to be made against mothers than against fathers purely on the basis of current post-separation custody and access practices in Canada. On behalf of Statistics Canada, Maire Sinha tells us in *Parenting and child support after separation and divorce*<sup>42</sup> that 70 % of separated or divorced parents report children's primary residence with the mother. We could expect concerns about being alienated from children to be raised primarily by non-primary residence parents, most of whom are fathers.

Courts made no explicit alienation findings in 50.9 % of the cases in which parental alienation claims were made by mothers against fathers. The primary reasons for courts not making findings against fathers included both parents being partly to blame for the child's rejection of the mother; negative parenting practices on the part of the mother; absence or rejection of expert evidence presented by mothers; lack of evidence that the father was discouraging the relationship between the mother and child; evidence of the independence of the child's views or child maturity, including findings that it would be futile for courts to force teenage children to have contact with mothers against their will. Some of these cases were parental alienation claims advanced by alleged victims of domestic violence

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39 Dr. Richard Gardner was able to use his non-tenure-stream volunteer relationship with Columbia University to create assumptions of academic credibility in family courts in the United States. For a scathing review of the damage done to children and their families see "Dr. Richard A. Gardner" Friday May 2003, *Independent* on line. The article states "The theory – one of the most insidious pieces of junk science to be given credence by US courts in recent years has created a generation of mothers and children scarred psychologically and, in many cases, physically by the court rulings he has influenced." For academic criticisms to the same effect, see: Carol Bruch (2001) "Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases" 35 *Family Law Quarterly* 527 ; Holly Smith (2016) "Parental Alienation Syndrome: Fact of Fiction? The Problem with its Use in Child Custody Cases" *U Mass Law Review* 64-99; Joan Meier "A Historical Perspective on Parental Alienation Syndrome and Parental Alienation" 2009 6 *Journal of Child Custody* 232-257; L.E. Walker et al. (2005) "A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court" 1(2) *Journal of Child Custody* 47-74; M.S. Pignotti "Parental alienation syndrome (PAS) unknown in medical setting, endemic in courts" 104(2) *Pub Med* 54-58; Rita Berg (2011) note 12 ; S.J. Dallam (1999) *The Parental Alienation Syndrome: Is it Scientific?* in E. St. Charles & L. Cook (eds.) *The Failure of family courts to protect children from abuse* (Los Gatos, CA: Our Children Charitable Foundation);

40 Holly Smith (2016) *ibid.* and Joan Meier (2014) note 30.;

41 Note that in twelve of the cases, claims were made against the mother and the father and that fifteen of the original 357 cases were excluded because the claims were against third parties.

42 Maire Sinha (2014) *Parenting and child support after separation and divorce*. Cat 89-652-X (Ottawa: Statistics Canada) available on line.

after children aligned with the father and rejected the mother. These cases will be discussed later in the article. Similarly, when parental alienation claims were made against mothers, courts declined to make findings of parental alienation against mothers in approximately half (50.8 %) of the cases. The reasons were similar: lack of evidence the mother was discouraging the relationship with the father; lack of expert evidence; negative parenting on the part of the father; negative parenting on the part of both parents; evidence the child had not completely rejected the father; neglect or abandonment of the child by the father; independence of the child's views or child maturity. The additional factor, in court refusals to make parental alienation findings against mothers, were findings of realistic child fear as a consequence of domestic violence or child abuse. As indicated earlier, domestic violence cases are discussed in Part Two.

It is when we turn to cases in which courts accepted and applied parental alienation theory and made parental alienation findings against a parent that a disturbing pattern of what appears to be systemic gender bias on the part of Canadian family courts emerges. Definitive findings of parental alienation were made against fathers in 53 cases and against mothers in 95 cases.<sup>43</sup> When courts made definitive parental alienation findings against fathers, children were left in the primary care of the father in 19 cases ( 35.9 %) and in the shared care of the father and mother in an additional 4 cases (a total of 43.4% of the cases). In *Kanta v Kanta*, 2017 BCSC 1428, for example, the mother was invited to accept the child's rejection, to discontinue court actions and to withdraw from the child in the hope that a more positive relationship would develop in the future without court coercion.<sup>44</sup> In 10 cases, in which parental alienation findings were made against fathers, primary parental care was granted to the mother with unsupervised access to the father. Courts limited the children's contact with 'alienating' fathers to supervised access or suspended the father's physical access temporarily or indefinitely in 19 cases (35.8 %). Many of these cases involved the father's domestic violence or child abuse and concerns about child safety as well as findings that the father had undermined the children's relationship with the mother. For example, in *Lacoursière v Penk*, 2017 NWTSC 8 after courts had repeatedly ordered access to the father, - in 2013 NWTSC 29 and in 2015 NWTSC 19 - despite the father's alienating conduct, his domestic violence, his negative parenting, his negative litigation tactics and his failure to obey court orders, the court finally terminated the father's access in *Lacoursière v Penk*, 2017 NWTSC 8.

When we turn to the 95 cases in which courts made findings of parental alienation against mothers, in a mere 16 cases the children were left in the primary care of their mothers, usually on the basis of clear evidence that the children were doing well in the care of the mother or the children had no relationship with the father or the court had concerns about the parenting capacity of the father. These cases include cases which increased the father's access and ordered the mother to engage in parental alienation therapy. We might contrast the 16.8 % of cases in which, despite parental alienation findings, children were left in the primary care of their mothers with the 35.8 % of cases where, despite alienation findings against fathers, children were left in their fathers' primary care. In an additional 12 cases the court changed the mother's primary care and custody to joint custody or ordered shared parenting to continue, including *Ottewell v. Ottewell*, 2012 ONSC 5201 which continued joint custody<sup>45</sup> but

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43 Cases in which courts declined to make clear parental alienation findings were of three types: cases in which the court heard evidence and decided against a parental alienation finding, cases that did not result in explicit parental alienation findings, and cases that were premature, that involved directions for parental alienation or parent child assessment.

44 The author does not necessarily disagree with the decision.

45 The term 'custody' or 'joint custody' as used in this report, usually refers to parental decision making power. The term 'shared parenting' is used to refer to orders that grant both parents appreciable parenting time with the children.

changed the children's primary residence to the father.<sup>46</sup> We might contrast the 43.4 % of cases in which, despite concerns about parental alienation by fathers, the courts allowed children to maintain significant parenting relationships with fathers with the mere 29.5 % of cases in which, despite court findings of parental alienation on the part of mothers, courts allowed children to maintain significant parenting relationships with mothers. The courts granted primary care of the children to fathers subject to children's unsupervised access to their mothers in an additional 12 cases. Children were removed from mothers and their contact with their mothers was restricted to limited supervised access or was suspended or denied entirely for a period of time by courts in 45 cases (47.4 %) or almost half of the cases in which courts made findings of parental alienation against mothers. In the majority of these cases, mothers had been the primary caregivers of the children, often for extensive periods of time. In none of these cases, unlike the 35.8 % cases which restricted or removed children's parenting by fathers, did the evidence reported in the decision indicate the mother was a danger to the child (beyond the speculative assertions of parental alienation theorists).

Some of the cases in which children were removed from primary care mothers and denied parenting contact are worrying in terms of child safety;<sup>47</sup> others are simply heartbreaking. For example, we learn in *J.C.W. v. J.K.R.W.*, 2014 BCSC 488, that the court gave little weight to the mother's expert who testified as to the limitations of parental alienation theory because the evidence was a criticism of another expert report. Another expert in the case attributed the children's problems to parental conflict. The court, however, quotes judicial comments and expert testimony from other cases to support the parental alienation finding against the mother. Despite acknowledging that the children were spending equal time with the father, and despite the mother's and children's concerns about the father's parenting rigidity and anger management problems, the court endorsed strong measures to rehabilitate the children with the father and ordered an immediate change in custody to the father on the basis that "they are distant from him. They show no affection toward him; and they are not receptive to any show of affection from him." Instead of considering child-focused issues such as parental warmth, child stability, and parent-child attachments, the court ordered an immediate change in sole custody, guardianship and primary residence to the father and suspended all of the children's contact with their mother: "the mother shall have no direct or indirect access or phone access with the children, their school or the father until further order of the court." Police were directed to enforce the order. In *A.G.L. v. K.B.D.*, 2009 CanLII 943 despite finding that the children, 14, 11 and 9 had resided with their mother

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46 Subsequently, in *Ottewell v. Ottewell*, 2013 ONSC 721 we learn that, despite noting that the mother was working as a server on a part time basis and that in the face of "little to no evidence as to whether a cost award against the RM would be affordable or enforceable" the court ordered costs against the mother payable to the father on a full recovery basis in the amount of \$120,256.76. The order was said to be a response to the mother's 'unreasonable' conduct and the court's desire to discourage unnecessary litigation. The author's impression is that cost awards against mothers in parental alienation claim cases are both punitive and excessive. Nonetheless I have not compared the cost awards against mothers with cost awards against fathers in these cases. Additional scrutiny of the case law on this issue is warranted.

47 In the absence of effective therapy, we know that people who engage in coercive domestic violence seldom change character or patterns of behavior after separation. Domestic research has documented consistently: 1) patterns of coercion and control, abuse and violence being directed against the children once the targeted parent is removed; 2) increased risk of child abuse after separation; 3) negative parenting practices against children that mirror the psychological and physical dynamics of the coercive domestic violence against the targeted parent; 4) the reappearance of domestic violence as new relationships are formed; 5) continuing patterns of manipulative coercive control against the targeted parent after separation; 6) the misuse of courts and litigation manipulation as a means to continue to exert coercive control over the family. Furthermore, the risk and potential for lethal outcome indicators are essentially the same for children as they are for adults. In other words the presence of domestic violence against a parent is directly related to children's risk and safety after parental separation. See Neilson (2017) note 2. The on-line e-book includes discussion of pertinent research and offers web links to educational materials.

since the time of their birth, the court ordered interim sole custody (parenting and decision making) to the father and ordered that the children would have no access to their mother (phrased as the mother shall have no access to the children) except for purposes of counselling. The court's stated goal was to secure their relationship with the father. The court ordered the children to be brought to the court where a forceful transfer of physical custody would occur with the assistance of the Sheriff and court officers. The mother was also ordered to deliver all of the children's personal possessions to the father. "She is not to have any contact, direct or indirect. Or cause any contact, direct or indirect, with the children or with the applicant pending review of this matter." The father was directed to confiscate any communication equipment supplied by the mother and the police were directed to enforce the order.<sup>48</sup> In *Wenzel v Wenzel*, 2017 MBQB 14, the case recounts the father's problems with anger, his physical hitting and pinching of the children. The mother attempted to insist on supervised parenting. The parental conflict and the mother's fears escalated. She took photos of the children following each contact with the father. One child had severe allergies. The mother's instructions to the children about food and medications and attempts to exert sole control over their diets was characterized by the court as "behavior that the court often hears about in cases of parental alienation" and as a warning sign the mother was obsessive and beginning a pattern of alienation. The court ordered custody and sole decision making of the children, 13 and 11, to the father. The court allowed the children to have supervised contact with their mother for merely three hours, two days each week and one day on the weekend to be reviewed on application of the mother after completion of a course of therapy to "address her anxiety and parental alienation behaviours."<sup>49</sup>

Similarly, in *S.P. v. P.B.D.*, 2007 CanLII 31787 ONSC, we learn that despite child fear, numerous assertions of domestic violence, criminal charges, child resistance to contact, and despite the child's counsellors believing the child's fears of the father were real, an expert (not a domestic violence expert) made a finding of parental alienation against the mother. The court dismissed concerns associated with the father having been charged with sexual exploitation of two 14 year old girls resulting in a hung jury and job loss and indicated that, while the allegations of serious domestic violence should ultimately be subjected to scrutiny, the court speculated that the domestic violence allegations might be part of an alienation strategy. In the absence of scrutiny of the case by a domestic violence expert, rather than postponing any decision about the children's primary care until full scrutiny of the allegations of both parents could be assessed during a trial, the court rescinded all prior custody and access orders, ordered joint custody and placed the children immediately in the primary care of the father. The mother's concerns about the father's parenting capacity were held against her: "I am convinced that the mother does not really want the father to have access to the children. Otherwise, there would be no purpose to her continued parading of the scandalous allegations she apparently continues to make". Not only were the children uprooted and removed from their primary care parent and placed in the primary care of an allegedly abusive parent, the court denied the children all but supervised contact with their mother (characterized as the wife shall have interim supervised access to the children) merely one day a week

48 Subsequently, in *A.G.L. v. K.B.D.*, 2009 CanLII 29189 the mother was ordered to pay fixed costs in the amount of \$251,641.75 forthwith. See comments on cost awards in note 46.

49 This case was subsequently appealed: *Wenzel v Wenzel*, 2017 MBCA 113. In essence the Court of Appeal of Manitoba endorsed the trial court's concerns about the mother's obsessiveness and well as the trial court finding that many of the father's parenting difficulties had been overcome. The appeal court noted procedural unfairness in the case as the trial judge ordered sole custody to the father in the absence of a sole custody claim by the father. The appeal court was concerned that the mother had not been given notice that sole custody was being contemplated. In response the appellate court converted the sole custody trial order into a joint custody order with primary care and control and final decision making to the father and supervised care and control to the mother in accordance with the terms of the trial judge's very limited access order to the mother. Thus in essence the Court of Appeal endorsed the trial decision.

for up to two hours beginning no sooner than 10 days after the date of the order. The court even restricted the children's ability to telephone their mother. (Note the British Columbia Court of Appeal's subsequent criticism of such orders in *N.R.G. v. G.R.G.*, 2017 BCCA 407.)

In *X v. Y*, 2016 ONSC 545, despite the children's clear articulation of parenting concerns while in the care of the father and the oldest child's anxiety stemming from the father's orchestrated arrest of the mother and the court's finding that both parents were good parents, as a result of alienation findings against the mother, the court ordered custody of the children to the father with no access to the primary care mother or her family for a minimum of 90 days. The court also allowed the father's interim relocation with the children. It is important to note that, in this case, the children were reported to have improved following relocation and there was evidence of problems with the mother's parenting, particularly in connection with her prioritizing her own interests over those of the children. Child protection authorities reported reservations about the mother's influence on the children. Despite the children's repetitive pleas to see their mother, the court focused on ensuring the mother's obedience to the court order preventing her and the children from contacting one another. Subsequently, in *X v Y*, 2016 ONSC 4333, the court denied the mother's request to attend her daughter's graduation ceremony because "I had nothing that reassured me the Y would not use the event to contact the children". Then, despite finding that the mother was of modest means, the court ordered the mother to pay \$625,337.40 in costs including \$135,000 for assessments and \$ 67,337 for the Family Bridges program in *X v Y*, 2016 ONSC 5551. The mother's multiple claims and concerns were dismissed and denied. The mother was criticized by the same court for not being able to pay continuing fees for therapy and for the financial predicament "of her own making" leading to bankruptcy, all of which was interpreted by the court as "a step calculated to provide a rationale for not obeying my February 6, 2016 reasons" (*X v Y*, 2017 ONSC 1617, paragraph 59). Finally, in 2017 in *X v Y*, 2017 ONSC 1617 as a result of the total depletion of the family's resources on the part of both the father and the mother and the children's continuing heartbreaking pleas in writing for contact with their mother, the court finally granted the children one weekday unsupervised visit with their mother from after school until 8 pm and one weekend day from 2 pm to 6 pm. The Family Bridges reunification program was directed to conduct quarterly reviews of the children's 'progress' in establishing a positive relationship with the father. The mother was ordered to pay 80% of the costs of the Family Bridges reviews, payable by the father paying Family Bridges and deducting the payments from his spousal support payments, with the mother being deemed by the court to be receiving the support payments in full. The court scheduled an access review in six months time.

