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Chair's Column

As One Door Closes, Another Door Opens

by Stephanie Frangos Hagan

As my year as chair of the section comes to an end, I look back on this year's accomplishments with a sigh of relief and a sincere sense of satisfaction. The Family Law Section is the largest section of the NJSBA, and by far the most active. As a section, I believe we have fulfilled our mission to serve and protect our clients, their families and especially their children from the negative impact of divorce. By regularly reviewing, commenting and testifying on legislation, we continue to strive to do the very best to improve the laws that effect the practice of family law. In addition to legislation, we also review administrative proposals, rules and statutory changes, as well as issues that arise between the bench and the bar, all in an effort to advance and promote the practice of family law.

In May of last year, I took the reins from the very capable Tim McGoughran, who led our section with dignity and pride. This year, Michael Weinberg took the reins from me on May 17 at the NJSBA Annual Meeting in Atlantic City. As I pass the baton to Michael, I would like to take this opportunity to recap this past year and thank the many people who assisted in making my year as chair a success, including the officers of the section, my partners and my family. Chairing the section is no easy task, and requires team effort and support. I am extremely grateful for the support I received from the officers of the section—Mike, Sheryl, Ron, Robin and Tim—as well as my partners—Frank, Phyllis, Debbie and Alyssa. And, of course, this past year would not have been a success without the love and support of my husband and three children.

Beginning with our first meeting at the Law Center in June, the officers and the members of the Family Law Executive Committee showed their support and commitment to the section. The level of comradery amongst our members is second to none.

In July, the officers and many of our members gathered for our annual South Jersey Meet and Greet networking event at Café Aldo in Cherry Hill. Thank you to Marla Marinucci for organizing this event each year, which allows the officers of the section to spend time networking and getting to know members of our South Jersey community.

I would also like to thank our young lawyers co-chairs, Tom Roberto and Alix Claps, for their hard work and dedication this past year in organizing their Kick-Off Networking event at the Asbury Hotel Roof Top Bar in September, their annual South Jersey Trivia Night at the Chop House in Gibbsboro in November and their annual Sip and Paint event in Morristown in April. All of these events were great networking opportunities for our members, both young and old.

As a section, we not only enjoy networking with our members, but giving back to the profession and to the community. In December, we held our annual holiday party at the Oyster Point Hotel, in Red Bank. As is our tradition, the holiday party included a silent auction and basket raffle, which raised more than $8,000 for the Monmouth County Legal Aid Society. Thank you to Tim McGoughran, Allison McGoughran and the young lawyers co-chairs and sub-committee for spending their time and energy soliciting items for the auction and wrapping the many baskets for the raffle.

Perhaps the best example of the section's comradery and determination this year was shown in March, when over 225 people attended the Family Law Section Annual Retreat at the Baha Mar Resort in the Bahamas. The retreat was a huge success despite all of the weather issues that had plagued the trip from the beginning. As many of you are aware, the retreat was originally scheduled to take place on the beautiful island of Saint Thomas. Unfortunately, Mother Nature had other ideas when Hurricane Maria decimated the island in late August, leaving little time to find a new destination. Luckily, it takes a lot more than a hurricane to stop our section from planning a retreat. With some hard work and determination, in a matter of weeks we were able to negotiate a contract with the newly opened Baha Mar Resort in the Bahamas.

However, little did we know Mother Nature was not done testing us. In nothing short of what can only be described as a cosmic joke, on the very day our retreat was to begin New Jersey was hit by the third snowstorm in March, causing United Airlines to cancel over 780 flights. Once again, our members rose to the occasion and did whatever it took to make sure they made it to the Bahamas. In a testament to our resilience, it was truly heartwarming to listen to the many stories of members scouring the internet into the wee hours of the night and early morning trying to find alternate flights.

For those who rallied, they were not disappointed, as their resiliency paid off. The more than 225 people who attended enjoyed a well-deserved beach getaway at a fabulous resort, three days of networking and continuing legal education (CLE), great food, warm sun, fabulous golf and an all-around great time, and no one missed the snow.

Our section worked hard this year to advocate for our members and to be heard on the reoccurring alimony reform bills that continue to pop up in Trenton. We continued to testify in Trenton, met with senators, legislators and their staff on legislation dealing with domestic violence, parental rights, college contribution, and child support, as well as recent legislation advocating a rebuttable presumption of joint legal and physical custody.

Indeed, at my last meeting as chair, members of our section's executive committee held a spirited debate over recent proposed legislation to ban all marriages under the age of 18. Although there were strong views on both sides, in the end, in a testament to our strength and dedication to our profession, our members came together to agree upon a unified position on the bill.

This past year, we saw our efforts to change the standard used in relocation cases pay off with the *Bisbing* decision, where the New Jersey Supreme Court did something it rarely does, reversed its previous 16-year-old ruling. Our section had advocated for years that the standard in relocation cases should be the 'best interest of the child.' The section submitted an *amicus* brief on behalf of the NJSBA, which was artfully argued by Tim McGoughran and supported a change in the standard used in relocation cases. In fact, our section had proposed legislation to change the standard used in relocation cases prior to the ruling in *Bisbing*.

Our section was also asked to review and comment on reports from the New Jersey Supreme Court Rules Committee. Within days of being sworn in as chair, I testified in Trenton along with other members of our committee on proposed rule changes, which would require court-appointed family law mediators to file to collect their fees in small claims court, as opposed to the family part. Our committee members also testified with regard to the inconsistencies from county to county in the probation notices regarding the new child support statute and Rule 1:38 regarding the need to limit online and keep confidential access to complaints, as well as certifications, filed in the family part, which often contain financial information as well as confidential statements regarding the care and custody of the parties' children. Indeed, Justice Stuart Rabner allowed our section to have input into developing a uniform set

of forms and notices for probation and family law mediators, who, among other things, would now be allowed to file in the family part or special civil part in order to obtain a judgment for their fees.

Our section also continued, this past year, to advocate for *pro bono,* or in the alternative CLE credit, for those of us who volunteer countless hours each year to sit on early settlement and blitz panels in a successful effort to reduce the backlog that persists in the family part.