In *R.R. v. S.L.*, 2016 BCSC 1230 the mother applied to set aside three orders: a consent order, an ex parte protection order and an order requiring the children to reside with godparents and reinstatement of previous interim orders awarding both parents equal parenting time. The father sought continuance of the reunification program put in place by the consent order. The Views of the Child Report documented that the children, 12 and 9, wished to live full time with the mother but liked spending time with the father. After the court imposed a 50:50 split time parenting order, the children resisted. In an effort to respond to the problem, the parents consented to enrolling the children in a reunification (with the father) program. Little progress was made, largely because one of the children insisted on attending school associated with the mother and the father was not receptive. The terms of the consent order gave the reunification program extensive power to make parenting decisions. That program decided that the children would live with the father for four weeks during which time the children would not be allowed any contact with their mother. The mother was told to pack the children's clothing and to transport them to the Program for their exchange to the father. The program also

directed the mother not to tell the children in advance they were being removed from her care. After being delivered to the program the children ran away and were apprehended by the police. The reunification program and the court blamed the mother for not following the directions of the reunification program and for probably having told the children about the plan to remove them from her care and to award their physical custody to the father.<sup>50</sup> The court issued an interim order that the children would live with their godparents and that they would have no contact with their mother (phrased as “G.P. should have no direct or indirect contact with the children”). The children ran away again. They were again apprehended by police and returned. The reunification program reported considerable progress in the children’s relationship with the father in that they were beginning to respond positively to him in public settings (though the children were continuing to refuse overnight contact with the father). The mother attempted to present earlier findings of family violence/emotional abuse but the evidence was considered historic and of little relevance. The court gave no weight to the mother’s experts in this case, the first because he had only assessed the mother and not the father and the children, the second, an assessment of the child which stated “It is quite apparent that his high level of anxiety is related to exposure to various behaviors of the father and to his experiences when he is staying with him,” on the basis that the content of the report had been known earlier and thus was not new evidence. The court was also concerned that the expert had exceeded what he had been asked to do. At this point the children had not seen their mother for 4 1/2 months. The court attributed blame for the lack of contact to the mother for not fully supporting the dictates of the reunification program and ordered continuation of the program. The court distinguished *Williamson v Williamson*, 2016 BCCA 87 on the basis that the reunification program in *Williamson* had been associated with a permanent change in custody whereas the original plan of the reunification program in this case had been to deny the children access to their mother on a temporary basis. Yet, after distinguishing *Williamson*, the court documents and endorses the reunification program’s stated objective to “transition the children into the Father’s care” and to decide if and how the Mother’s access should be supervised or unsupervised. The court also endorsed the reunification program’s discretion in this case “to determine when and how parenting time, communication, and all interactions between the parties and the children take place.”<sup>51</sup> The mother’s subsequent reasonable apprehension of bias application was dismissed in *R.R. v. S.L.*, 2016 BCSC 1241. Then, in *R.R. v. S.L.*, 2016 BCSC 2165, the court heard from an expert who focused squarely on the interests and needs of the children, rather than on the conflict between the parents. Instead of focusing on attributing blame to the mother for the children’s resistance to overnight contact with the father, the expert focused squarely on the circumstances of the children and both parents. That expert recommended, despite problems, if any, with the mother’s conduct, that the children reside primarily with the mother. Upon considering that expert report and after finding that the family’s resources had been depleted by funding the reunification with the father program, which the family could not longer afford, and also upon finding that the father had no suitable accommodation for the children, the court made another interim order allowing the children to reside primarily with the mother.

Oddly, appeal decisions cautioning trial courts against use of “draconian”<sup>52</sup> punitive orders against parents and children in parental alienation claim cases, and cases that have allowed children to

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50 Presumably, the mother had assumed the program would help the family implement in a positive way their shared parenting arrangements.

51 Delegation of court authority to decide custody and access and parenting matters is not normally allowed but in this case the parties had consented to the program exercising decision-making power.

52 *Williamson v Williamson*, 2016 BCCA 87.

intervene, for example, *Williamson v Williamson*, 2016 BCCA 87 and *S.G.B. v. S.J.L.*, 2010 ONCA 578 have tended to be cases involving parental alienation findings against fathers.

In short, when courts accept and apply parental alienation concepts, we see a pattern of response that is consistent with gender bias combined with what appears to be an illogical pattern of decision making and punishment. Mothers (and in a small number of cases, fathers) as well as children are being punished when children resist contact with non-primary care parents (usually fathers). These punishments are justified on the basis of ‘children’s rights to maximum contact with both parents’ yet the orders are commonly combined with dismissal of children’s views and preferences (discussed in more detail below) and with court imposed restrictions on children’s contact with their primary-care and preferred parents. Not uncommonly, courts are even mandating the use of force against children who resist court ‘reunification’ efforts. For example, in *Filaber v Filaber*, 2008 CanLII 57449 (ONSC), the court ordered the sheriff to assist in the transfer of the ‘children’ from the father to the mother (on the basis of the father’s alienation), directed police to enforce the mother’s sole custody of the ‘children’, age 14 and 12, and to use “such force as is reasonable in the circumstances” and in *Mikan v Mikan*, 2004 CanLII 5062, the court states: “The residence order shall not be subject to Larissa’s consent. Mother and Father are authorized and, if necessary, required to apply reasonable force to Larissa to secure compliance.” Directions to police to use force against mothers and children to enforce reunification orders are very common in these cases.

Sadly, but perhaps not surprisingly, children approaching maturity are beginning to apply to courts to be removed from parental authority entirely, presumably in order to stop courts interfering in their lives. For example, in *L. (N.) v M. (R.R.)*, 2016 ONSC 809, a earlier court consent order endorsed an arbitration decision to forcefully order two sons 16 and 17 1/2 into the care and custody of the father in order to repair his parent-child relationship. That order was combined with an order prohibiting “communication between the children and their mother, between the children and members of the mother’s extended family.” The case report tells us that the children repeatedly ran away from the father and the police repeatedly returned them. Ultimately the Toronto Police force applied, successfully, to have police enforcement of the father’s custody removed and the ‘children’ applied for a declaration of withdrawal from both parents’ control. The court comments:

*The evidence indicates that the two sons are closely bonded with each other, the mother, and the mother’s family. Yet the existing order puts up barriers to those contacts, attempting to isolate the son from the maternal family while mandating an exclusive relationship with the father that has not worked...The result is that they have no family.*

The ‘children’ were, by the time of this decision, 17 and 18. While, ultimately, the court resolved the problem by ordering that no one would have custody or access rights over them thus freeing the youth from continuing litigation, one wonders how much court-mandated damage had been done to these youth in the interim. See also *Glegg*, 2016 ONSC 5292; *Glegg (re)*, 2016 ONSC 7181 and *Glegg v. Glegg*, 2017 ONCJ 102; *R.G. v. K.G.*, 2017 ONCA 108; *O.G. v. R.G.*, 2017 ONCJ 153; *O.G. v. R.G.*, 2017 ONSC 6490.

Throughout cases accepting and applying parental alienation concepts we see a disturbing pattern of gender-related discourse on the part of parental alienation advocates and courts. Fathers’ parental alienation claims are being characterized or associated in the discourse with children’s rights to maximum contact with both parents (illogically often in opposition to the perspectives of the children), while children’s desires to reside primarily with primary care mothers are being characterized in negative terms as the result of ‘unusual’ parent-child closeness, enmeshment, or the mother’s over-



protection. We also see in these cases a pattern of gendered discourse that comes close to father's rights' assertions of entitlement to equal parenting along with a punishment discourse directed against primary care parents and children who resist. For example, in *A.L. v. L.W.*, 2017 BCSC 964, the parent-child assessor comments "The over arching goal is to gradually increase the daughter's time with her father and to move up to an equally divided parenting plan." In *S.D.G. v. D.K.N.*, 2017 BCPC 61 at paragraph 141 the court quotes with approval and cites extensively from an article titled "The Importance of Fathers".<sup>53</sup> The mother in this case was ordered to attend at the Father's residence to breastfeed during the father's parenting time in the event that the parties could not agree on another breastfeeding location. Any time spent nursing, including transportation for the purposes of nursing "shall be added to the Father's hours of parenting time". The mother was criticized for her failure to recognize the importance of the parenting role of the father's new partner. The court declined to order that the child would not refer to the father's new partner as "mom" (though it did comment that the child should not be encouraged to do so). In *Droit de la famille - 17889*, 2017 QCCS 1684, the mother was held accountable for the oldest, 14 year old's resistance to parenting time with her father. The proof was the mother's apparent failure to exercise her parental authority to insist that the children continue to maintain a good relationship with the father and his family. Parental alienation theorists in the case informed the court that it was necessary – over child objections – to entrust custody of the children to the father in order to protect the father-child relationship. See also *BM c. S.Mo*, 2005 CanLII 30242 (QC CS) and *BM c. SMO*, 2006 QCCS 2060. In *Droit de la famille 083035*, 2008 QCCS 5680 the mother claimed the child feared unsupervised contact with the father because of the pattern of abuse in the family. Nonetheless the parents participated in shared parenting until the daughter began to resist contact with the father (the son continued to see the father regularly). The parental alienation theorist testifying in the case claimed that unless the resistant child's contact with the Mother was prohibited, the father would lose all contact with his daughter and that the son, Y, might become alienated from the father as well. While the court comments at paragraph 232 that X and Y are entitled to have a healthy and positive relationship both of their parents, the court also states that this goal can only be achieved by the Father having exclusive custody of X and Y, and the children having only very limited supervised contact with their mother for a minimum period. The court goes on to speak of the necessity of the children **redeveloping** a parenting relationship with the father and concludes that, if the mother wished to regain contact with her children, she would have to show the Court that she would interact with the children in a way that would not be detrimental to their relationship with their Father.<sup>54</sup>

Do such orders reflect children's rights to have maximum contact with both parents, or something else?

In *J.A.F. v. J.J.F.*, 2016 BCSC 300 the court recited the mother's assertions of domestic violence and her concerns about the father's excessive use of physical force against the child as well as the father's warning by social services to discontinue physical discipline of the child. The special needs child had become physically violent toward the father. The mother had assumed most of the parenting responsibility for attending to the child's special needs. The child had been residing primarily with the

53 See also the assertion in *L.C.T. v. R.K.*, 2017 BCCA 63 wherein it is reported that the expert asserted significant risks to children who do not have fathers involved in their lives. No credible child focused expert seriously disputes the value to children of contact with supportive, non abusive parents – male or female or non-gendered. Problems arise, however, when our focus shifts from a child centred focus on the best interests and safety of children to a focus on parental entitled claims associated, explicitly or implicitly, with gender.

54 Four years later, the court continued to criticize the mother for her alienating behavior and for describing herself as a victim of spousal abuse, in *Droit de la famille - 123572*, 2012 QCCS 6442. One child had stopped seeing the mother, the other sought to reside with her and to see the father regularly. Despite concerns about the mother's continuing instigation of conflict, the court finally accepted and endorsed the children's views.

mother subject to the father’s limited supervised access following an incident of family violence – the mother claimed the father threw her down the stairs, the father claimed she fell. The case was not assessed by a domestic violence expert. The court dismissed the child’s reports of the father’s violence as not reliable and/or of minor importance (in paragraphs 83 and 84) and, in the next paragraph, concluded, at paragraph 85 “Most importantly, the degree of alienation of K towards her father is, as I have said, extreme. In contrast, she has an extremely close and loving relationship with her mother.” Rather than adopting a child centered analysis of that evidence with a thorough analysis of parenting and best interest of the child criteria at this point, the court accepted the expert’s speculative assertion that the maternal closeness between the mother and the child had provided “ample room for her memory or her statements to be influenced consciously or not by the mother.” The court notes that the relationship between the father and child had gone from troubled to disastrous and concluded from this that “drastic measures are needed if there is to be any chance for a positive parent-child bond to be **re-established**<sup>55</sup> between K and her father.” The court notes the child’s need for structure, stability, security and consistency but indicates that the concerns “will have to be sacrificed to a degree .. if a formal reunification program is implemented.”

Similarly, in *S.D.G. v. D.K.N.*, 2017 BCPC 61 the court quotes from *Usova v. Harrison*, 2009 BCSC 1640, as follows:

*The solution, in my view, is not to further restrict Kailey’s contact with her father and to make him even more of a stranger. I consider it to be in Kailey’s best interests to allow her to spend enough time with her father, in his home, to allow the two of them to establish a close and loving relationship.*

In short what we are seeing in these cases is a focus on assignment of blame for parenting conflict and a focus on repairing, restoring or even creating children’s relationships with non resident parents (usually fathers),<sup>56</sup> rather than a child centred analysis of evidence of existing relationships, each parent’s parenting, and the child’s needs and interests.<sup>57</sup>

## **How do Parental Alienation claims affect consideration of child best interests factors?**

Do parental alienation claims deflect court attention from consideration of child best interest factors as the critics assert? The short answer is yes, but only when courts attempt to apply parental alienation concepts. Throughout the body of cases that endorse parental alienation theory we do not see assessment of evidence such as parent-child warmth, the closeness of the parent-child relationships, scrutiny of parenting practices, safety, and stability factors while taking into account the maximum contact principle “to the extent that such contact is consistent with the child’s best interests” as set out by the majority of the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 SCR 27, 1996 CanLII

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55 Bold added by author.

56 See also *McClintock v. Karam*, 2017 ONSC 6633; *C.J.B. v A.R.B.* 2017 BCSC 1682. Note also, however, the appellate court’s criticism of the court’s focus on parental conflict in order to assess child best interests in *N.R.G. v. G.R.G.*, 2017 BCCA 407.

57 No one, including the author, contests the importance of supporting children’s relationships with both parents when those relationships are beneficial to the child. The author’s concern is that parental alienation theory is deflecting court attention from scrutiny of other best interest of the child factors.

191 (SCC). Instead courts appear, as previously indicated, to be starting from the premise of parental entitlement to equal parenting and to be attributing blame with punishment when children or their primary care parents resist that concept.<sup>58</sup> The theory is also shifting attention from child-centred analysis to a focus on adult factors, particularly assignment of blame for parental conflict (see, for example, *N.R.G. v. G.R.G.*, 2017 BCCA 407). The ultimate goal is also changing from designing parenting plans that reflect children's current relationships to a futuristic focus on repairing children's relationships with non-resident parents (usually fathers). Courts are imposing reunification therapies that are expensive (eg *J.A.F. v. J.J.F.*, 2016 BCSC 1114; *X v Y*, 2016 ONSC 4333) and depleting family (and thus child) resources. A number of courts are expressing concern. For example, *Testani v. Haughton*, 2016 ONSC 5827 proposes a number of principles in connection with reunification therapy at paragraph 18, among them sparing use of such orders.

Thorough analysis of evidence associated with statutory best interest criteria occurred in less than one third of the parental alienation claim cases.<sup>59</sup> Cases that accepted parental alienation theory tended to focus instead on parental conflict. When we look at cases in which both parental alienation and domestic violence or child abuse claims were advanced, we will find that courts failed to assess child best interest factors in favor of devoting attention to parental alienation concerns in approximately half (48 %) of the cases. As a general rule, when courts did engage in thorough analysis of evidence associated with statutory best interest of the child criteria (refer, for example, to *Williamson v. Williamson*, 2016 BCCA 87; *N.R.G. v. G.R.G.*, 2017 BCCA 407; *Darr v. Darr*, 2006 SBQB 795; *Supple (Cashman) v. Cashman*, 2014 ONSC 3581; *Luo v. Lee*, 2016 ONSC 202; *Mattina v Mattina*, 2017 ONSC 5704; *Children's Aid Society of Ottawa v. M.P.*, 2014 ONSC 1551) courts were: less apt to make parental alienation findings, more apt to consider and accept the views of children, and less apt to make punitive orders.

## How do Parental alienation claims affect Children's legal rights?

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58 As a general rule, social science documents clearly the benefits of shared parenting for most children, when neither parent is abusive, when each parent is competent and a positive role model for the child, when the parents are able to support one another and parental conflict and child stress levels are moderate to low and or when conflict and/or problematic parenting can be successfully remedied such that parenting by each parent is safe and beneficial. Courts, however, must make decisions about the best interests of individual children in the individual circumstances of each child. No one seriously questions the benefits of maximizing children's contact with both parents – fathers or mothers or non-gendered parents - when it benefits the child. It is important, however, to keep in mind the limitations of social science in a legal context. Social scientists identify and seek to verify human trends and patterns. The application of general trends and patterns identified by social scientists can readily produce erroneous and unjust results in individual cases when the legal case differs from the type of cases included in social science studies. Social scientists commonly study populations that differ markedly from the type of families involved in litigation (which are often high conflict and/or abuse cases). Social science findings that children benefit from shared parenting will only apply in a legal setting to the extent that the facts in the individual case mirror the facts in the cases included in the shared parenting studies. In a legal context, the Supreme Court of Canada cautions against post-separation-and-divorce parenting presumptions and asserts that the only test in a legal context is the best interest of the child test. *Gordon v. Goertz*, [1996] 2 SCR 27, 1996 CanLII 191 (SCC); *Young v. Young*, [1993] 4 SCR 3, 1993 CanLII 43 (SCC); *P. (D.) v. S. (C)*, [1993] 4 SCR 141, 1993 CanLII 35 (SCC).

59 It is difficult to categorize parental alienation cases as totally inclusive or totally exclusive of best interest of the child considerations. While many of the cases did not discuss statutory child best interest criteria at all, in other cases courts referred to best interest of the child criteria but focused almost exclusively on analysis of blame for parental conflict and 'parental alienation'.

Parental alienation claim cases often involve adolescent youth. Parental alienation theorists claim this is because ‘children’ this age are more susceptible than younger children to parental manipulation or they assert that it can take many years for the effects of parental manipulation to consolidate in rejection of the other parent.<sup>60</sup> Experts who are not involved in the parental-alienation theory movement point out that adolescent resistance to shared parenting and to orders that require appreciable alternating parenting time with non resident parents commonly reflect adolescent views that are independent of either parent<sup>61</sup> and/or reflect normal child development patterns in that social life begins to revolve around peers rather than around parents and parenting.<sup>62</sup> Thus it is not surprising that adolescents begin to object to orders requiring them to be parented alternating blocks of time by each parent and seek instead to make their own decisions to reside where their friends are most comfortable. In any event, more than one half of the ‘children’ in the parental alienation claim cases, whose ages could be determined from the case reports, were 13 years of age or older.

Article 12 of the United Nations *Convention on the Rights of the Child 1989*, signed by Canada May 28, 1990 and ratified December 13 1991, states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In *B.J.B. v. D.L.G.*, 2010 YKSC 44 (favourably cited by the British Columbia Supreme Court in *A.A.A.M. v Director of Adoption*, 2017 BCSC 2077) Justice Martinson asserts:

*The Convention is very clear: all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children’s participation.*

Given the large number of parental alienation claim cases involving children approaching early-mid and late-adolescence, we might expect courts to be adhering to the legally mandated rights of children and thus to be eliciting and giving considerable weight to the views of teenage children in these cases. Nonetheless, contrary to the rights of children to have their views heard and accorded due weight “in

60 See, for example, comments in *M.M.B. v. C.M.V.*, 2017 ONSC 3991 at paragraph 1037. This is one of the cases in which both parents claimed parental alienation. The mother claimed to have been subjected to coercive domestic violence, emotional cruelty and stalking by the father as well as the father’s manipulation and turning the children against her. The children had begun to engage in emotional abuse and physically assaults against her. The evidence clearly indicated the father’s enlistment of the children in the parental conflict. The court ordered an immediate change in sole custody to the mother, family reunification therapy, the mother’s right to conceal from the father the location of interventions, and a protection order prohibiting the father from being within 500 meters of the children.

61 Joan Kelly and Janet Johnston (2001) “The Alienated Child. A Reformulation of Parental Alienation Syndrome” *Family Court Review* 249-266.

62 See, for example the judicial comments in *N.R.G. v. G.R.G.*, 2015 BCSC 1062; *Chisholm v Chisholm*, 2017 NSSC 45; *Morey v. Morey*, 2009 CanLII 12117 (ON SC); *R-P T. v. D-P T.*, 2013 BCSC 732.

accordance with age and maturity”, parental alienation advocates and courts applying parental alienation concepts are expressly not considering the views of youth and are asserting instead that, if parental alienation is established “it is especially important not to give effect to a child’s wishes because, if that is done, the parent who has behaved improperly by causing alienation is in effect rewarded for that behavior, and more importantly, the child is negatively impacted because the result of the alienation is to cut off that child’s bond with the alienated parent.”<sup>63</sup> Justice Brown asserted on behalf of the Court of Appeal of Alberta at paragraph 10 of *Letourneau v Letourneau*, 2014 ABCA 156:

*While the case management judge’s reasoning that the child would be best served by having some semblance of a normal relationship with her father meant discounting the child’s wishes, this was no error in principle, given his finding of parental alienation. In such circumstances, it was open to him to take the child’s “wishes” as not truly reflecting the child’s wishes, but rather as a vicarious expression of the controlling parent’s wishes.*<sup>64</sup>

Claims for *amicus curiae* support for children ( *D.B.C. c. R.M.W.*, 2005 ABQB 898<sup>65</sup> ) applications for Voices of the Child reports ( *K.E.F. v. T.W.P.*, 2016 BCSC 1706 ), requests that judges interview children (eg *S.G.B. v. S.J.L.*, 2010 ONSC 3717; *Zaidi v. Qizilbash*, 2014 ONSC 201) and requests for legal counsel for children are sometimes being denied ( *J.E.S.D. v. Y.E.P.*, 2017 BCSC 495;<sup>66</sup> *M. B.-W. v. R.Q.*, 2015 NLCA 28; *Hosein v Dhamoon*, 2017 ONSC 2482) on the same basis in these cases.

Consider also, however, the Court of Appeal for Ontario’s concluding comments at paragraph 67 of *R.G. v. K.G.*, 2017 ONCA 108, cited earlier in connection with mature child applications to remove themselves from parental control:

*This appeal demonstrates the importance of the emerging movement to incorporate the voice of the child in all matters concerning minors. The degree to which the court will follow the wishes of the child will depend upon the age and level of maturity of the child and will be subject to the judge’s discretion as she seeks to determine the child’s best interests. Where, as here, the child is months away from her eighteenth birthday, a continuation of litigation involving her indicates more about the parent’s needs than the child.*

A review of the prior court proceedings and orders involving this child tells us that the father claimed that the child had been manipulated by the mother against him and had no independent views of her own. The father was awarded custody (parenting and decision making) and began to limit the child’s access to her mother. He also subjected the child to repetitive use of police force to enforce his court ordered custody entitlements, including in connection with his successful claim that the mother had abducted the child after the child sought to remain with the mother in Florida following an access visit. That led to a court order containing a police enforcement clause which resulted in the child being forcefully removed from her mother by police in Florida and returned to Ontario. The forcible removal, from the point of view of the child, is described by the Court of Appeal for Ontario at paragraph 9. Ultimately the child’s decision to remove herself from parental control and to enroll in a university in Florida was accepted, as a result of a Court of Appeal decision, when she was 18 years old.<sup>67</sup> Should

<sup>63</sup> *Pilon v. Pilon*, 2015 NWTSC 64.

<sup>64</sup> See also *M. B.-W. v. R.Q.*, 2015 NLCA 28.

<sup>65</sup> Subsequently the children were granted representation.

<sup>66</sup> *Amicus curiae* assistance was ordered instead, see also *J.E.S.D v. Y.E.P.*, 2017 BCSC 666.

courts be forcing children to go to such lengths in order to have their views and preferences considered and respected?

When we examine the pattern of decisions in these cases, we find that, when child views were mentioned in the decision (not all parental alienation claim cases mention children's views particularly when the children were young), children's views were considered and given some degree of weight in merely 21 (20.8 %) of the cases that endorsed parental alienation theory; children's views were not considered or were dismissed as not reflecting the genuine views of the child or their best interests in 80 (79%, the sizeable majority) of such cases. In the few cases where courts did hear direct evidence from the youth, courts were more inclined to engage in thorough child focused best interest of the child analysis and were more accepting of youth views and concerns (for example *McLaren v. McLaren*, 2016 BCSC 2458; *L. (N.) v M. (R.R.)*, 2016 ONSC 809; *N.R.G. v. G.R.G.*, 2017 BCSC 774<sup>68</sup>).

## Parental Alienation Claims: Impact on Evidence

Oddly, parental alienation theorists claim to be able to 'diagnose' the presence of parental alienation in children on the basis of documentary assertions and behavioral checklists, in the absence of complete collection and analysis of primary data (such as interviews with each parent, interviews with children and youth, interviews with extended family members, documentation and analysis of parenting practices and observations of the children in each home).<sup>69</sup> Refer, for example, to Amy Baker's 'expert' qualification and testimony in *Fielding v Fielding*, 2013 ONSC 1458 and 2013 ONSC 5102 and in *C.J.J. v A.J.*, 2016 BCSC 676. We might contrast this approach with court criticism of one-sided 'expert' analyses in *D.S.W. v. D.A.W.*, 2014 BCSC 514 at paragraphs 27 to 33, and *Mattina v Mattina*, 2017 ONSC 5704.

Courts are making parental alienation findings in some of these cases in the absence of evidence. For example, courts: 1) are ordering reunification therapy in these cases in the absence of expert evidence (for example, *Mikan v Mikan*, 2004 CanLII 5062; *L. M. v. J. B.*, 2016 NBQB 93) and 2) are reciting generic alienation checklists or expert testimony from other cases in order to support judicial parental alienation 'diagnoses' in the case before them (*L. M. v. J. B.*, 2016 NBQB 93; *Children's Aid Society of Ottawa v. M.P.*, 2014 ONSC 1551, paragraphs 165-166;<sup>70</sup> *J.C.W. v. J.K.R.W.*, 2014 BCSC 488 at paragraphs 69 to 70 wherein the court cites and relies on expert evidence from another case in support

67 The litigation between the father and daughter did not end with the Court of Appeal decision. Two subsequent decisions concern the daughter's application for child support and the question of whether she had withdrawn from her father's control voluntarily or involuntarily: *O.G. v. R.G.*, 2017 ONCJ 153; *O.G. v. R.G.*, 2017 ONSC 6490.

68 Ultimately the father 'surrendered' custody of the children to the mother: *N.R.G. v. G.R.G.*, 2017 BCSC 2130 following years of litigation and court mandated therapeutic intervention, presumably at enormous emotional cost to the youth and the family.

69 See, for example, Rachael Birnbaum's criticism of parental alienation evidence in *Luo v. Lee*, 2016 ONSC 202.

70 This is one of the domestic violence/parental alienation cases in which the parental alienation claim was made against the father who had allegedly also engaged in domestic violence. The court in this case thoroughly assessed parenting patterns and other best interest of the child criteria which clearly demonstrated that the children were in need of protection. Parental alienation was merely one aspect of the decision. My impression is that courts, on the whole, seem to be more likely to consider the impact of domestic and family violence on children when third parties, such a child protection services, are involved in the case. If the impression is correct, it would be consistent with concerns about systemic gender bias (women are not believed unless they are able to offer gender-neutral third party evidence). The issue warrants additional empirical analysis.

of making a reunification program order;<sup>71</sup> *Cantave v Cantave*, 2014 ONSC 5207, paragraphs 55 to 62;<sup>72</sup> *H.G. v. K.G.*, 2016 BCPC 274). While appellate courts are beginning to react to some of these evidence problems - *Williamson v. Williamson*, 2016 BCCA 87; *N.R.G. v. G.R.G.*, 2017 BCCA 407 - and a number of trial courts are expressing concern about courts applying generic checklists to judicial assessments of individual case circumstances (for example, *Fielding v Fielding*, 2013 ONSC 1458; *King v King*, 2016 ONSC 3752) and/or are expressing concerns about altering children's primary residence on the basis of what "might or might not happen in the future" (*McLaren v McLaren*, 2016 BCSC 2458), evidence problems permeate this collection of cases.

Courts are being asked by parental alienation theorists to discount children's views, to alter children's primary residence and to deny children contact with primary parents on the basis of speculative assertions about what might happen in the future. For example, parental alienation theorists claim to be able to create new positive relationships between children and rejected 'alienated' parents. They also claim that, if not addressed in accordance with parental alienation theory, child alienation can produce a series of negative outcomes when children become adults<sup>73</sup> Generally, however, no evidence is presented by parental alienation advocates testifying in these cases to tie such assertions to the particular circumstances or characteristics of individual children before the court.

It is important that lawyers, courts, parent-child assessors and parents understand that 'parental alienation' also known as 'child alienation' is not a diagnostic condition. Instead, it is a hotly contested theory that purports to 'diagnose' - usually by blaming the primary resident parent - child resistance to contact with non-primary-resident parents. One-sided checklists designed to identify preferred, primary parent blame are employed; punitive measures are recommended. Despite considerable effort on the part of parental alienation theorists to have 'the parental alienation condition' recognized as a mental health condition affecting children, and to have the condition recognized as a form of child abuse, the professional mental health associations have to date declined to include it as a diagnosable condition in mental health manuals.<sup>74</sup> In addition, unlike childhood exposure to domestic and other violence, child

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71 The reunification program director was delegated enormous power in this case. The powers including the right to determine the parenting schedule for twelve months, the right to make decisions about the need for counselling and who would provide it, the right to exchange information with other professionals, and "If Dr. Reay deems appropriate, the children shall be released directly into her care and, if necessary, under the supervision of a peace officer." The frequency of inclusion of court directions for police enforcement against mothers and children in these parental alienation cases is disheartening. The mother was directed to deliver the children's BC Care Cards to the program and the children's passports to the father. In *B.S.M. v. J.I.M.*, 2009 BCSC 477 at paragraph 41 through 47, 53-56 the court recited expert testimony from other cases but did not adopt the expert recommendations from those cases on the appropriate basis that no professional opinion had been offered to the court to prove that the reunification program proposed by the father would be in the best interests of the particular child. The court comments, correctly in the author's view: *On its face, the program may offer some hope for a restoration of a broken relationship between the father and the older daughter. However, hope is not a sufficient basis for the court to impose such a coercive remedy ostensibly in the best interests of the child. The program would see the older daughter forcibly removed from the mother's day-to-day care and transported out of the jurisdiction....where she would have little if any choice other than to participate in the Family Workshop Program.*

72 This is one of the cases where the parental alienation finding was against the father. Refer to *Cantave v. Cantave*, 2014 ONSC 5999 in connection with costs awarded to the mother.

73 Oddly, many of the alleged parental alienation outcomes for children resemble the outcomes for children reported in scientific research in connection with high levels of child stress and/or exposure to domestic violence in the home.