This year, the section organized several CLE events, including the seminars in October in Madrid, Spain, during the NJSBA Mid-Year Meeting and the annual Hot Tips Panel at the Law Center in November, led by Sheryl Seiden. Once again, the pinnacle of our CLE programs was the last weekend in January, during our annual Family Law Symposium at the Hyatt Regency in New Brunswick. As chair of the section, I had the privilege of chairing the committee that organized the panels and the honor of moderating the symposium. It was truly a worthwhile experience working with so many talented individuals to create such a great program.

On Friday evening of the symposium, we had a great program that was moderated once again by John DeBartolo and attended by approximately 200 people. On Saturday, almost 600 attendees watched over 25 speakers discuss various topics in an in-depth fashion. I was very proud of all of our speakers and want to thank them, as well as the members of the Judiciary who sat on the panels and provided valuable insight to the topics presented. The enthusiasm of the speakers on the panels, which were led by our officers, Mike, Tim, Sheryl, Ron and Robin, was truly amazing. Of course, there was standing room only with regard to the many sponsors and vendors.

At our annual meeting this year we honored Jane Altman with this year's Tischler Award, for her countless years of hard work and dedication to the section and the practice of family law. I could think of no better recipient than Jane, who has and continues to be a huge supporter of the section and is always one of the first to lend a hand with any issue that arises.

The Family Law Section values its bench/bar relationship, and for more than 20 years welcomed sitting and retired judges to attend our Family Law Executive Committee monthly meetings. Unfortunately, we received notice from the Administrative Office of the Courts that despite our strong efforts to continue this policy, sitting judges are no longer allowed to attend our monthly executive committee meetings. I think I speak for all of the members of the executive committee when I say this is a huge disappointment and a tremendous blow to our bench/bar relationships. There is nothing more important to our practice than to keep the lines of communication open between the bench and the bar.

Indeed, in May, at our annual bench/bar seminar held at the Annual Meeting in Atlantic City, we honored Judge David Issenman, who received this year's prestigious annual Serpentelli Award for his years on the bench, as well as his hard work and dedication to the practice of family law.

It has been a rewarding, fulfilling and memorable year for me as I say goodbye and thank you all again for your support and good wishes throughout the year, and I congratulate Mike as he takes over the reins. I know our section is in good hands. ■

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Editor-in-Chief's Column

MESP Panelists Should Receive *Pro Bono* Exemption

by Charles F. Vuotto Jr.

This column submits the proposition that the attorneys of this state who volunteer substantial time, skill and knowledge each year to the Matrimonial Early Settlement Program (MESP), a program that assists the Court and the public, should receive *pro bono* exemptions.

Efforts in this regard began in earnest in 2015, when Carolann M. Aschoff (the Hudson County MESP chair) gathered the MESP chairs of the other 20 counties and the Early Settlement Panel Statewide Organization (ESPCSO) was born. The ESPCSO's mission was to elevate the MESP and seek substantive benefits for its panelists.

In support of these efforts, Timothy F. McGoughran, in his role as chair of the NJSBA Family Law Section, appointed an *ad hoc* committee at the June 28, 2016, Family Law Executive Committee meeting. The purpose of the committee was to explore the concepts of early settlement panelists being compensated either by continuing legal education credit; an exemption from *pro bono* assignment; or, indeed, some type of monetary compensation as takes place in the Civil Part under Rule 4:21A-1 *et. seq.* for civil arbitrators. That *ad hoc* committee was chaired by Amy Shimalla.

Aschoff, as head of ESPCSO,[1] wrote to Judge Glenn A. Grant, J.A.D. (acting administrative director for the Administrative Office of the Courts) on behalf of the 21 county chairs of the Matrimonial Early Settlement Panel Program, seeking recognition for the panelists in the form of legal education credits and an exemption to the *pro bono Madden* list.[2]Aschoff provided a brief overview of the Matrimonial Early Settlement Panel Program in each county, which is mandated under Court Rule 5:5-5.

As we all may know, with the adoption in 1971 of a version of the Uniform Divorce and Marriage Act, which formalized the introduction of the no-fault divorce, a significant explosion of divorce filings occurred in the family court system. Massive backlogs developed to the point where some counties required three to five years to resolve prejudgment matters. This backlog spawned the MESP, creating an avenue of alternative dispute resolution in a world of judicial gridlock. Early settlement panels (ESPs) established by county bar associations started popping up informally and, ultimately, were formally established, becoming a statewide mandatory Court Rule program.

Panelists will usually receive their panel assignments prepared by the ESP coordinator months in advance. Many panelists spend considerable time before the panel date reviewing these submissions. All individuals with a pending divorce case, whether they have attorneys or are self-represented, must appear before an early settlement panel. The court can also assign post-judgment cases to a panel. The panelists make good faith efforts to rearrange their own personal schedules, appointments and court dates to allow them to appear and participate on the panels. On average, panelists will preside over scheduled panels (which can amount to between one and six panels in a day) for at least four hours at the courthouse. Many counties have MESP panel schedules that require each panelist to appear up to four times per year, and in some counties up to eight times. Most county panels consist of two panelists (usually one male and one female). During the panels, the panelists will apply statutory and case law, as well as their own professional experience, in making their recommendations to the litigants and their attorneys. In some counties, the panelists will also run the child support guidelines to assist the litigants. Also, in some counties, the panelists will make written recommendations regarding their settlement analysis. Therefore, it is virtually indisputable that the MESP has assisted the courts in settling cases for more than three decades through the substantial time and effort of volunteers from the family law bar in the various counties of the state. The program represents the ultimate expression of cooperation between the bench and the bar, which the family bar is very proud of. Participation in the MESP is a time-consuming responsibility these volunteer attorneys provide to the public and the courts without remunera-

tion or other substantive benefit. Without this meaningful contribution, burgeoning family law dockets may very well come to a grinding halt. Certainly, no one wants to see this happen. It would not benefit the bench, the bar or the public at large.