74 Rebecca Thomas and James Richardson report in (2015) "Parental Alienation Syndrome: 30 years On and Still Junk Science" 54(3) *Judge's Journal* report that the Presidential Task Force of the American Psychological Association on Violence in the family stated "there are no data to support the phenomenon called parental alienation syndrome, in which mothers are blamed for interfering with the children's attachment to their fathers". See also the American

abuse and neglect, the ‘parental alienation’ concept is not documented in the scientific child development literature as a predictor of negative child development.<sup>75</sup> In other words, at this point, parental alienation is a controversial social science theory based on questionable research.

A related legal problem is that Canadian courts are accepting into evidence, without thorough judicial scrutiny, assertions advanced by parental alienation advocates, many of whom offer parental alienation or family reunification therapy, such as the following:

*The critical success factor is the element of court ordered compulsion. (Huckerby v. Paquet [2014] S.J. no 791)*

*Dr. Goldstein shares the view that irrationally alienated children must be separated from the alienating parent for a period of time in order to repair the relationship with the other parent. He, too, commented on the almost instant transformation of some children once they are removed from the alienating parent’s care. S.G.B. v. S.J.L., 2010 ONSC 3717 at paragraph 47.*

*Therapy and counselling with an alienated child does not work in severe cases when the child is continuing to have contact with the alienating or favored parent. There needs to be an interruption in that contact. ... There needs to be a period of stabilization and reintegration with the rejected parent without the child going back into the orbit of the favoured parent for a period of time, then we reintegrate back the favoured parent, hopefully. S. v. N., 2013 ONSC 556 at paragraph 35.*

*Research demonstrates that when there is cessation of contact with the aligned parent, the outcomes for the children are greatly increased. J.C.W. v. J.K.R.W., 2014 BCSC 488.<sup>76</sup>*

In *C.J.J. v. A.J.*, 2016 BCSC 676 the court accepted expert opinion from parental alienation advocate, Amy Baker, who advised the court to take punitive action against children and the preferred parent because:

*The likely long-term negative effects of alienation to the very fabric of their personality and the significant risk that, absent court intervention, reconciliation may not occur as parent and child become strangers to each other, or that if reconciliation does not occur in future it will be at great cost to both parent and children, mandate that the courts should intervene immediately and*

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Psychiatric Association *Diagnostic and Statistical Manual of Mental Health Disorders*, Fifth Edition; [DMS-5 Update October 2017](#); Jennifer Hoult (2006) “The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy” 26(1) *Children’s Legal Rights Journal*. For a contrary view, consider William Bernet and Amy J. L. Baker “Parental Alienation, DSM-5 , and ICD-11: Response to Critics” 2013, 41 (1) *Journal of the American Academy of Psychiatry and the Law* 98-104

75 Harvard University’s Centre on the Developing Child – on line at <https://developingchild.harvard.edu/> ; Centers for Disease Control and Prevention, Adverse Childhood Experiences (ACEs) materials on line: <https://www.cdc.gov/violenceprevention/acestudy/index.html>

76 In connection with such assertions, a number of questions come to mind. What research supports these assertions? Where was the research published? Was it peer reviewed? Was any of the research conducted arm’s length by tenured academic experts who do not offer parental alienation therapy? How was the research sample chosen, what psychological tests were administered; what were the research controls? How many children were studied; what were the success and failure rates? Are these assertions based on academic research employing accepted research methods or are these merely impressions drawn from parental alienation therapy practice?



*deliberately in these cases. Parental alienation is a form of emotional abuse, to do nothing is to participate in the continued abuse of children.*

*Dr. Baker said in her report that if alienation is found to be the likely primary cause of the child's rejection of the disfavoured parent then it is not advisable to honour the child's preferences ... even in the case where the child is doing well academically and is reported to be thriving. Intervention is necessary because it is preferable for the child to have a relationship with both parents. Even where a parent is considerably less than ideal – but not abusive - it is preferable for a child to make ties with both parents and to be aided or indeed compelled to do so if a breach has occurred.*

*She said that the overwhelming consensus in the field is that routine, two person (dyadic) counselling does not work. Dr Baker said in fact it is a complete waste of time and often makes this worse because it “runs out the clock” in the case of older children.*

*Dr Baker said the most important indicator for a successful solution is that there must be no contact with the favored parent during the period of intensive treatment.*

*Research has not revealed any reports of children who have suffered adverse effects from being removed from the home of the preferred parent for a time.<sup>77</sup>*

The testimony quoted above asks courts to ignore evidence of child well being in the care of the child's primary, preferred parent, and suggests as well that evidence of problematic parenting on the part of the non-resident parent - short of abuse – is immaterial. Courts are being told to deny children any contact with the parent they prefer in order to restore their relationship with the parent they reject. The testimony also asserts that courts that do not adhere to parental alienation theory and its remedies are engaging in a form of child abuse. Why are Canadian courts accepting such extreme assertions without engaging in thorough scrutiny for reliability?

*R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC) sets out legal principles associated with admission of expert evidence. Particularly pertinent in connection with parental alienation assertions such as those quoted earlier are the following comments by the Supreme Court of Canada in connection with judicial cost benefit analysis prior to admission of expert evidence:

*Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involved an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability....*

*The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.*

*In summary, expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusions without the*

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77 One might ask here what research studies the author is referring to, conducted, by whom.

*assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the principle.*

These principles were further clarified by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 wherein Cromwell J. asserts at paragraphs 16 through 23:

[16] *Since at least the mid-1990s, the Court has responded to a number of concerns about the impact of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirement for admissibility, added new requirements in order to assure reliability, particularly of novel science evidence...*

[17] *There is a danger that expert evidence will be misused and will distort the fact-finding process.*

[23] *At the first step the proponent of the evidence must establish the threshold requirements of admissibility. There are the four Mohan factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose.*

[24] *At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In Mohan, Sopinka J. spoke of the “reliability versus effect factor” (p.21), while in J.-L.J., Binnie J. spoke about “relevance, reliability and necessity” being measured against the counterweights of consumption of time, prejudice and confusion’ para. 47.*

In connection specifically with the admission of expert testimony on parental alienation, the Court of Appeal for British Columbia is now reminding trial courts to adhere to *Mohan* and *White Burgess Langille* principles at paragraph 47 of *Williamson v Williamson*, 2016 BCCA 87.

Given the proximity of parental alienation assertions to the ultimate issues courts must decide in family law and child protection cases, and given the extensive academic and professional concern about research foundations and reliability of the theory, as well as the serious implications for children and their families, we should be seeing considerable effort on the part of courts to verify the research foundations and thus reliability of this theory and its recommendations. Yet, when we examine the case reports in parental alienation claim cases, we see courts allowing into evidence sweeping statements such as “research shows” without any apparent scrutiny of the research on which the assertions are based.<sup>78</sup> Some of the pertinent questions that come to mind are: how many court-mandated-children were included in these research studies, what research methods were used to select them; what validated psychological tests were administered; what controls were imposed by the researchers to ensure that the results were due to parental alienation and not to something else (for example, exposure to parental conflict and child stress – negative factors affecting children that have broad research support). Which of the studies cited were conducted arm’s length by researchers who do not offer

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<sup>78</sup> As indicated earlier in the article, many of the parental alienation ‘research studies’ are not academic research; they are conclusions associated with the professional practices of those who offer ‘parental alienation therapy’ (also called reunification therapy).

parental alienation or reunification therapy?<sup>79</sup> How many of the research studies were conducted by full time tenured or tenure-stream academic professors working in accredited academic institutions?<sup>80</sup> What studies have been conducted to contrast the well being of children subjected to court mandated reunification with the well being of children who have been allowed to remain in the care of their preferred parent?<sup>81</sup> What methods did the researchers use to distinguish the effects of parental alienation from the effects on children of exposure to parental conflict, domestic violence and other adversities?

Given the importance of reliability, the controversies surrounding this theory in the scientific community, the dangers of oversimplification, as well as the potential deflection of attention from fact finding associated with the best interest of the child criteria documented earlier, we should be seeing careful court scrutiny of the scientific basis on which parental alienation diagnoses and conclusions rest prior to the admission of expert testimony.<sup>82</sup> In the absence of judicial gatekeeping to ensure the reliability of controversial social science theories, there is a real danger that theories that lack adequate scientific foundation will become legal concepts and will be imposed on children and families by courts that do not have a clear understandings of the foundations and limitations of the concepts.

Unfortunately, this is occurring now. An illustration of how social science theory becomes a legal principle can be found in *N.R.G. v. G.R.G.*, 2015 BCSC 1062 wherein the court states: “Regardless of academic debate respecting labels and diagnosis, the simple fact of the matter is that alienation is a useful and important concept which is frequently at play in high-conflict separations and has been recognized as such in numerous cases before the Canadian courts.”<sup>83</sup> In this way, once a social science theory is accepted and applied by courts, particularly once a theory is endorsed by an appellate court, its nature changes from a social science theory that can be questioned, challenged and qualified on the

79 While much of the domestic violence and child development research has been conducted by or in association with tenured academic researchers, much of the parental alienation ‘research’ has evolved from the therapeutic practices of parental alienation or family reunification therapists. While theories and conclusions drawn from therapeutic practice are not necessarily, on that basis alone, erroneous, such theories should be inviting detailed scrutiny of reliability and professional acceptance prior to application in a legal context.

80 Given the importance of distinguishing arm’s length academic scientific research from therapeutic assumptions drawn from clinical practice, it is important to note that some universities are allowing therapeutic practitioners who are not full time academic faculty staff and are not directly employed by the university, to use terms such as ‘assistant’ and ‘associate professor’ and ‘professor’. Traditionally these terms were reserved for tenured or tenure-stream academics. This is no longer the case. It is important to distinguish full-time-tenure-stream academic designations from other designations in order to prevent erroneous assumptions about academic credibility based merely on a university’s academic reputation. See, for example, note 39.

81 The author has examined a number of the ‘parental alienation research studies’. Mental health assertions such as the percentage of alienated children who experience ‘depression’ - commonly cited in expert testimony in Canadian cases as 70 % - seems to be derived from a small number of people who reported having experienced depression. The figure appears to have been derived from self reflection rather than from mental health testing for depression. In addition, unless we know how many non-alienated children, whose parents separate and divorce, experience depression, we have no way of assessing the relevance of the 70 % figure.

82 Linda C Neilson (2017) [\*Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases\*](#) (Ottawa: CanLII) at 10.11 (expert evidence) and at 10.12 (parental alienation).

83 The judge in the 2015 case characterized the problem as the mother’s belief that the father had been abusive and her alienation of the children from the father. The mother was ordered to support the children’s parenting time with the father; family reunification therapy was ordered. Several years later, after considerable use of police powers against the children on behalf of the father, and after interviewing the children, the court concluded that the children had not been coached, that they wanted more freedom and sought to live primarily with the mother. The court concluded, after a 17 day trial, “Counsel for the mother submits that the father has become so focused on .. trampling of this “parental rights”, that he sees everything in the most negative ways possible.. I am inclined to agree.” *N.R.G. v. G.R.G.*, 2017 BCSC 774.

basis of degree of research support, into a legal concept. Once this transformation occurs, it becomes very difficult, if not impossible, for experts, in this case social science and legal academic researchers, domestic violence and child development experts, to challenge the underlying basis and premises associated with the theory. When courts begin to cite and rely on parental alienation assertions of long term child harm and suggested responses recited by other courts, judicial scrutiny of reliability prior to admission of expert evidence is avoided. When this happens, social science theories without adequate research support can become legal concepts with the potential to cause grave injustice to children and their families. Thus it is critically important that courts conduct thorough assessments for reliability prior to accepting expert evidence, particularly in connection with theories that are contentious, punitive or that deflect attention from thorough scrutiny of best interest of the child factors.

Does forcibly removing children from their preferred parent, denying them contact with that parent and using police to force them into relationships they resist accord with scientifically documented and accepted child development principles? The Center on the Developing Child at Harvard University documents for us scientifically verified principles we should all be following if we wish to improve outcomes for children and their families. For example, in *Three Principles to Improve Outcomes for Children and Families* on line,<sup>84</sup> the Center lists:

Reduce Sources of Stress

Strengthen Core Life Skills

Support Responsive Relationships.

Particularly important to child resilience and thus well being is the importance of restoring children's *sense of safety, control, and predictability*<sup>85</sup> and *having at least one stable and committed relationship with a supportive parent, caregiver or adult*.<sup>86</sup> In connection with reduction of child stress the publications emphasize (in addition to protecting children from exposure to abuse and violence to be discussed in Part Two of this article) protecting children from chaotic, threatening and unpredictable situations. Do the approaches suggested by parental alienation advocates adhere to these principles or do they lead us in the opposite direction? How does use of police force against children restore children's sense of safety, control and predictability? Judges, lawyers and parents considering police enforcement of parental contact orders against the views and preferences of children should first review New Zealand Family Violence Clearinghouse on-line materials "Media investigates Family Court orders and "disturbing" footage of uplifting children".<sup>87</sup> Surely there are better methods courts can use to encourage beneficial relationships between children and their parents.

Let us turn now to other assertions of parental alienation advocates testifying in Canadian cases to see how the assertions, if accepted by courts, would affect judicial fact finding and analysis of evidence.

84 On line at <https://developingchild.harvard.edu/resources/three-early-childhood-development-principles-improve-child-family-outcomes/>

85 Center on the Developing Child, Harvard University, *8 Things to Remember about Child Development* on line.

86 Center on the Developing Child, Harvard University, *Three Principles to Improve Outcomes for Children and Families 8 Things to Remember about Child Development* on line note 84.

87 New Zealand Family Violence Clearinghouse "Media investigates Family Court orders and "disturbing" footage of uplifting children" August 2017 on line at <https://nzfvc.org.nz/news/media-investigates-family-court-orders-and-disturbing-footage-uplifting-children>. See also: Melanie Reid and Cass Mason for *Newsroom* August 8, 2017, *Taken by the state* on line at <https://www.newsroom.co.nz/2017/08/07/41459/taken-by-the-state>.

Parental alienation advocates advise courts to assume the presence of parental alienation when children resist contact with non-primary-care parents:

*Without the influence of the favored parent, the child would not reject the other parent, paragraph 943 of M.M.B. v. C.M.V., 2017 3391.*

*It should be noted that parental alienation is difficult to prove. It occurs behind closed doors, insidiously and without any witnesses. The parent who is the victim usually has to resort to indirect evidence, based on the comments and conduct of a young child. Droit de la famille – 113861, 2011 QCCA 2242 at paragraph 97.*

*The clear inference to take from such situation is that such learning of a children's rejection to visit an access parent generally comes from the conduct of a custodial parent, paragraph 67 of Benson v Butler, 2009 CanLII 33527 (ON SC)*

*When the expert but non specialist expert undertakes a family assessment for alienation, he or she generally succumbs to a number of cognitive and clinical errors that typically occur resulting from the counterintuitiveness of alienation cases... a common error is to mistake alienation for estrangement' in X v Y, 2015 ONSC 7681*

*It is important to note that there is virtually no evidence in this trial respecting the private communications between the mother and children so not all of the mother's alienation behaviors can be readily identified: N.R.G. v. G.R.G., 2015 BCSC 1062.*

Parental alienation advocates also advise courts to ignore evidence of child well being while in the care of primary preferred parent. Examples include:

Dr. Amy Baker testimony in *C.J.J. v. A.J.* cited earlier.

*Dr. Goldstein was asked to comment on the fact that JB appears to be doing so well in school and with his friends. It was suggested that this means JB is doing fine and needs no interventions or changes in the custody arrangement.. Dr. Goldstein noted that it is often put forward how well alienated children are doing at school and with their friends. He opined that school and friends are ways for the child to try to get away from parental conflict. Dr. Goldstein expressed real concerns about JB's future development and ability to relate to women or form healthy relationships in the future if he remains alienated from his mother. S.G.B. v. S.J.L., 2010 ONSC 3717 at paragraph 76. (Later, in S.G.B. v. S.J.L., 2010 ONCA 578, the Court of Appeal for Ontario endorsed a stay of the order granted in this case which would have transferred custody to the mother and denied the child any contact with the father for three months. The appellate court also granted the 16 year old boy leave to intervene in the case.)*

Advocates also advise courts not to consider too carefully the parenting practices of parents the children resist:

*No parents are perfect. .. If families stay together, except in those rare circumstances in which a child is found to be in need of protection, the state and the courts allow imperfect parents to raise their children as best they can... If families separate, however, and issues of custody and access*

*arise, in the guise of determining the best interests of the child, a parent's flaws of character and conduct are put under a microscope. In such circumstances, care must be taken not to lose sight of the strengths that a party brings to the challenge of raising a child.* Paragraph 12 of *A.L. v. L.W.*, 2017 BCSC 964. See also: *N.R.G. v. G.R.G.*, 2015 BSSC 1062.

*However, certain characteristics of rejected parents may influence or encourage a child's rejection. Rejected parents, generally fathers, tend to be lacking in warmth, empathy, and an understanding of the child's viewpoint. They may engage in emotionally abusive behaviour with their former partners or children, and often have difficulty with depression, anxiety and management of emotional responses. While these characteristics may be tolerated in intact families, in the context of alienation any parenting deficiencies on the part of a rejected parent are likely to become exaggerated and can be the source of extreme hostility for the child. Faced with such an unexpected response, rejected parents may be inclined to distance themselves further from the child, thereby exacerbating any negative feelings the child may have.* *Bradford v Bradford*, 2017 BCSC 661 at paragraph 39.

Oddly the quotation in *Bradford* suggests that emotional abuse and adverse parenting are tolerated in intact families. The quotation also implies that courts should assume that parents exaggerate such concerns after separation as an aspect of litigation. Yet one could equally argue that courts should assume the validity of such claims, given that concerns about abusive behavior, difficulty with emotional management and negative parenting commonly result in separation. The best option, however, is that recommended by the National Council of Juvenile and Family Courts in the United States in connection with judicial officer training: "overcoming implicit bias and how to view each case as a blank slate." National Council of Juvenile and Family Courts (2017) *Custody and Visitation in Civil Protection Orders: Guiding Principles and Suggested Practices for Courts and Communities* (NCJFCJ).

Parental alienation advocates also tell courts not to order non-parental-alienation<sup>88</sup> forms of therapeutic intervention and to dismiss the views of therapists who work with children:

*Dr. Baker said that although a common judicial response to parental alienation is to refer alienated children and the disfavoured parent for "dyadic therapy" ... to learn how to communicate with one another, there are good reasons why this is likely to be an inappropriate treatment for alienated children. There reasons include: (1) the therapist is likely to side with the children; (2) the children are likely to be exposed to continued negative messages about the disfavoured parents; (3) the process itself may cause the children to become more entrenched; (4) the process identifies the disfavoured parent as the problem; and (5) the alienating parent is likely to sabotage the therapy if the children appear to be softening.* *C.J.J. v. A.J.*, 2016 BCSC 676.<sup>89</sup>

If courts were to accept and apply such assertions how would it affect fact finding and analysis of evidence? Courts would begin by assuming that primary care parents are to blame when children resist spending time with non-primary-resident parents. They would then ignore the legal rights and views and preferences of children. Next they would dismiss evidence of child well being in the care of primary preferred parent and would pay scant attention to evidence of negative parenting practices on the part of the parental alienation claimant. Courts would also dismiss the analytical conclusions of

<sup>88</sup> These therapies are also referred to as family reunification therapy.

<sup>89</sup> Again, we might ask what these research evidence these assertions are based on.

experts who are not parental alienation advocates. Finally, courts would remove children from the care of their preferred parents and order them into the full-time care of the parents the children reject. At the same time courts would implement punitive measures, including police force, against the preferred primary care parent and against the children. Is this what best interests of the child decision-making looks like in Canada? Parental alienation theory, when accepted and applied, seems to be causing family courts to be losing sight of the children, their experiences and perspectives, in favor of enforcing parental (often father's) rights.

It is important to note here that I am not suggesting that clear evidence of a parent's vindictive manipulation of a child against a non abusive, beneficially involved parent or other adult (male, female or non gendered) should be ignored or dismissed. Clearly such behavior is not in the best interests of any child, as shall be discussed in more detail in Part Three. It does mean, however, that aspects of the theory that 1) produce systemic gender bias and 2) are out of line with well respected scientific research on child development should be abandoned. It also means that such claims should not be allowed to take over fact finding processes. Potential injustices occur when parental alienation theory becomes the central focus of legal analysis rather than merely one best interest of the child factor among many.

Theoretically, parental alienation claims do not apply when the claimant has engaged in domestic or family violence or in child abuse. In such cases, the child's fears and resistance to contact can be explained by the child's family and/or post-separation parenting experiences. Are courts investigating children's experiences and perspectives in cross-claim cases or is the theory deflecting attention from such issues? Let us turn now to a focus on cross-claim cases (cases in which parental alienation claims are advanced and domestic violence or child abuse claims are also made).

## PART TWO

### Parental Alienation & Domestic Violence / Child Abuse: The Claims of Critics

In addition to concerns about the scientific support for parental alienation concepts and assessment tools, domestic and family violence experts are concerned that parental alienation concepts will be inappropriately applied in custody and access cases that involve domestic or family abuse/violence.<sup>90</sup> Concerns relate to the absence of thorough domestic violence screening in family law cases, the potential misuse of parental alienation theory to discount adverse child experiences and to ignore adult

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90 National Council of Juvenile and Family Court Judges (2008) *A Judicial Guide to Child Safety in Custody Cases* (Reno, NV: NCJFCJ), (2006) *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence A Judges Guide* (Reno, NV: NCJFCJ; Michael Davis, Chris O'Sullivan et al. (2011) *Custody Evaluations Where There Are Allegations of Domestic Violence: Practices, beliefs, and Recommendations of Professional Evaluators*; Daniel Saunders et al. (2011) *Child Custody Evaluators' Beliefs About Domestic Abuse in Relation to Custody Outcomes*; Daniel Saunders (2015, presentation) [Child Custody Evaluations and Domestic Violence: New Research and Implications for Practice](#) (Griffith.edu.au); Daniel Saunders (2017) Evaluating the Evaluators: Research-based Guidance for Attorneys Regarding Custody Evaluations in Cases involving Domestic Abuse" 47 *Michigan Family Law Journal*; .Linda C Neilson (2001) *Spousal Abuse, Children and the Legal System Final Report for Canadian Bar Association Law for the Futures Fund* (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research, March 2001).

and child safety issues.<sup>91</sup> A related concern is that application of the theory can undermine children's access to empirically verified factors that protect children from lasting harm resulting from negative family experiences (such as domestic violence and child abuse).

We know scientifically that high levels of repetitive parental conflict and/or domestic violence in the home, repetitive fear, and child stress can potentially produce long term emotional and developmental harm to children.<sup>92</sup> These conclusions are consistent across decades of research, across research methods (qualitative and quantitative) and even across disciplines (social science, medicine, psychiatry, child development, neurobiology).<sup>93</sup> We also know that negative post-parental-separation parenting practices commonly associated in research with perpetrating coercive domestic violence, when present in a case, can impair child resilience and recovery.<sup>94</sup> The operative factors are child stress on the one hand and the presence of resilience factors – factors that enable children to recover from or resist harm - on the other. As previously mentioned, factors that promote child resilience documented in the scientific literature include social and community support for the family; safe, stable, stress-free supportive attachments with caregivers who are not abusive; parental warmth; stability and security; child self sufficiency; and personality factors such as easy child temperament and positive outlook.<sup>95</sup> In short, lawyers, service providers and courts seeking to promote the best interests and well being of children in domestic violence and family abuse cases will prioritize safety and protection of children from continuing stress<sup>96</sup> while taking into account and supporting factors that enhance child resilience such as child self sufficiency and safe, stable supportive relationships and surroundings.<sup>97</sup> Hon. Donna

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91 Ibid. See also Holly Smith (2016) [Parental Alienation syndrome: Fact or Fiction?](#) The Problem With Its Use in Child Custody Cases in 11 *Mass. L. Rev.* 64; Daniel Saunders (2016) “The Need to Carefully Screen for Family Violence When Parental Alienation is Claimed” 46(6) *Michigan Family Law Journal* 7-11.

92 For a discussion of the pertinent research, see Linda C Neilson (2017) Chapter 6 “Children: Impact of Domestic violence & Evidence of children” in [Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases](#) (Ottawa: CanLII).

93 Refer, for example, to the lengthy list of references on this issue at “Supplementary Reference Bibliography: Effects of Domestic Violence on Children” of [Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases](#) (Ottawa: CanLII) on line.

94 Lundy Bancroft et al. (2012) *The Batterer as Parent* 2<sup>nd</sup> ed. (Los Angeles: Sage); Jeffrey Edleson and Oliver Williams (eds.) *Parenting by Men who Batter* (New York: Oxford); Claire Sturge (2003) “Can violent parents be fit parents?” Chapter 10 of Peter Reeder et al. Eds *Studies in the assessment of parenting* (New York: Brunner -Routledge); Kierron Worley et al. (2004) “An examination of parenting experiences in male perpetrators of domestic violence: A qualitative study” *Psychology and Psychotherapy*; Kierron Worley et al. (2004) “An examination of parenting experiences in male perpetrators of domestic violence: A qualitative study” *Psychology and Psychotherapy*. This does not mean that negative parenting practices will be present in every case; it does mean children depend on us to assess for their presence or absence. Refer as well to the research discussed in L. Neilson (2017)note 92, Chapters 6, 11 and *Supplementary Reference 2*.

95 Center on the Developing Child, Harvard University “Resilience” on line at <https://developingchild.harvard.edu/science/key-concepts/resilience/>; Cecilia Martinez-Torteya et al. “Resilience Among Children Exposed to Domestic Violence: The Role of Risk and Protective Factors” 2009 80(2) *Child Development* 562-577; Sandar Graham-Bermann et al. “Factors discriminating among profiles of resilience and psychopathology in children exposed to intimate partner violence (IPV)” (2009) 33 *Child Abuse and Neglect* 648-660.

96 Review materials on “Toxic Stress” published on line by the Center on the Developing Child, Harvard University at <https://developingchild.harvard.edu/science/key-concepts/>. See also Lynn Schafran “Domestic Violence, Developing Brains, and the Lifespan New Knowledge from Neuroscience” 2014 *Judges’ Journal* on line at <https://www.legalmomentum.org/resources/domestic-violence-developing-brains-and-lifespan-new-knowledge-neuroscience-judges-journal>.

97 Mary Armstrong et al. “Pathways Between Social Support, Family Well Being, Quality of Parenting, and Child Resilience: What We Know” 14(2) *Journal of Child and Family Studies* 269-281; Center on the Developing Child, Harvard University “Key Concepts” “Resilience” on line at <https://developingchild.harvard.edu/science/key-concepts/>.



Martinson sets out helpful parent-child evaluation criteria in domestic violence cases in her 2013 on line publication *The Family Law Act and Family Violence: Independent and Impartial Parenting Assessments*.

Does the pattern of decision-making in cases in which both parental alienation and domestic violence or child abuse are alleged respond to scientific child development principles and address the concerns of domestic and family violence experts? Are courts taking into account verified child adversity and resilience factors as well as mandated child best interests criteria in the cross-claim cases? For answers, let us turn to the case law.

## Parental Alienation & Domestic Violence or Child Abuse: Case Law

As previously mentioned, 142 of the parental alienation claim cases (41.5 %, almost one half)<sup>98</sup> involved assertions of domestic violence and/or child abuse. In most (76.8 %) of these cases, the parental alienation claim was advanced by the alleged perpetrator of domestic violence or child abuse, including a small minority of cases (3 cases) in which the alleged perpetrator was the mother. In 33 of the 142 cases (23.2 %), the parental alienation claims were advanced by the parent claiming domestic violence or child abuse.<sup>99</sup>

The National Council of Juvenile and Family Court Judges in the United States, Chris O’Sullivan et al., Daniel Saunders et al., Curt Bartol et al. tell us that, in the absence of specialized understanding of domestic violence, its effect on children and on post separation parenting practices, parent-child experts who conduct evaluations are devoting insufficient attention to child and adult safety and to parenting practices that harm children.<sup>100</sup> Best practice professional guidelines for parent-child evaluation contain warnings to the same effect.<sup>101</sup> Nonetheless evaluation of any aspect of these cross-claim cases by a domestic or family violence expert was ordered or considered in only four (2.8%) of the 142 cases. In one of these four cases, the domestic violence allegations were, unusually, against the mother.<sup>102</sup> We might contrast the absence of expert scrutiny of domestic violence claims and associated parenting and safety issues with the fact that in 62 of the 142 domestic/family violence cross-claim cases a parental alienation evaluation was ordered or considered by the court.<sup>103</sup> Indeed in some of these cases, despite

98 Fifteen cases that involved claims against assessors or professionals and that did not also include a claim against either a mother or father were removed from the total.

99 Manipulation and/or alignment of children with the perpetrator against the parent targeted by domestic violence is reported regularly in the domestic violence literature. Refer, for example, to the literature cited in Linda C Neilson (2017) chapter 6 and chapter 10.12 of [\*Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases\*](#) (Ottawa: CanLII) on line.

100 National Council of Juvenile and Family Court Judges (2008) (2006); Michael Davis, Chris O’Sullivan et al. (2011); Daniel Saunders et al. (2011) (2015, presentation); Linda C Neilson (2001) note 90 as well as Curt Bartol and Anne Bartol (eds) *Current Perspectives in Forensic Psychology and Criminal Behavior* (Thousand Oaks: Sage).

101 Donna Martinson (2013) note 13 ; (National Council of Juvenile and Family Court Judges (2004) *Navigating Custody & Visitation Evaluation in Cases with Domestic Violence: A Judge’s Guide* (State Justice Institute and NCJFCJ) available on line; Association of Family and Conciliation Courts (2016) *Guidelines for Examining Intimate Partner Violence: A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation*, available on line.

102 *J.L.H. v. P.J.H.*, 2017 BCSC 561.

103 The other cases include cases in which parent-child evaluations were not specific to parental alienation, cases in which perpetrators of domestic or family violence who claimed parental alienation presented no expert evidence, and cases in which judges made parental alienation findings in the absence of expert evidence.

the domestic violence or child abuse claims, courts expressly ordered evaluators to restrict their evaluations to assessing for the presence of parental alienation. In only a few cases, for example *H.D.F. v. L.M.F.*, 2012 BCSC 1301, did a court comment expressly on the inappropriateness of ordering a parental alienation evaluation in a cross claim case without also ordering an evaluation of the circumstances of the child by a domestic violence or child abuse specialist.

Child views and preferences in seeking to reduce parenting time with alleged domestic violence or child abuse perpetrators were considered and affected the court decision in 26 of the domestic violence /parental alienation cases; children's views and requests to reduce or limit parenting time with alleged domestic violence or child abuse perpetrators were ignored or discounted as having been influenced by the preferred parent in 29 of the cross-claim cases.<sup>104</sup> In 11 cases children's desire to reside primarily with the alleged perpetrator of domestic violence was accepted and endorsed by the court. Generally, those cases involved older children (usually 14 or older).