Aschoff and other members of the ESPCSO continue their organization with the sole purpose of improving and elevating this very important program. Its value to the courts and the public is immeasurable. It is safe to assume that the bench and the bar want to attract the best and the brightest to the program as well, and believe the efforts of the panelists should be recognized like the hard-working volunteer members of the Ethics Committee and the Fee Arbitration Committee (just to give two of many examples). To that end, Aschoff sought Judge Grant's governance in offering benefits to the hard-working attorneys who volunteer much time and knowledge to the MESP. By way of letter dated Aug. 1, 2017, Aschoff submitted the request of the ESPCSO for *pro bono* exempt status pursuant to Rule 1:21-11, 12. She explained to Judge Grant that the program provides valuable assistance to litigants through the cooperation of *pro bono* volunteers who offer voluminous hours and effort to the court each year. Aschoff further explained that without these volunteers, an incalculable number of cases would continue through the system further backlogging an already overburdened family court docket. As such, she requested recognition for those efforts by taking advantage of the opportunity provided by Rule 1:21-11,12 (a), which is commonly known as the *Madden* exception, based on voluntary qualifying *pro bono* service.

Judge Grant responded by way of letter dated Sept. 18, 2017. He couched this in terms of a request to be added to the *pro bono* Exemption 88, which would relieve said attorneys from responsibility of taking *pro bono* cases assigned through the *Madden v. Delran* list the following year pursuant to Rule 1:21-11,12. Judge Grant graciously recognized that the work of the attorneys who serve as panel members in county early settlement programs has been important to the operation of the justice system for over three decades. He further recognized that these volunteer attorneys assist the courts with settling the financial and property distribution aspects of marital dissolution cases, thereby avoiding litigation, a costly trial, and possible appeal, as well as easing the emotional burden that can be associated with litigated matrimonial cases. Judge Grant extended his appreciation to the volunteers who work as panel members and facilitate the success of these programs throughout the state. However, in the end, he indicated that he was not able to recommend to the Supreme Court that this volunteer work be added to Exemption 88. He did note, however, that the *pro bono* assignment program is currently under review, and if he later determines it would be appropriate to recommend to the Court that Exemption 88 be expanded to include volunteer work for the county early settlement programs, he will reach out to Aschoff.

The New Jersey State Bar Association, upon learning of Judge Grant's response, decided to intervene. Angela Scheck, the executive director of the New Jersey State Bar Association, and Jeralyn Lawrence, the secretary of the New Jersey State Bar Association, contacted Aschoff to obtain the background information on EPSCO's efforts. The request for *pro bono* exemption for MESP panelists was added to the other items on their agenda that they presented to the Supreme Court in March of this year. The Supreme Court listened and requested follow-up information, including the number of panelists in the state, which is approximated at 1,150. The state bar is in the process of preparing a letter to submit the information requested. The family law bar will wait patiently and hopefully upon submission.

The fact that family lawyers serve in this role uncompensated in any manner appears unique in the court system. This is not the case in all parts of the superior court. In the civil part, there is also a mandatory arbitration program. Unlike the family part, however, civil arbitrators are compensated by court rule. This compensation is found in Rule 4:21A-1 *et seq.*, where qualifications and the appointment of arbitrators are largely overseen by county bar associations. By rule, those arbitrators are paid $350 per diem for a single panel and split a $450 per diem for a two-person panel. In the criminal part, public defenders are appointed and paid. In addition, pool attorneys are assigned and paid in cases where multiple defendants create a conflict for the public defender's office.[3] To be clear, however, this author is not suggesting compensation by way of dollars to MESP volunteers, but rather a *pro bono* exemption.

Compounding the current decision not to grant a *pro bono* exemption to ESP panelists is the fact that the Court also enacted (through court rule) mandatory economic mediation, which requires participant mediators to provide two free hours of service. Many of these family law mediators are also volunteering their time as ESP panelists. Further still, and as a result of *J.E.V.*,[4] Chief

Justice Stuart Rabner and a unanimous Court ruled that litigants have a right to appointed counsel in contested adoption matters, stating:

> As noted above, this Court has found that due process requires appointment of counsel to indigent litigants in various settings. Given the fundamental nature of the right to parent that may be lost forever in a disputed adoption hearing, there is no room for error here. We therefore hold that indigent parents who face termination of parental rights in contested proceedings under the Adoption Act are entitled to have counsel represent them under Article I, Paragraph 1 of the State Constitution.

In *J.E.V.* the court specifically noted that until some state funding occurs, the bar association and family law attorneys will be bearing the brunt of these assignments. The court stated:

> The very reasons that call for a lawyer to be appointed also *favor the appointment of attorneys with the experience to handle these matters*. Contested adoption proceedings raise important substantive issues and can lead to complicated and involved hearings. The Office of Parental Representation in the Public Defender's Office has developed expertise in this area from its fine work in state-initiated termination of parental rights cases. Without a funding source, we cannot direct the office to take on an additional assignment and handle contested cases under the Adoption Act. See *Crist*, *supra*, 135 N.J. Super. at 575-76; *see also Pasqua, supra*, 186 N.J. at 153.
>
> In the past, as we noted in *Pasqua*, "the Legislature has acted responsibly" and provided counsel for the poor when the Constitution so requires. Ibid. For example, after *Crist*, the Legislature enacted N.J.S.A. 30:4C-15.4(a), which directs judges to appoint the Office of the Public Defender to represent indigent parents who ask for counsel in termination of parental rights cases under Title 30. Once again, we trust that the Legislature will act and address this issue. *See Pasqua*, *supra*, 186 N.J. at 153.
>
> In the interim, we have no choice but to turn to private counsel for assistance. We invite volunteer organizations to offer their services, as *pro bono* attorneys have done in other areas. See, e.g., *In re* Op. No. 17-2012 of Advisory Comm. on Prof'l Ethics, 220 N.J. 468, 469 (2014). *Until the Legislature acts, we may need to assign counsel through the Madden list, which is not an ideal solution*. *See Madden v. Delran*, 126 N.J. 591, 605-06 (1992). [emphasis added][5]

It is clear that this language envisions family lawyers getting these appointments in difficult, emotionally charged and draining cases. At some point the questions arise: When will it be enough? And why are family lawyers treated differently than civil or criminal lawyers? These questions are worthy of discussion, but are beyond the scope of this column.

As officers of the court, we all realize that we have a *reasonable* obligation to perform *pro bono* service that goes along with the privilege of having our law license. Our practice is a noble one, and we should be proud of the service we provide to society. However, the burden of *pro bono* service appears to fall disproportionately on family lawyers, in particular. Sadly, for the most part, the good work of early settlement panelists and other volunteer family law attorneys goes unrecognized in a meaningful way.[6]

There are approximately 1,150 family law attorneys who serve on ESP panels across the 21 counties of our great state. Although not an insignificant number, it is only a fraction of the total active and resident attorneys in the state (estimated at over 42,000[7]). Granting those attorneys who serve on ESP panels and meet a reasonable set of criterial p*ro bono* exemption should not result in any material impact on the laudable goals of the *Madden* list unless those goals are being met disproportionately by the family bar.

This issue is long overdue for review. The road to the proper recognition of the volunteer efforts of family lawyers serving in the Mandatory Early Settlement Panel Program started in 2015. This author would like to see it come to fruition in 2018. This author respectfully submits that the Supreme Court should provide recognition in the form of a *pro bono* exemption for the members of our profession who volunteer their valuable time to the MESP. The program has worked well as one facet of the alternative dispute resolution process in the family part. Panelists have served voluntarily and happily for many decades. This author believes to refuse a *pro bono*

exemption is troubling, to say the least. If such reasonable accommodation is not granted, one is hard-pressed not to muse: *What would the court system do if ESP panelists refused to serve?*

Special thanks is given to Carolann M. Aschoff, head of the Early Settlement Panel Chairs Statewide Organization, and Timothy F. McGoughran, past chair of the NJSBA Family Law Section, for their assistance with this column.

Endnotes

1. This group consists of the county MESP coordinators, chaired by Carolann Aschoff, of Hudson County. This group was formed in an attempt to promote professionalism and uniformity to the MESP vicinage-based program as codified under Rule 5:5-5 and Rule 5:5-6.
2. In *Madden v. Delran*, 126 N.J. 591 (1992), the Supreme Court reaffirmed the bar's duty to represent indigent defendants without pay where the Legislature has made no provision for the public defender to represent defendants who are entitled to counsel. Attorneys are assigned *pro bono* cases through the Administrative Office of the Court's *pro bono* computer system, which maintains an alphabetical list of attorneys eligible for *pro bono* assignment for each county.
3. *See* McGoughran's prior column entitled What Are We, Chopped Liver?, published in 37 *NJFL* 2 (Nov. 2016).
4. *In the Matter of the Adoption of a Child by J.E.V. and D.G.V.*, 2016 N.J. LEXIS 710, *37.
5. *In the Matter of the Adoption of a Child by J.E.V. and D.G.V.*, 2016 N.J. LEXIS 710, *40.
6. 37 *NJFL* 2 (Nov. 2016).
7. *See* ABA National Lawyer Population Survey for 2017 found at https://www.americanbar.org/content/dam/aba/administrative/market_research/National%20Lawyer%20Population%20by%20State%202017.authcheckdam.pdf.

Executive Editor's Column

Arbitration Clauses and Retainer Agreements: Exploiting the Client or a Practical Approach?

by Ronald G. Lieberman

Can an attorney include a clause in his or her retainer agreements that mandates that any and all disputes between the attorney and the client, including malpractice claims, will be arbitrated? If that clause is permissible, should an attorney include it in the retainer agreement?

Guidance on those questions was just provided in the recent decision from the United States Court of Appeals for the Third Circuit in the matter of *Smith v. Lindemann, et al.*[1] In that case, a matrimonial litigant, who had hired and fired four lawyers, sued each of these lawyers for legal malpractice at the conclusion of her case. One of the lawyers sought to enforce an arbitration clause in his retainer agreement with the former client. The client argued that New Jersey law prohibited arbitration provisions relating to malpractice claims.[2]

In the *Smith* matter, the clause read "[s]hould any difference, disagreement or dispute between you and the Law Firm arise as to its representation of you, or on account of any other matter, you agree to submit to such disagreements in binding arbitration."[3] The arbitration clause further read "signing of this agreement will be deemed your consent to the methods of alternative dispute resolution set forth in this section, and constitutes a waiver on your part and on the part of the Law Firm to have such disputes resolved by a court which may include having the matter determined by a jury."[4] The United States Court of Appeals for the Third Circuit cited the Federal Arbitration Act as permitting such claims to be arbitrated, and further held that the Federal Arbitration Act overruled any conflicting state law.[5] The court held that arbitration agreements were viewed as being on equal footing with all other contracts, which could not interpret state law differently in the context of arbitration.[6] As a result, the Third Circuit Court of Appeals found that the former client failed to explain why a written or oral warning needed to use the word 'malpractice' to be enforceable, and found that the arbitration provision in this matter was straightforward.[7]

The Third Circuit Court of Appeals then held that all arbitration provisions must be clear to the consumer, and the former client in this case never indicated what would be unclear about the arbitration provision in this matter.[8]

The *Smith* decision is an interesting case relating to the relationship between an attorney and a client because attorneys are well aware of the ability of a client to sue for legal malpractice within a six-year statute of limitations time period.[9] Now that attorneys are permitted to have their retainer agreements mention an arbitration of any claims between the client and the law firm, should the attorney do so?

Certainly, clients are consumers of goods and services in other areas of their lives and likely face arbitration provisions in other contracts, be they with corporations or financial institutions or credit card companies. So, no consumer-client should be surprised by the idea of arbitration in a broad context. Given the view that arbitration is favored and arbitration clauses are presumptively valid,[10] the client must agree to arbitrate any dispute before it can be enforceable.[11] The provision in any retainer agreement that would require the arbitration of malpractice claims between the attorney and the client needs to be clear or, at the very least, mimic the language in the *Smith* retainer agreement. But, there can be no harm to the attorney in placing the terms 'legal malpractice' or 'attorney malpractice' in the arbitration clause so the client cannot claim a lack of understanding regarding the scope of the arbitration clause. If the attorney chooses to have the clause included in his or her retainer agreement, the client should be made to initial each page to avoid any argument by the client that he or she did not actually read the retainer agreement.