On a positive note, it is important to keep in mind that courts did not make findings of parental alienation against parents claiming to have been targeted by domestic violence (usually because the perpetrator called no expert evidence or a parent-child evaluator testified there was no parental alienation in the case) in the majority of the cross-claim cases. Nonetheless in 40 cases, 36.7 % of the 109 cases in which the parental alienation claim was advanced by the alleged perpetrator of domestic violence or child abuse,<sup>105</sup> the court made a finding of parental alienation against the parent claiming domestic violence or child abuse. In 39 of these cases, contrary to scientific child development and resilience research discussed earlier, children were removed from the targeted and preferred primary care parent and their physical custody was awarded temporarily<sup>106</sup> or finally to the alleged perpetrator of domestic violence. In 24 of these cases children's contact with their preferred parent was limited by the court to supervised access and or was denied entirely. In contrast, alleged perpetrators of domestic violence or child abuse were granted unsupervised parenting time with children in the vast majority of cases.

Canada has a legal obligation pursuant to article 19 of the United Nations *Convention on the Rights of the Child* to protect children from violence and abuse. Yet, in many of these 142 cases, mothers' concerns, as a result of earlier experience of abuse and violence on the part of the father, about child well being and safety in the care of fathers, were characterized as overprotection. Claims of domestic violence and turning to experts for help were commonly cited as evidence of mothers' attempts to alienate children from fathers. Statements such as "the mother continues to see herself as the victim of

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104 In many cases child views are not mentioned in the judgement. While in some cases courts may have neglected to comment on evidence of children's views, considering it unimportant for the decision to be made, in other cases the evidence probably was not presented to the court. A parent accused of alienating a child would be, understandably, reluctant to present child views and concerns about contact after being advised that, as a result of the parental alienation claim, the child's views would not affect the decision and/or could be considered evidence to support the alienation claim.

105 Keep in mind that in 33 cases the parental alienation claimant was also the parent claiming domestic violence.

106 When cases could be linked to the same family, they were counted once. In some of the cases, as a result of the parental alienation claims, children were removed from their mothers and awarded to fathers. Years later in a number of these cases children took matters into their own hands and returned to their mothers and/or sought to be removed from parental authority – and thus from court control – entirely. See, for example, *N.L. v. R.R.M.*, 2016 ONCA 915.

violence”<sup>107</sup> and “multiple allegations of sex abuse borders on parental alienation”<sup>108</sup> are found throughout the cases. In some cases mothers were criticized by judges for lack of trust in violent fathers’ coparenting capacity (see for example, *MacPhee v Sanford* 2008 JSSC 175; *Scott v Lloyd*, 2014 ONCJ 639). Evidence of strong attachment bonds between mothers who sought to introduce evidence of domestic violence and their children was commonly characterized by parental alienation advocates or by courts accepting the theory as ‘excessive’ or ‘abnormal’ and, as previously mentioned, mothers are also soundly criticized by courts throughout these cases if they discussed domestic violence with their children (for example, *Ottewell v Ottewell*, 2012 ONSC 5201; *L.T. v. S.M.* supra).

In other words, courts accepting parental alienation theory in cross claim cases are placing protective parents (primarily mothers) in a horrifying double bind: if the parent insists on presenting evidence of domestic violence or child abuse in order to protect the children she risks her efforts being categorized as attempts to alienate the children from the other parent. She may even face loss of primary care or even contact with her children. She thereby places her children at risk. If the protecting parent fails to present such evidence to the court, she also places the children at risk because the court making the custody and access order will have no knowledge of potential risks to children. It is likely that many protective parents are choosing the second option rather than risking loss of the children. This issue of silencing and suppression of evidence warrants additional research scrutiny.

Even worse, the judicial discourse in some of these cases suggested judicial scepticism or even bias against domestic violence evidence. Other comments reflected fallacies about such evidence. For example, the court states in *S.P. v. P.B.D.*, 2007 CanLII 31787 ONSC:

*I accept Dr. Hepburn's conclusion that while there are allegations of serious domestic violence that merit scrutiny, they must be considered with great care, understanding that they may be part of the alienation strategy....I am aware of the allegations of violence, but am also aware they they must be regarded with caution and a degree of skepticism.*

Similarly, in *J.C.W. v. J.K.R.W.* 2014 BCSC 488 the court dismissed concerns of a child about domestic violence in part because:

*when this kind of marital conduct is witnessed by children, it can appear that the father is the aggressor and the mother the victim.*

In *Benson v Butler*, 2009 CanLII 33527 the court comments at paragraph 6:

*We have seen cases, all of us who are experienced in this, of one party trying to use the Criminal Court to bolster an agenda in Family Court.*

In *P.D. W. v. H.A. H.*, 2017 NBQB 110 after noting extensive police involvement with the family, the court comments, in connection with the ongoing criminal case, that the charge of assault against the father was:

*no doubt followed through by the mother because of the issue of custody.*<sup>109</sup>

In *L.C.T. v. R.K.*, 2015 BCSC 2378 at paragraph 293 we learn that the judge dismissed the testimony of the mother’s expert relating to her post-traumatic stress disorder and Battered Wife Syndrome on the basis, in part, that “*If she was as traumatized by her history with the respondent as she suggests, I*

<sup>107</sup> *Droit de la famille – 10936*, 2010 QCCS 1745. Refer as well to the gendered use of mental health labels and perpetrator litigation tactics in custody cases discussed in Suzanne Zaccour, “Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes” (2018) 31 *Can. J. Fam. L.* 55.

<sup>108</sup> *T.S. v. M.L.J.* [2017] NBJ 61.

<sup>109</sup> We might contrast these comments with comprehensive analysis of coercion and control patterns and thorough assessment of parenting practices in cases such as in *Santos v. Pantelidis*, 2017 ONSC 674 (where serious domestic violence claims were made against the mother); *M.M.B. (V.) v. F.M.V.*, 2017 ONSC 3991; *Lau v IBU*, 2016 ABQB 74; *P.H. v. T.J.*, 2017 ONCJ 166 and *Mattina v Mattina*, 2017 ONSC 5704.

doubt she would have been able to sit as she did throughout the trial in what appeared to me to be a normal presentation”<sup>110</sup> and because the personality tests administered by two experts – not qualified as domestic violence experts - showed “relatively normal results (barring slightly elevated anxiety levels) with no objective evidence of abuse.” It is important to note here that psychological tests cannot prove or disprove the validity of domestic violence.<sup>111</sup> Although the evidence in the case demonstrated the father’s use of pornography and the sexualized behavior of the children, and sexual abuse is a common component of coercive domestic violence,<sup>112</sup> the judge in this case preferred the father’s denials to the mother’s claims of sexual domestic violence. The mother’s concerns were held to be insufficient to support her claims for supervision of the father’s contact with the children. The mother’s appeal was denied in *L.C.T. v. R.K.*, 2017 BCCA 64.

We also find in this collection of cases judicial comments suggesting that the seriousness or even the existence of domestic violence may be discounted on the basis of absence of police or hospital records or on the basis of lack of criminal findings (for example *Baker-Warren v Denault* 2009 NSSC 59;<sup>113</sup> *ADM v SWL*, 2015 ABQB 630;<sup>114</sup> *Calabrese v. Calabrese*, 2016 ONSC 3077; *Ottewell v Ottewell*, 2012 ONSC 5201). In contrast the empirical research demonstrates that patterns of domestic violence are seldom reported to medical authorities or to police and are seldom prosecuted in the criminal system.<sup>115</sup> Instead, we know that evidence associated with some of the most serious, severe patterns of coercive domestic violence may be presented only to family courts, when parents attempt to present detailed evidence in order to try to keep children safe. In several cases, courts concluded, presumably as a result of not being made aware of how trauma affects demeanour and disclosure patterns,<sup>116</sup> that claims not advanced initially or claims advanced later were on that basis unreliable. And we find in this collection of cross-claim cases judicial comments suggesting or even stating expressly that domestic violence is between parents and is thus unimportant when making decisions relating to the post-separation parenting of children (*ADM v SWL*, 2016 ABQB 96; *Karar v. Abo-El Ella*, 2017 ONSC 33; *Droit de la famille – 101456*, 2010 QCCS 2786; *C.J.B. v A.R.B.*, 2017 BCSC 1682).

As previously mentioned, parental alienation advocates advise courts to excuse negative parenting on the part of parents the children resist seeing, commonly commenting that no parents are perfect. Perhaps most concerning of all in light of concerns about empirical support for the theory and the frequency of such claims being advanced by alleged abusers, is the assertion that parents who are alienated from their children typically exhibit the following behaviors:

110 The Court of Appeal for British Columbia subsequently commented on the danger of court making conclusions on the basis of demeanour in *L.C.T. v. R.K.*, 2017 BCCA 64 at paragraph 65, although the mother’s appeal was dismissed with the exception of the reduction of child support.

111 L. Neilson (2017) note 2, Chapter 7 at 7.3.1.

112 Refer to the sources cited in Neilson (2017) *ibid.*, Chapter 4 at 4.2.

113 The court does note in this case that the absence of a criminal conviction beyond a reasonable doubt does not disprove domestic violence in a civil context.

114 See *ADM v. SWL*, 2016 SBQB 96 in connection with costs awarded against the mother.

115 Maire Sinha (2013) “Section 4: Responses to violence against women” (85-002-X (Ottawa: Statistics Canada) available on line. The reasons can include safety concerns, intimidation or negative social and economic consequences.

Repetitive recants of domestic violence in the criminal system are now being linked in research to increasing risk and danger for victims. Moreover despite the fact that coercive domestic violence is best understood as a cumulative pattern with cumulative effects – see Linda Neilson (2013) Part 5 of *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, Family, child protection)* (Ottawa: Department of Justice) on line. Canada’s criminal definitions are limited to instances of violent action, each of which must be proven. As a result serious patterned abusive behavior is seldom prosecuted in the criminal system.

116 Linda Neilson (2013) *Enhancing Safety* *ibid* at 4.2 “Patterns of Revealing Domestic Violence: Survivors” on line.

*Harsh, rigid and punitive parenting style;*  
*Strong objection to child challenging authority (domestic violence experts identify this as an element of control);*  
*Passivity in the face of conflict;*  
*Immature, self-centered in relation to the child;*  
*Loss of temper, angry, demanding;*  
*Intimidating character traits;*  
*Counter rejecting behavior;*  
*Lacks empathetic connection to the child;*  
*Inept, un-empathetic pursuit of the child;*  
*Unannounced embarrassing visits;*  
*Challenges child beliefs and attitudes;*  
*Dismissive of child feelings;*  
*Induces guilt;*  
*May use force to reassert parental position;*  
*Vents rage, blames alienating parent for brainwashing child and takes no responsibility.*<sup>117</sup>

Refer to *M.M.B. v. C.M.V.*, 2017 ONSC 3991 at 943. See also *W.C. v. C.E.*, 2010 ONSC 3575; *L. M. v. J. B.*, 2016 NBQB 93.

With the exception of ‘passivity in response to conflict’ these negative post-separation parenting behaviors are well documented in the research literature on the post separation parenting practices of those who engage in coercive domestic violence.<sup>118</sup> Parental alienation advocates focus attention on restoring child-parent relationships with rejected parents. Negative parenting is dismissed as a ‘normal’ reaction to a child’s rejection or is said to be of little consequence as no parent is perfect. Domestic violence experts assert, instead, that when negative post-separation parenting patterns are present in a case, courts and service providers should take action to protect children, harmed already by domestic violence, from further harm.<sup>119</sup> The scientifically supported goal is to ensure that children, particularly

<sup>117</sup> The original list lacks parallel structure.

<sup>118</sup> L. Bancroft, J. Silverman and D. Ritchie (2012) *The Batterer as Parent Addressing the impact of Domestic Violence in Family Dynamics* (Thousand Oaks: Sage); J. Edleson et al. (2003) *Parenting in the Context of Domestic Violence* (Judicial Council of California); and O. Williams (eds.) *Parenting by men who batter: new directions for assessment and intervention* (Oxford University Press: 2006); Department for Child Protection (2013) *Perpetrator Accountability in Child Protection Practice: A Resource for child protection workers about engaging and responding to perpetrators of family and domestic violence* (Perth western Australia: Western Australia government). Linda Neilson (2001) [Spousal Abuse, Children and the Legal System Final Report for Canadian Bar Association Law for the Futures Fund](#) (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research, March 2001). Chapter 11 of Linda C Neilson (2017) [Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases](#) (Ottawa: CanLII) on line. Chapter 11.1.10 outlines negative post-separation parenting practices and chapter 11.1.13 lists factors associated with risks to children connected to unsupervised contact with perpetrators documented on the research. It is important to note, however, that not every perpetrator of domestic violence will engage in such practices. Nonetheless, it is important to assess for their presence. The goal is ensure to the extent possible, positive, safe parenting for vulnerable children.

<sup>119</sup> Chapters 11 and 14 of Linda C Neilson (2017) *ibid.* Bancroft and Silverman’s documentation of the parenting practices of men who engage in domestic violence in the informative publication L. Bancroft, J. Silverman and D. Ritchie (2012) *The Batterer as Parent Addressing the impact of Domestic Violence in Family Dynamics* (Thousand Oaks: Sage) is derived from clinical experience. Lundy Bancroft began his career in the domestic violence field as a therapist for abusive men. Jay Silverman is a developmental psychologist and Professor of Medicine and Global Public Health at the University of California. Both Silverman and Bancroft have considerable direct experience counselling abusive men. Nonetheless, unlike parental alienation theorists, Bancroft, Silverman and Ritchie do not make unsupported empirical claims such as “80 percent of abusive men engage in negative parenting” nor do they suggest that courts make

traumatized children, receive safe, stable, supportive parenting and services to help them recover from negative family experiences.

The alleged long term consequences of parental alienation – problems in school, difficulty with trust and relationships later in life, difficulty in caring for their own children in future, and mental health problems such as depression and anxiety, along with increased risk of alcohol and drug abuse - quoted from *N.R.G. v. G.R.G.*, [2015] BSJ No. 1288 (BCSC) at paragraph 24 of *H.G. v. K.G.*, 2016 BCPC 274<sup>120</sup> are reported consistently across scientific and social science research studies in connection with harm from multitude child adversities, including direct and indirect exposure to domestic violence. The science establishes clearly that the more adversities a child experiences, the higher the risk of future developmental harm.<sup>121</sup> Attributing such outcomes solely to parental alienation is not consistent with either the scientific child development or the domestic violence literature.

Few parent-child evaluators and few parenting coordinators are domestic violence experts.<sup>122</sup> In the absence of expertise, evaluators and parenting coordinators may assume that domestic violence is an adult phenomenon caused by poor interpersonal relationships between parents. We see judicial discourse suggesting this assumption throughout the case law. When the assumption is accepted, a period of time without adult violence may make repetitive complaints about earlier patterns of domestic violence appear to be self serving rather than child focused. In contrast, empirical domestic violence, child development and trauma research tells us the domestic violence in the home has a, profound and potentially long lasting effect on the whole family and particularly on children. In addition, coercive domestic violence is often associated with direct forms of child abuse and with negative post-separation parenting practices. Patterns of behavior associated with coercive domestic violence, such as demeaning domination, monitoring and surveillance, isolation, excessive physical discipline, and coercive control, commonly continue against children – as well as against targeted adults – after adults separate.<sup>123</sup> Domestic violence is not a relationship problem; it is a collection of behaviors that are characteristic of perpetrators. Merely separating a perpetrator from his or her current target, does not change those characteristics nor does it prevent resort to new targets/‘victims’. Indeed the domestic violence literature tells us that risks to children increase following separation once the targeted parent is no longer available as the target or buffer between the perpetrator and the children.<sup>124</sup> Assumptions that coercive, demeaning, controlling and or violent individuals change when they no longer have access to a particular victim appear to rest on the false assumption that relationships and victims are responsible, in full or in part, for perpetrator conduct. Once we abandon the false assumption, it comes as no

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assumptions or impose punitive outcomes based on counter-intuitive assessment tools.