The question then becomes whether the attorney, as a fiduciary to the client, is taking advantage of the client through the lawyer's expertise in retainer agreements by adding that arbitration clause. All transactions between a

client and a lawyer should be fair and reasonable, so is there any harm in the attorney offering the client the opportunity to have independent counsel before signing the retainer agreement?

Now that the ability to have such a binding arbitration clause has been sanctioned by the federal courts looking at an interpretation of the Federal Arbitration Act as it relates to New Jersey law, it will be up to each attorney to decide whether he or she wants to go down this road.[12]

Endnotes

1. No. 16-3357 (Sept. 21, 2017).
2. *Ibid*. at slip opinion at p. 1.
3. *Id*.
4. *Id*.
5. *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 533 (2012).
6. *Buckeye Check Cashing, Inc. v. Cardegna*, 546, U.S. 440, 443 (2006).
7. *Id*.
8. *Id*.
9. N.J.S.A. 2A:14-1; *McGrogan v. Till,* 167 N.J. 414 (1999).
10. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986).
11. *United Steelworkers of America v. Warrier & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).
12. The client in *Smith* placed emphasis in *Kamaratos v. Palias*, 360 N.J. Super. 76 (App. Div. 2003), which asserted that a retainer agreement with a commercial arbitration clause waiving any right to access for disputes in the attorney-client relationship should be viewed as unenforceable. The *Smith* Court held that the position from the Appellate Division in 2003 was "clearly inconsistent" with the U.S. Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) that held that state law may not prohibit the arbitration of any type of claim.

Parental Alienation: An Overview of the Available Case Law

by Michelle Altieri

Parental alienation has generated a wealth of books, scholarly articles, and other literature discussing its origins, clinical characterizations, controversies surrounding the syndrome, and even its notoriety in the mainstream media and television.[1] While there continues to be much attention given to parental alienation in social media, there is a dearth of case law in New Jersey on the subject.[2] In fact, most of the cases discussing parental alienation are unpublished opinions that do not squarely address the issues and controversies surrounding the phenomenon itself. These cases, therefore, provide little guidance to practitioners who are either pursuing or defending against claims of parental alienation. This article will discuss a few cases that shed some light on the issues that arise from claims of parental alienation, including potential tort claims a parent engaging in alienation could face. While most of the cases cited in this article are unpublished opinions and are not binding upon any court, these opinions may be cited as secondary authority in accordance with the Rules of Court.[3] Hopefully, they also will assist the reader in recognizing the issues that arise with claims of parental alienation, crafting arguments to be advanced on a client's behalf, and formulating approaches to resolve cases with these toxic issues.

M.A. v. A.I.

In *M.A. v. A.I.*,[4] the parties had two children who aligned with their father at the time of the parties' divorce, and displayed "signs of overt hostility and anger towards their mother."[5] The situation did not improve as the divorce litigation proceeded, and the children refused to spend time with their mother, drive with her or eat meals she prepared.[6] Even after both parties agreed to hire a therapist to assist the children, the children's relationship with their mother only deteriorated.[7] The court found that the children's relationship with their mother remained strained after spending time with their father.[8] Both parties retained custodial evaluators and the trial court appointed a guardian *ad litem* for the children.[9]

While the divorce was pending, the mother ultimately moved for sole legal and physical custody of the children for a period of six months and requested permission to enroll the children in a reunification program located in California.[10] The trial court conducted a hearing over 23 days, during which both parties, their experts, the court-appointed custody expert, and the guardian *ad litem* testified.[11] The court-appointed expert testified that "[w]hen one considers the different symptoms of parental alienation, one is struck by the fact that the children did demonstrate many of the characteristics cited in the literature."[12] The court-appointed expert opined that the alienation was "moderate to severe."[13] The trial court granted the mother's application for sole legal and physical custody, permitted her to enroll the children in the reintegration program, suspended the father's parenting time, and barred his contact with the children for a period of 90 days.[14] In rendering its decision, the trial court found the father had been pivotal in ensuring the children rejected their mother; "empowered" the children to act in a manner that was inappropriate toward her; and involved the children in the litigation, including discussing the proceedings with the children and efforts to have the children obtain information on his behalf.[15]

The trial court based its decision on the eight criteria of parental alienation syndrome (PAS), and held:

> In New Jersey, while there are several cases attempting to deal with the problem, there is no definitive analysis as to what actually constitutes parental alienation. This court now holds that in order for a parent to sustain a claim that the other parent has alienated their child, the proponent must prove the presence of the eight criteria.[16]

Without referencing a source for the criteria, the trial court identified the eight criteria of parental alienation syndrome as:

1) a campaign of denigration of the parent;
2) weak rationalizations for the deprecation;
3) lack of ambivalence;
4) insistence that the rejection is the child's own idea;
5) reflexive support for the alienating parent in the parental conflict;
6) the absence of guilt or remorse over cruelty to the alienated parent;
7) the presence of borrow scenarios; and
8) the spread of rejection to extended family and friends of the alienated parent.[17]

The trial court also referenced the best interests factors set forth in N.J.S.A. § 9:2-4(c), but held that when dealing with parental alienation the statutory factors are important but not "dispositive."[18] The trial court stated that the eight criteria of PAS were "more probative, relevant, and significant in determining whether there is alienation and what to do about it."[19] Notably, the trial court did not perform any further review of the factors noted in N.J.S.A. § 9:2-4(c), other than to find that the father "was on the edge of being unfit," and concluding that a parent who is alienating his or her children may be unable to care for his or her children.[20]

The father appealed, arguing that it was error for the trial court to rely upon PAS as a basis for its decision as it is a "novel theory and there was no evidence that it is generally accepted in the relevant scientific community."[21] The Appellate Division agreed, and reversed the trial court's decision, stating:

> Neither the scientific reliability nor general acceptance of PAS was established in this case by either the testimony of any expert or the literature. Indeed, the theory is still the subject of considerable controversy within the medical and legal communities and should not have played a part in the court's ruling.[22]

The Appellate Division also found that PAS had not been recognized as a mental health illness in the Diagnostic and Statistical Manual of Mental Disorders (DSM) and, further, that the New Jersey Supreme Court had not yet decided that PAS is "a scientifically reliable or generally accepted theory."[23] In order to be admissible, a novel scientific syndrome such as PAS must be generally accepted in the specific scientific community.[24]

Important, however, is that the Appellate Division did not completely rule out the admissibility of PAS in future cases. "We express no opinion on whether PAS may ever be properly admitted. We note only that, in this case, a proper foundation for its admission was not established."[25] The appellate court did not elaborate any further on the foundation necessary to render evidence of PAS admissible. Although this question remains unanswered, some commentators have recommended that an expert, who is an authority on PAS, be offered as an "educational resource" on the subject to provide a court with guidance on the subject matter.[26] This educational resource expert would be offered for the limited purpose of educating the court on PAS. The PAS expert would, in essence, be neutral on the ultimate issues of who should retain custody, parenting time schedules, and remedies for the family, such as therapy. In other words, the expert would be offered separate and apart from a custodial expert, who would opine on the custody issue. While an expert offered solely to provide information on PAS may be helpful, the issue that still needs to be faced is a general recognition in the scientific community, and it appears that issue still remains unresolved.[27]

V.U. v. L.U

The Appellate Division decision in *V.U. v. L.U.*[28] is a reminder that even where there may be acts of parental alienation, a court may leave the children with the alienating parent. In *V.U.*, the trial court ordered that the defendant/mother undergo counseling for parental alienation issues.[29] Despite this finding, the court ordered the parties' two daughters to remain in the custody of their mother.[30]

On appeal, the plaintiff argued that the trial court erred by failing to implement the directives of the court-appointed psychologist, who recommended the children be removed from the defendant's custody.[31] The Appellate Division affirmed the trial court's holding that the primary concern was the children's best interests and, despite the defendant's actions, the children were "healthy and doing well in school."[32] While the trial court was cognizant of the court-appointed expert's conclusion that the mother engaged in alienating the children from their father, the trial court had interviewed each child twice and found they were both involved in extracurricular activities, active in their church, articulate in voicing their opinions, socially engaged with friends, and doing well academically.[33] Based upon these findings, the trial court did not accept the recommendation of a

transfer of custody, and was satisfied the children's best interests were served remaining in the defendant's care.[34] The Appellate Division agreed, and stated that the trial court had "meticulously" reviewed all of the facts and noted, while "another judge may have a different conclusion," the Appellate Division could not find the trial judge abused his discretion.[35]

Quinn v. Quinn

In *Quinn v. Quinn*,[36] the Appellate Division affirmed the trial court's denial of a request for a parental alienation evaluation and an order directing the parties and the children to engage in therapy.

The parties were divorced, with two children.[37] Their property settlement agreement (PSA) provided for parenting time for the defendant with the parties' children and designated a parent coordinator for the parties to engage with respect to any parenting issues.[38] A little over a year following the entry of the final judgment of divorce, the plaintiff obtained a final restraining order (FRO) against the defendant-father.[39] The FRO provided that parenting time would continue as set forth in the parties' PSA.[40] Three years after the FRO was entered, the defendant filed a motion requesting a parental alienation evaluation, claiming that his relationship with the children had been strained since the issuance of the FRO.[41] The defendant alleged the plaintiff "fueled and cultivated" the children's refusal to visit and communicate with him.[42]

The Appellate Division agreed with the trial court's denial of the defendant's request on the basis that the PSA provided the parties with a mechanism to address custody and parenting issues, but the defendant never took advantage of those remedies.[43] Further, the court faulted the defendant for allowing several years to lapse without making any efforts to address the issues.

> Given the assertions of the defendant that plaintiff has engaged in a course of conduct designated to alienate the children, he offers no explanation as to why he waited so long to seek general remedies. As such, given the passage of time, the age of the children and their acknowledged unwillingness to have a relationship with defendant, the relief he sought is not only impractical, but unlikely to garner any positive results.[44]

Perhaps, the lesson learned here is to be vigilant when faced with a parent who may be alienating children, and follow any directives of a custody order or agreement so relief is not denied for failure to adhere. Conversely, the plaintiff was well served by focusing on the agreed upon provisions of the PSA (apparently ignored or forgotten by the defendant) outlining the protocols for addressing custody and parenting time disputes.

Flesche v. Flesche

The *Flesche v. Flesche*[45] decision is instructive for the relief crafted by the Appellate Division and the instructions to the parties, including an admonishment to the child's father. In *Flesche*, the parties were divorced and had agreed that the father would be the parent of primary residence with the mother having every other weekend with the child and parenting time on Tuesdays and Thursdays of each week.[46] The parties' son refused to exercise parenting time with his mother and treated her with disrespect.[47] He also refused to speak with his mother on the phone, accept gifts from her, and attend activities with her.[48] The son's animosity toward his mother stemmed from her extramarital affair with the child's hockey coach.[49]

The child's father ultimately filed a motion to be designated the child's custodial parent and modify the parenting time provisions of the parties' property settlement agreement to "as agreed upon by the parties."[50] The mother opposed the motion, acknowledging that she did not have parenting time with her son and admitting that the problems with her son, in part, stemmed from her relationship with his hockey coach.[51] However, she also contended that the child's father stoked the child's negative feelings for his mother by condoning the child's disrespectful language and conduct, constantly calling her a "whore" in the child's presence, and excluding her from school events, medical appointments, and the child's activities.[52]

The trial court found that there was really no factual dispute. The court entered an order granting residential custody of the child to his father and modifying the mother's parenting time as agreed upon by the parties.[53] The court also stated that it would be receptive to applications for reunification therapy.[54] In deciding the defendant-mother's appeal of the trial court order, the Appellate Division agreed that the lower court's order did nothing more than reflect the actual circumstances of the parties that had been ongoing since the son stopped visiting with his mother.[55] But, the Appellate Division commented that the trial court did not order the parties

to attend mediation, appoint a therapist to assist the parties and/or their son, or order a plenary hearing, which could have "some utility in fashioning a long-term remedy to this quite difficult situation."[56] While the Appellate Division hesitantly affirmed the trial court's decision, it did impose several conditions to the trial court's order.[57]