120 In *T. (V.E.) v. T. (C.E.)*, 2009 BCSC 444 the alienation advocate asserts: “Alienation of young girls from their fathers has been associated with later rebellion and rage toward the maternal figure, sexual promiscuity, low self esteem, depression.” With the exception of rage toward the maternal figure, these adverse child effects are documented regularly in connection with direct and indirect exposure to domestic violence.

121 Refer to the [Adverse Childhood Experiences \(ACE\) Questionnaire](#) posted online by the National Council of Juvenile and Family Court Judges in the United States as well as materials posted by the Center on the Developing Child, Harvard University and materials cited in L Neilson (2017) note 19, Chapter 6 “Children: Impact of Domestic violence” and in the *Supplementary Reference Bibliography*.

122 See note 100.

123 L. Bancroft, J. Silverman and D. Ritchie (2012); J. Edleson et al. (2003) ; J. Edleson and O. Williams (eds.) (2006); Department for Child Protection (2013); .Linda Neilson (2001) (2017) note 118.

124 Ibid. See also Neilson (2017) 19, Chapter 11.

surprise that the characteristic patterns of behavior continue in post-separation perpetrator parenting practices, as the empirical domestic-violence research documents.<sup>125</sup>

Yet, when we turn to the case law, we find that few parent-child evaluators or courts commented on clear evidence of negative parenting patterns associated with domestic violence. Fifty eight of the cases<sup>126</sup> documented clear evidence of such parenting practices.<sup>127</sup> Twenty of the cases documented severe abusive and/or violent conduct on the part of children against mothers, presumably mirroring perpetrator conduct. Nonetheless experts and courts seldom associated negative parenting with the domestic violence, probably as a result of the almost total absence of domestic violence expert testimony in these cases.

Courts also failed to recognize or to consider the lingering effects of trauma on targeted adults and on children. In fact a number of judges suggested that continuing fear on the part of children or their protecting parents in the absence of recent incidents was irrational, manipulative or, at minimum, had no basis (for example *Children's aid society – waterloo v. L. (K.A.)*, 2010 ONCJ 80; *R.R. v. S.L.*, 2016 BCSC 1230). We might contrast this perspective with the scientific data. The National Scientific Council on the Developing Child at Harvard University, tells us that child fear associated with toxic levels of child stress in the home, for example as a result of severe or repetitive domestic violence between parents, can result in potentially long-term, developmental harm to children. The science also tells us that, when present, persistent fear and its harmful effects will continue until trauma is treated and fear is unlearned in safe, secure, supportive surroundings that do not expose children to additional stress or fear. Please review *Persistent Fear and Anxiety Can Affect Young Children's Learning and Development* on line at <https://developingchild.harvard.edu/resources/persistent-fear-and-anxiety-can-affect-young-childrens-learning-and-development/>.<sup>128</sup> We learn here that persistent fear in childhood can distort how a child perceives threat, can limit the child's capacity to distinguish threat from safety, can prevent the formation of healthy relationships, can negatively affect education, learning, memory and social behavior. The Council reports:

*Contrary to popular belief, serious fear-triggering events can have significant and long-lasting impacts on the developing child, beginning in infancy.*

*Children do not naturally outgrow early learned fear responses over time... fear learning and associated memories that occur early in life get built into our brain architecture.*

*Simply removing a child from a dangerous environment will not by itself undo the serious consequences or reverse the negative impact of early fear learning.*

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<sup>125</sup> Notes 123 and 124.

<sup>126</sup> Note that this does not mean that similar negative parenting practices were not present in the other cases. Courts will not necessarily comment on evidence that was not considered relevant in some way to the decision.

<sup>127</sup> Chapter 11 of Linda C Neilson (2017) *Responding to Domestic Violence in Family Law. Civil Protection and Child Protection Cases* (Ottawa: CanLII) on line. Refer to 11.1.10 in connection with negative post-separation parenting practices and 11.1.13 in connection with the potential risks to children connected to unsupervised contact with perpetrators that have been documented in the research. It is important to note, however, that not every perpetrator of domestic violence will engage in such practices. Nonetheless, it is important to assess for and identify these practices if they are present. The goal is to ensure, to the extent possible, positive, safe parenting for vulnerable children.

<sup>128</sup> Refer as well to Lynn Schafran (2014) note 26.

***Science clearly shows that reducing fear responses requires active work and evidence-based treatment. Children who have been traumatized need to be in responsive and secure environments that restore their sense of safety, control, and predictability – and supportive interventions are needed to assure the provision of these environments.***

*Other promising approaches include specific training for professionals who work with families experiencing trauma and the incorporation of developmental interventions for young children in programs that address domestic violence.<sup>129</sup>*

Similarly, the effects of domestic violence on adults do not immediately end when exposure to domestic violence ends. We interpret the behavior of others in accordance with past behaviors and experiences. Moreover, domestic violence can produce long-term psychological trauma and fear responses in adults as well as in children.<sup>130</sup> At the severe end of the scale, the lingering, indeed potentially permanent effects of brain trauma, for example as a result of strangulation,<sup>131</sup> being hit or banged on the head, are being medically scientifically documented now.<sup>132</sup> In short, continuing fear in the absence of recent incidents is a normal, not an abnormal much less a vindictive, response to having been targeted by domestic violence or family abuse in the past.

We also find instances of parental alienation advocates offering erroneous expert evidence. For example, parental alienation advocate Amy Baker was allowed by a court to testify in *Huckerby v Paquet* [2014] S.J. no 791 that “abused children are not as categorical or absolute in their views” toward abusive parents [as alienated children are], thereby suggesting that when a child rejects a parent, the likely cause is parental alienation and not domestic violence. Nothing in the case indicated that Dr. Baker was qualified as a domestic violence expert. Indeed had a domestic violence expert testified in the case, the court would have learned that child alignment with abusive parents against targeted parents, child fear and rejection of abusive parents, and child ambivalence to abusive parents are all

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129 Bold added by author, Dr. Linda Neilson. The quotations are from the National Scientific Council on the Developing Child at Harvard University (2010) [\*Persistent Fear and Anxiety Can Affect Young Children’s Learning and Development\*](#) on line.

130 Pamela Ponc et al. “Trauma- (and Violence-) Informed Approaches to Supporting Victims of Violence: Policy and Practice Considerations” in 2016 *Victims of Crime Research Digest No. 9* Canada Department of Justice on line; Judith Herman (2015) *Trauma and recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror* (Basic Books).

131 Research establishes a strong correlation between strangulation and potential lethal outcome. Medical doctors tell us strangulation can result in serious injury, even delayed death, long after the event. Physical signs are present in merely 50 % of cases. For additional information see educational materials posted by the Training Institute on Strangulation Prevention on line at <https://www.strangulationtraininginstitute.com/>.

132 Glynnic Zieman et al. “Traumatic Brain Injury in Domestic Violence Victims: A Retrospective Study at the Barrow Neurological Institute” February 2017, 34(4) *Journal of Neurotrauma* 867-880; Eve Valera and Howard Berenbaum (2003) “Brain Injury in Battered Women” 71 (4) *Journal of Consulting and Clinical Psychology* 797-804; Halina Haag, PhD research on traumatic brain injury from intimate-partner violence at Wilfrid Laurier University in Canada; United States Department of Justice “Traumatic Brain Injury and Domestic Violence” on line at [http://www.doj.state.or.us/wp-content/uploads/2017/08/traumatic\\_brain\\_injury\\_and\\_domestic\\_violence.pdf](http://www.doj.state.or.us/wp-content/uploads/2017/08/traumatic_brain_injury_and_domestic_violence.pdf).



‘normal’ responses of children to domestic violence.<sup>133</sup> Refer as well to the National Council on the Developing Child in connection with persistent fear mentioned earlier.

In *L.T. v. S.M.*, 2016 BCPC 124, the court outlines evidence of repetitive domestic violence assaults and exchanges of the child at police stations, concerns about the father’s physical discipline of the child, including expert concerns that the father might cause physical harm to the child. The child in the case was going to be a witness for the crown in the father’s forthcoming criminal trial; the mother reported that the crown prosecutor would be seeking a no contact order. The mother also reported concerns about the child’s anxiety disorder, the child’s alleged attempted suicide,<sup>134</sup> as well as bruises on the child who claimed they were caused by the father. There were also allegations in the case of the father’s abuse of the family dog,<sup>135</sup> and serious allegations of domestic violence that are associated, in domestic violence research, with a risk of lethal outcome.<sup>136</sup> Nonetheless the court was concerned the young child knew his father had hit his mother and could not “dismiss the possibility that if M.S.T. does not want to see his father, his resistance has been fostered by S.M.”. The father claimed parental alienation and that all of the mother’s allegations were lies. He characterized her turning to police, social services and courts as evidence of her vendetta against him. Throughout years of litigation and professional assistance the child had consistently expressed fear of the father. Numerous experts testified on behalf of the mother in favor of child safety and stability. Nonetheless the court substituted its own perspective at paragraph 24 that “one of the most destabilizing factors in M.S.T.’s life has to be his almost complete isolation from a parent with whom he had spent much of his young life”. The father’s anger, aggression and non compliance with legal obligations were excused on the basis of his embitterment with court processes. The court focused instead on the mother’s failure to ensure the child’s participation in supervised parenting with the father and for attempting to insist on professional supervision of access. The mother was also heavily criticized for turning to experts for help and for giving her child the ‘authority’ to decide not to see the father. The court concluded “S.M.’s resolve to restrict M.S.T.’s parenting time with his father is far more serious than L.T.’s petulant non compliance with a production order or disrespect for court decorum.” The father was granted compensatory parenting; the mother was fined for contempt. The evidence of negative parenting and inappropriate behaviour were excused on the basis that ‘no parents are perfect’ at paragraph 305.

From the case reports associated with *Karar v Abo El Ella*, 2016 ONSC 1564, 2016 ONSC 2575, 2016 ONSC 6284, 2016 ONSC 7926, and 2017 ONSC 33 we learn that the mother’s concerns about potential bias in that the court appointed parent-child had been a member of the committee that attempted, unsuccessfully, to have parental alienation introduced into the mental health Diagnostic and

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133 A. Cunningham and L. Baker (2004) *What About Me? Seeking to Understand a Child’s View of Violence in the Family* (London: Family Court Clinic); J. L. Edleson and J. O. Williams (eds.) (2007) *Parenting By Men Who Batter New Directions for Assessment and Intervention* (Oxford University Press); Dale Bagshaw, Thea Brown et al. (2010) *Family Violence and Family Law in Australia The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006* (Monash University); Lisa Hooker, Rae Kaspiew, Angela Taft (2016) [Domestic and Family Violence and parenting: Mixed methods insights into impact and support needs: State of Knowledge Paper](#) (New South Wales: ANROWS);

134 This case involved extremely high rates of litigation. Litigation becomes a control tool in domestic violence cases. The case reports indicate that the child had been diagnosed with Post Traumatic Stress Disorder, one of the well documented results of exposure to severe domestic violence.

135 Animal abuse is strongly associated with coercive domestic violence. See 4.6.4 in Chapter 4 of L. Neilson (2017) note 19.

136 Indicators of potential for lethal outcome are outlined in Neilson (2017) *ibid.* at 8.14.

Statistical manual were dismissed.<sup>137</sup> The father in this case had been charged criminally with three counts of assault, criminal harassment, and death threats. Domestic violence claims included threatened international abduction (strongly associated in empirical research with domestic violence),<sup>138</sup> forcible confinement, a death threat against both the mother and the daughter, break and enter, theft of the children's birth certificates and passports. (Theft of the children's birth certificates and passports, if established, indicate planned as well as threatened abduction.<sup>139</sup>) Nonetheless, the mother's claim for urgent relief and for increased security as a result of the threats and criminal charges were dismissed by the court on the basis in part that the mother had failed to "provide any evidence of efforts on her behalf to negotiate with the father to resolve the matter of supervision of his access visits with the children." The mother was criticized by the court for attempting to insist on professional supervision, which would have delayed the father's access to the children, for telling the children the father had killed a family pet and for hiring a security guard in connection with supervised access in contravention of the terms of the court order. In the face of a positive supervised access report,<sup>140</sup> the court decided that continued supervision of the father's access was unwarranted "except for the exaggerated fears of the mother." As a result of the mother's earlier false or erroneous assertions against a court appointed parent-child assessor,<sup>141</sup> and the mother's resistance to what she feared were lax security measures endorsed by the court, the mother was found to be in contempt of court and repeatedly ordered to pay costs. The mother was accused of exaggerating concerns about the children's safety and criticized for probably sharing her belief with the children that the father was dangerous. The court concluded in 2017 "Where one parent is charged criminally, there is generally a restraining order in the form of a recognizance that offers a measure of security. In this case, although serious, none of the charges against the father involve the children." (Presumably, the father was not charged criminally with the death threat against the child because the police were unable to prove that the email which contained the death threat against the daughter had been sent by the father.) The quotation also suggests an assumption that domestic violence, child fear, child abuse and negative perpetrator parenting practices are unrelated. Given the presence of factors in this case indicating, if established, potential for lethal outcome to the children as well as the mother,<sup>142</sup> why was no consideration given to ensuring a balanced analysis of the circumstances of these children by a domestic violence expert?

We might contrast court priority to concerns about mothers not supporting children's relationships with fathers with a seeming lack of concern by experts and courts in some of the parental alienation claim cases for child safety. From *A.A. v. S.N.A.*, 2007 BCCA 363, 2007 BCCA 364 and related cases involving the taxation of the father's solicitor's accounts following the father's successful parental alienation case (2008 BCSC 1223 and 2008 BCSC 1679) we learn that, following trial, despite reporting on the mother's repetitive resistance to the father's parenting of the child and concerns that the child was "hypersensitive to her mother's needs" the trial judge decided not to order a change in

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137 In part the mother was responsible for this reaction. She erroneously or falsely claimed that the assessor had a personal experience bias in favor of parental alienation.

138 L. Neilson (2017) note 19, Chapter 16.

139 *Ibid.*, Chapter 16 at 16.6.2 and 16.6.4.

140 One of the characteristic behavior patterns associated with domestic violence is positive behavior while being monitored in contrast to private behavior. Most supervisors of access are not domestic violence or child experts. Evidence from supervisors of access should not be relied on for assurances of child safety when access is no longer supervised. Refer to Nat Stern and Karen Oehme "The Troubling Admission of Supervised Visitation Records in Custody Proceedings" 75 *Temp. L. Rev.* (2002) 271. See also Fiona Kelly (2011) "Enforcing a Parent/Child Relationship at All Cost?: Supervised Access Orders in the Canadian Courts" *Osgoode Hall Law Journal* 49 (2) (2011): 277-309.

141 See note 137.

142 Discussion of lethality research and conclusions can be found In Chapter 8 at 8.14 of Neilson (2017) note 2.

custody to the father as a result of the court's inability to control and manage the chaotic day-to-day results of a forcible removal of a child from a close parental bond. The parents of the ten year old child were never married and had not lived together. The father's parenting experience with the child seems to have been limited to contact with the child while in the presence of the mother or professionals.