The Appellate Division stated that it viewed the order as an 'interim custody order" subject to future proceedings.[58] The court further provided the mother 90 days to file an additional motion seeking prospective relief such as therapeutic counseling and modification of the original order, if warranted.[59] The Appellate Division essentially instructed the mother to detail her attempts to pursue counseling with her son and set forth any new facts that occurred since the order was entered.[60] The Appellate Division noted that opposition submitted by the father should also detail any attempts he made to assist in repairing his son's relationship with his mother.[61] The court further held that if a motion was filed, the trial court should consider whether mediation and a plenary hearing are necessary and, in furtherance of a hearing, an interview with the child.[62] The Appellate Division's final comments directed to both parents are worth repeating here:

> The parties and their son have a very challenging and emotional situation. It is incumbent upon both parents to exert their best efforts cooperatively to repair their son's fractured relationship with his mother. The mother, for her part, must take the initiative in pursuing suitable counseling, and in exhibiting appropriate sensitivity, judgment and patience in order to help her son learn to accept her again as a parent with open arms. Likewise, we admonish the father, despite his understandable hard feelings about his former spouse's affair, to honor his express commitment in the PSA, as well as his inherent duties as a co-parent, to show respect for his son's mother, to refrain from disparaging her, and to support the mutual efforts of mother and son to rebuild a constructive relationship. Without such mutual parental cooperation, the son surely will be deprived of the inestimable benefits of his mother's love and support, and the mother will be deprived of the reciprocal fulfillment and respect that every parent presumptively deserves from his or her children.[63]

These words directing the parties to encourage respect for the other parent apply equally in all custody and parenting time disputes, not just to extreme cases involving the alienation of children.

Segal v. Lynch

Separate from the custody issues attendant to parental alienation is the potential tort claims the alienated parent has against the alienator. This issue was addressed in *Segal v. Lynch*.[64] In *Segal,* the unmarried parties had two children. After the parties ended their relationship, they continued to reside close to one another in Toronto, Canada, with the children residing with their mother but enjoying "frequent and liberal contacts" with their father.[65] The genial relationship changed when the children's father moved to New Jersey. Although the children and their mother moved to New Jersey a few years after the father's move, the mother changed her phone number and ended all contact between the children and their father.[66] She prohibited the children from emailing their father and blocked the father's emails to the children.[67] Consequently, the father had no contact with his children for over three months, during which time he alleged the mother had alienated the children with "false and spiteful things about their father."[68]

The father was ultimately able to locate the children and filed a complaint in the family part requesting an order to resume his parenting time and contact with the children.[69] The trial court granted supervised visitation.[70] While not a part of the appellate record, the father also alleged that a court-appointed psychologist opined that the mother had taken steps to alienate the children from their father.[71]

Subsequent to initiating an action in the family part, the father filed an action in the Law Division against the mother, claiming intentional and negligent infliction of emotional distress.[72] The trial court dismissed the complaint on three grounds: first, the claim was barred by the Heart Balm Act; [73] second, the factual recitation set forth in the complaint failed to state a claim for intentional and/or negligent infliction of emotional distress; and third, the claims were barred by the entire controversy doctrine and Rule 5:1-2(a) due to the fact that the claims could have been brought in the family part action.[74]

The Appellate Division affirmed the dismissal of the father's claims, holding that a "legally cognizable claim

was not presented;" however, the court held that the Heart Balm Act did not work as a bar to such claims, which are cognizable under the common law. The Appellate Division first addressed the Heart Balm Act, holding that the claims of alienation were not based upon a loss of a conjugal relationship with the children's mother but rather were predicated on the mother's alleged pattern of conduct designed to alienate the father from his children.[75] Thus, the court concluded that the purpose of the Heart Balm Act to eliminate causes of actions to recover damages for the interference with conjugal rights was not implicated and, as a result, the act did not bar causes of action for intentional infliction of emotional distress due to a parent's interference with the other parent's relationship and bond with the children.[76]

The Appellate Division then discussed whether an action for intentional infliction of emotional distress due to acts of parental alienation was barred by the common law. Noting that the Supreme Court had lifted the bar on spousal suits for injuries caused by tortuous conduct, the Appellate Division concluded the law did not impede a spouse from suing another spouse for emotional distress; the court did, however, carefully state that the tortuous conduct must meet the definition of the alleged tort.[77] With respect to the intentional infliction of emotional distress, the plaintiff must prove that the tortfeasor committed outrageous and intentional conduct, proximate causation, and distress that is severe.[78]

Turning to the specific facts of Segal's claim, the Appellate Division affirmed the trial court's dismissal of the action. Relying upon its *parens patriae* duties, the Appellate Division agreed with the trial court that litigation would be contrary to the children's best interests, as it would create a proverbial "tug of war" over children.[79] The "force driving" the matter had nothing to do with the children's best interests, and instead was focused on monetary damages.[80] The court expressed its concern about the children being placed in the middle of the litigation and being forced to choose sides between their mother and father. The court commented on the likelihood that the children would be key witnesses in the litigation and subject to grueling depositions and examinations by experts.[81] Such a scenario, the court concluded, would be antithetical to the children's best interests.[82]

The Appellate Division further found that, even in viewing the facts in a light most favorable to Segal, he failed to state a cause of action for intentional infliction of emotional distress.[83] The court noted that the basis of his claim—a three month period wherein the children's mother prohibited his communication with the children, moved them to the state of New Jersey without notifying him of the children's whereabouts, and enrolled them in school under her surname[84]—did not rise to the level of such outrageous and extreme actions that went beyond the scope of decency and could be regarded as atrocious and intolerable.[85]

While the court dismissed Segal's claims, it did not completely foreclose future claims for intentional inflection of emotional distress emanating from acts of parental alienation.[86] The Appellate Division stated that there could be situations where one parent engaged in conduct so outrageous and extreme as to justify a claim for intentional infliction of emotional distress.[87] The court provided examples of conduct such as parental abduction and false accusations by one parent against the other for sexual abuse that may "cr[y] out for compensation."[88] The court noted claims of this nature must be brought in the family part, as "such claims raise issues that are uniquely suited to the function and expertise of the Family Part."[89]

Conclusion

The law on parental alienation in New Jersey still needs to be developed. The review of the few unpublished cases discussed in this article demonstrate there are numerous issues to be addressed, including, pertinently, the admissibility of parental alienation syndrome and the viability of tort actions by one parent against the other. It is clear, though, that claims of parental alienation are factually and emotionally complex and potentially destructive to children who are caught in the middle of these quandaries. Given the importance and sensitivity of these types of cases, guidance from the Judiciary on parental alienation issues is critical to families struggling to deal with these issues.