The father appealed the trial decision. During the trial the 'experts', who were not domestic violence experts, had focused on the mother and grandmother's resistance to the father's contact with the child, which they characterized as alienation detrimental to the child. It is not clear from the case reports whether or not the mother's claims of the father's firearms, narcotics use, violence, dangerousness and the child's fear and resistance to contact were ever fully investigated though we do know that the court expressed reservations about the mother's credibility and that her claims were denied by the father. The Court of Appeal accepted the father's parental alienation appeal, ruling that the trial judge had given priority to the child's immediate rather than long-term best interests. The appellate court ordered the immediate forced physical transfer of custody of the ten year old girl from her preferred parent and her grandmother, who had been her primary caregivers since her birth, to the father she was afraid of. The court also denied the child any direct or indirect contact with either her mother or maternal grandmother. Police were directed to enforce the order. The terms of the "unusual"<sup>143</sup> appellate order may be found in *A.A. v. S.N.A.*, 2007 BCCA 364. Subsequently, we learn from cases associated with the father's taxation of his lawyer's account that the father claimed he had not actually wanted custody of the child in the first place. In the taxation proceedings, the father's lawyer was complimented on her "excellent cross-examination skills" and for having "completely destroyed the expert for [the mother], Dr. Carol MacPherson." Now the father's lawyer and her assistant reported on the father's hostile, erratic behavior, his yelling and histrionics, and instability "in the office, where he would transform into a man yelling and screening about the judge and others involved in the judicial system and then the next day would attend with cakes and pastries and apologize for his behavior." We also learn of his accusations of a conspiracy between his own and the mother's lawyer. Of particular concern to [the father's lawyer] in terms of the father's potential dangerousness were comments by the father about knowing the mother's lawyer's "family, and knowing about them and where they lived." His lawyer commented that he was "the most difficult client in 30 years of practising law". What of the emotional well being and indeed physical safety of the ten year old girl ordered into his full time care and prohibited from any contact with her mother and grandmother with whom she had lived most of her life? While the record of the father's instability and dangerousness reported in the taxation case would not have been available to the appellate court - the appeal court decision predates the taxation cases - the facts make crystal clear the need for trial and appellate courts to abandon any and all assumptions about blame in connection with child resistance to contact and to consider very carefully and to investigate fully the reasons for child fear, concerns about child safety and stability, concerns about parental stability and mental health, abuse and violence, coercion and control patterns in the family, child and parental trauma, and problematic parenting on the one hand and parental warmth, parent-child attachments, child views and preferences on the other in cross claim cases.

Are parental rights more important to family courts than promoting child resilience and ensuring child and adult safety? In thinking about this issue, it might help to ask ourselves whether or not, if gender – and thus gender bias - were removed and facts, such as a father's family violence, death threats, drug use, criminality, hostility, erratic behavior and high levels of conflict between the parents – were

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143 Paragraph 30 of *Label v. Albanese*, 2008 BCSC 1223.

presented by child protection authorities, courts would deny children state protection and would order the authorities, as they do mothers, to place children in the unsupervised care of fathers in such cases.

Domestic violence researchers repeatedly have documented negative post-separation parenting practices on the part of perpetrators of coercive domestic violence, among them manipulation of children against the targeted parents (usually mothers).<sup>144</sup> When we focus our attention on the 33 cases in which the parental alienation claimant was also the domestic violence claimant, invariably mothers, we find that alleged perpetrators of both domestic violence and of parental alienation were granted unsupervised access, shared or primary care of one or more of the children in 69.7 %, the majority, of these cases. In *Quenville v Goodfellow*, 2017 ONSC 6549, the facts recited in the case indicate that the mother had had no contact with her oldest child, a 15 year old son, who was in the care of the father, for two years. The trial involved the youngest, an eleven year old. The mother sought a primary residence order and asked that access to the father be suspended until the child recovered from the father's parental alienation. The mother expressed concern about the father's involving the children in parental disputes, his denigration and his listening to her telephone conversations with the children. The mother's concerns about the father's use of pornography, the children's sexualized behavior, her claims of domestic abuse, inappropriate sexual behavior, physical abuse of the children, and stalking were dismissed – without analysis by a domestic violence expert<sup>145</sup> – on the basis that they were presented in order to gain “an advantage in the custody dispute”.<sup>146</sup> Despite an acknowledgement by the court that the father had actively undermined the bond between the oldest child and the mother, the court held that the mother's claims of domestic violence and her writing a public blog about her experiences accounted for her lack of relationship with the oldest child.<sup>147</sup> Then the youngest also aligned with the father and ran away from the mother. When the mother claimed parental alienation and sought a temporary period of no contact with the father to engage the youngest child in therapy, the court criticized the mother for assuming that “complete severance of all contact between Jacob and his father for a period of six months” would “allow him the opportunity to heal.” The court held, as a result of the mother's claim, that “granting Ms. Goodfellow primary residence of Jacob .. would put Jacob's meaningful and beneficial relationship with this father and brother at significant risk”. We might contrast this response with the perspective of courts when fathers claim parental alienation against mothers. The court granted the father sole custody and primary care of the oldest child in accordance with the oldest child's wishes, with access to the mother subject to the child's readiness to reestablish contact. The mother was granted sole decision making in connection with the youngest child with the two parents sharing equal parenting time on a week about basis.<sup>148</sup>

In only seven cases in which the parental alienation claimant was also the domestic violence claimant did courts severely restrict parenting contact with the father. In the vast majority of the cases, despite both domestic violence and parental alienation claims against fathers,<sup>149</sup> fathers were granted

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144 L Neilson (2017) note 2 at 10.12.6.

145 Nonetheless a number of parent-child assessors and therapists testified in the case.

146 Paragraph 61.

147 Given that the oldest child was a teenager, and probably embarrassed by the mother's public blog, this is not an unreasonable conclusion. See also *D.C. v P.C.*, 2017 PESC 26.

148 The point here is not necessarily that the case was wrongly decided. I think punitively denying children contact with their preferred, primary care parents (mothers or fathers) is unlikely to be in children's best interests. Instead of punitively denying children contact with preferred parents, surely the goal is to implement measures to ensure that parenting is safe and beneficial.

149 Courts appeared to be considerably more receptive to parental alienation than to domestic violence evidence, particularly when the domestic violence evidence was presented by mothers. Empirical research has demonstrated

unsupervised parenting time or even custody of the children, often in accordance with the views of the children. In other words even in cases where both domestic violence and parental alienation assertions are claimed by mothers against fathers, the application of parental alienation concepts appears to result in systemic bias against mothers in favor of fathers.

## PART THREE:

### Discussion and Concluding Comments

If we were to interpret family court responses to children in custody and access cases solely on analysis of cases that have accepted and have attempted to apply parental alienation theory, we might conclude that family courts have abandoned child-centred analysis of best interests of the child factors in favor of: attributing parental blame and assigning punishment for resistance to shared parenting, and insisting that children have or acquire positive parenting relationships with fathers.<sup>150</sup> It is important, however, to keep in mind that courts declined to make parental alienation findings in 50 % of the parental alienation claim cases (whether claims were advanced by mothers or fathers) and in 60 % of the cases involving parental alienation claims advanced by alleged perpetrators of domestic violence or child abuse. It is important to keep in mind as well statements in a number of recent appeal cases that may help to resolve some of the problems documented in this article.

The Court of Appeal for British Columbia reminds trial courts of the duty to focus on child best interests factors and is advising courts to exercise restraint in connection with use of punitive “draconian” orders that drastically alter child custody and parental care or that cut off children’s contact with a parent in *Williamson v. Williamson*, 2016 BCCA 87.<sup>151</sup> Although the court expressly declined in *Williamson* to resolve controversies surrounding parental alienation, it did remind trial courts of the need to take into account *Mohan* and *White Burgess* principles prior to admitting expert testimony on parental alienation. In *N.R.G. v. G.R.G.*, 2017 BCCA 407 the same court cautions trial courts to engage in “full and generous consideration” of best interests of children factors mandated by British Columbia’s *Family Law Act* and to avoid giving “inordinate weight” .. to “modifying the behaviors of the parents.” The appellate court opined that the trial court’s focus on the “battle between the parents” was not “an acceptable way of assessing the best interests of a child.” Also of concern to the appeal court was judicial assumption of parental responsibilities in the court order, more particularly ordering a parent to discipline the children in order “to ensure that the transitions from one household to the other occur.” The appeal court lifted trial court restrictions on the children’s activities proposed by the father as well as the prohibition on the children contacting each parent while away from that parent’s home. The principles set out in these two British Columbia appeal cases may help to correct some of the problems documented in this article.

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consistently that false claims of domestic violence and child abuse are rare, yet judicial scepticism permeates this collection of cases.

150 When father-child relationships are a positive benefit to children, clearly those relationships should be encouraged and supported. The central challenge in the legal system, however, is to avoid making any gender-based assumptions – positive or negative – and to conduct a thorough child-centred analysis of all best interest of the child factors.

151 From a gender perspective, it is interesting to note that the parental alienation claim was against the father in this case.

Also on a positive note in connection with some degree of support for parental alienation theory, clearly parental conduct that vindictively undermines a child's positive established relationship (attachment) with another caring, beneficial, supportive adult (paternal or maternal or gender neutral) is negative parenting. Indeed we know from the child development literature cited earlier that the factors that predispose children to positive developmental outcomes in the face of significant adversity include supportive adult-child relationships.<sup>152</sup> Nonetheless it is important to keep in mind that this factor is qualified by considerations of child stress, safety, stability and self sufficiency. Clearly when relationships are positive, children benefit from appreciable contact with both or all parents. Clearly as well, a parent who undermines a child's access to a beneficial relationship with the other parent is not acting in a child's best interests. Nonetheless the consideration applies only when those relationships are indeed beneficial to the child and is considered along with all of the other pertinent best interest of the child factors.

On a more negative note, our examination of parental alienation claim cases indicates a pattern of implicit judicial bias against mothers/primary care givers and against domestic violence evidence in the cases that endorse parental alienation theory. Resort to parental alienation checklists, such as those recited in *M.M.B. v. C.M.V.*, 2017 ONSC 3991,<sup>153</sup> *L. M. v J. B.*, 2016 NBQB 93 are of particular concern. The checklists should not be used in the legal system for three reasons (in addition to concerns about research validity and reliability):

- (1) many of the 'typical behaviors' listed in the checklists (exhibited by children, by favored or by rejected parents) can equally be associated with child adversities other than parental alienation (such as negative parenting practices, toxic levels of child stress, domestic violence, extensive parental conflict, excessive litigation, children's negative experiences with 'draconian' court orders or police powers, mental health issues, children's realistic fear, lingering adult and/or child trauma from past experiences, lack of parent-child warmth, strong positive parental attachments with the preferred parent, or weak parental attachments with the other parent)
- (2) the checklists create presumptions that preferred, primary care parents, most of whom are mothers, are to blame for child behavior, and
- (3) use of the checklists results in systemic gender bias in the legal system.

Abandonment of the checklists and careful scrutiny of the scientific reliability of Parental Alienation concepts prior to admission of expert evidence ought to allow courts to assess the reasons children resist contact without resorting to assumptions.

In addition to gender bias, parental alienation cases demonstrate limited attention to scientifically documented child development factors and limited understanding of the impact of domestic violence on parents or children. Trauma affects demeanour, disclosure, fear, and protective responses. In recognition of similar perceptual problems in courts in the United States, the National Council of Juvenile and Family Court Judges is recommending that all judicial officers receive training on:

- *How to identify the nature and context of abuse in a family, its implications for the children and parenting*
- *Child development*
- *Trauma and how it affects children and parents (including their participation in litigation)*

152 Centre on the Developing Child, Key Concepts, "Resilience" on line at <https://developingchild.harvard.edu/science/key-concepts/resilience/>.

153 The parental alienation claim in this case was advanced by the mother. The mother was granted full custody; family reunification therapy was ordered. The children were denied contact with the father or the father's family for a minimum of 90 days or until further order of the court. Police were directed to enforce the order.

- *Overcoming implicit bias and how to view each case as a blank slate.*<sup>154</sup>

Clearly judicial and professional education on the same issues is also warranted in Canada.

The chilling effects of parental alienation claims may extend far more deeply and broadly throughout the legal system than the patterns documented in this case law study suggest. In *Spousal Abuse, Children and the Legal System Final Report*, funded by the Canadian Bar Association, Law for the Futures Fund,<sup>155</sup> we documented law practice and procedural filters that result in evidence of domestic violence and negative parenting being omitted from legal consideration. Courts can only make decisions on the basis of facts in evidence. In this study we found that domestic violence and child abuse claims were characterized as evidence of primary parents' attempts to alienate the children against the other parent and speculated that in such circumstances protective parents may be advised not to present such evidence rather than risk loss of the children. If parental alienation claims are resulting in the silencing of women and in the suppression of evidence, as Susan Boyd, Professor Emerita, University of British Columbia Law School, and Pamela Cross in Ontario contend, it is likely that at least some, if not many, of the non-domestic-violence cases included in this study actually involved domestic violence or child abuse. Thus parental alienation claims may be deflecting attention from child best interests in a larger percentage of cross-claim cases than this study suggests.<sup>156</sup>

Research on the effects of parental alienation claims in domestic violence cases is currently being conducted by academic researchers across Canada led by Dr. Simon Lapierre of the University of Ottawa. We can expect this research to generate additional data and analyses, shedding new light on many of the issues raised in this article.

In closing, my hope is that, with additional understanding of systemic gender bias, child development, and domestic violence, the legal system in Canada will abandon reactive assignments of blame and punishment as well as the use of police power against children. Children, and particularly youth, have the right to be heard and to have their views respectfully considered. "Draconian" orders can be replaced by supportive, compassionate orders. Reliance on single controversial theories can be replaced by detailed scrutiny of child best interest factors and by reliance on scientific child-development principles that have broad professional and academic acceptance. Finally, adult-and-child-trauma-informed knowledge and practice can replace victim blame in order to ensure safe and effective decisions for children and their families.<sup>157</sup>

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154 National Council of Juvenile and Family Court Judges (2017) *Custody and Visitation in Civil Protection Orders Guiding Principles and Suggested Practices for Courts and Communities* (NCJFCJ) at pages 15 and 16.

155 Linda C. Neilson et al. (2001) *Spousal Abuse, Children and the Legal System* (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research) on line.

156 When a history domestic or family violence exists but the evidence is not presented to the court, for example because of a fear that such claims will be interpreted adversely as indicative of parental alienation, the judicial decision will not identify domestic or family violence as a factor in the case.

157 Neilson (2017) note 2 offers access to legal and educational materials that can be used to improve responses to domestic violence in family law, civil and child protection cases. Useful educational materials on child and adult trauma, some of them designed for use in the legal system, include National Council on Juvenile and Family Court Judges *Trauma Informed System of Care* on line; National Center on Domestic Violence, *Trauma & Mental Health Trauma-Informed Legal Advocacy (TILA) Project* materials on line; Pamela Ponio et al. "Trauma- (and Violence-) Informed Approaches to Supporting Victims of Violence: Policy and Practice Considerations" in *Victims of Crime Research Digest* No. 9 (Department of Justice, Canada); Lori Haskell (2004) *Getting the Most Out of Trauma Therapy* (Centre for Addiction & Mental Health) on line; American Bar Association (2016) *Trauma-Informed Legal Practice: Communicating With Children Who Have Experienced Trauma* on line; Jessica Griffin (2016) "Winter 2016: Trauma-Informed Practice" Boston Bar Association Family Law Newsletter; Lisa Pilnik et al. *Identifying Polyvictimization and Trauma Among*