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Endnotes

1. Ira Turkat, Parental Alienation Syndrome: A Review of Critical Issues, 18 *Journal of the American Academy of Matrimonial Lawyers* 131, 132-33 (2002).
2. Elizabeth M. Vinhal, Parental Alienation: The Quandary Lawyers and Judges Face, *New Jersey Family Lawyer*, Vol. 28 No. 95, 2007.
3. R. 1:36-3; *see also* Comment 2 on R. 1:36-3 (providing that a party may bring an unpublished opinion to the "attention" of the court so long as a full copy of the opinion is provided to opposing counsel and the court along with any contrary opinions).
4. 2014 WL 7010813 (App. Div. Dec. 15, 2014).
5. *Id.* at *1.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at *2.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at *3.
16. *Id.*
17. *Id.* at *3 n.3.
18. *Id.* at *3.
19. *Id.*
20. *Id.*
21. *Id.* at *4.
22. *Id.* at *5.
23. *Id.*
24. *Id.*
25. *Id.*
26. Turkat, *supra,* at 166-67 n.1.
27. Holly Smith, Parental Alienation Syndrome: Fact or Fiction? The Problem with its Use in Child Custody Cases, 11 *U. Mass. L. Rev.* 64 (2016)(noting that in cases where PAS has been addressed the syndrome has not been "validated" and that the syndrome has not been accepted by the American Psychiatric Association or the American Psychological Association).
28. 2006 WL 2707346 (App. Div. Sept. 22, 2006).
29. *Id.* at *2.
30. *Id.*
31. *Id.*
32. *Id.* at *4-*5.
33. *Id.*
34. *Id.*
35. *Id.*
36. 2014 WL 1257077 (App. Div. March 28, 2014).
37. *Id.* at *1.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at *2.
44. *Id.*
45. 2006 WL 1586025 (App. Div. June 12, 2006).
46. *Id.* at *1.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at *2.
51. *Id.*
52. *Id.* at *2.
53. *Id.* at *3.
54. *Id.*
55. *Id.* at *4.
56. *Id.* at *5.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at *6.
64. 413 N.J. Super. 171 (App. Div. 2010).
65. *Id.* at 179.
66. *Id.* at 180.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. N.J.S.A. § 2A:23-1 *et seq.*; The Heart Balm Act abolished the right to sue and recover damages for "the alienation of affections," adultery and breach of a contract to marry.
74. *Segal*, *supra*, 413 N.J. Super. at 181.

75. *Id*. at 185.
76. *Id.*
77. *Id.* at 185-86.
78. *Id.* at 186-87.
79. *Id.* at 187-89.
80. *Id.* at 188.
81. *Id*. at 189.
82. *Id*. at 190.
83. *Id*. at 191.
84. Interestingly, a recent unpublished case addressing these issues reached the same conclusion. In *Besen v. Weiss*, 2017 WL 3708139 (App. Div. Aug. 29, 2017), the Appellate Division affirmed the dismissal of a claim for intentional inflection of emotional distress arising from allegations of parental alienation. The Appellate Division again found that the alleged alienation was not sufficiently "outrageous" to sustain a claim for intentional infliction of emotional distress.
85. *Segal*, *supra*, 413 N.J. Super. at 191-92.
86. *Id*. at 192.
87. *Id.*
88. *Id.* at 189.
89. *Id*. at 192.

Commentary

Parental Alienation: Buzz Word or Critical Issue?

by Lizanne J. Ceconi

(Editor's Note: *This article was original published for the Jan. 2013 Family Law Symposium, where the article's author, Lizanne Ceconi, presented on the topic. This article is being reprinted, in full, as supplement to the article authored by Amy Wechsler, and published in this edition of the* New Jersey Family Lawyer.)

"So how many of you are Yankees fans?" The question is posed to a classroom full of school-aged children in Northern New Jersey in mid-October, when World Series hopes are alive and expectations high. The vast majority of the young audience raises its hand in unison. "And how many of your parents are Yankees fans?" The number of raised hands barely changes.

Now let's think about our favorite cousin. Chances are that your parents were close to his or her parent. Now how many of you have a relative that you can't stand? Chances are your parents didn't like them either.

Or how many of us tout and advertise that we are 'Super Lawyers'? Do we really believe this, or do we simply want to create the perception?

In 2011, it is estimated that we spent $412 billion dollars in advertising revenue.[1] All of this is done because advertising has proven to be an effective way to manipulate perceptions. The power of suggestion has been around forever. Its impact on children in separation and divorce cases has become a specialty in the field of psychology.

This phenomenon of a child's susceptibility to suggestion and social influence from parents or other relatives is not surprising. Indeed, as one of the leading authorities on the psychology of alienated children writes, "[t]he idea that parents can change the way children think, feel and behave is the basic premise of the parental guidance industry, of many schools of psychotherapy, and of an entire branch of the science of child development."[2] Notwithstanding the global acceptance of such significant parental influence, family law practitioners and judges alike continue to struggle with the idea of one parent 'alienating' their child from the other parent. It is a term that has become overused and misused by family law practitioners: parental alienation.

As family law practitioners we must rise to the challenge of familiarizing ourselves with the scientific data regarding parental alienation, educate our clients and judges, and ensure that we utilize the right experts to address the issue. Parental alienation seems to be the *diagnosis du jour* of family law custody cases, yet there is no definition or real guidance on how best to handle these matters. Practically speaking, litigants cannot afford extensive litigation, therapy, and expert costs associated with complex parental alienation cases. Courts are already overburdened and do not have the resources to take on long protracted trials. They are the most toxic and emotionally draining cases, with the potential for significant long-term devastation if not handled properly.

This article will attempt to address the legal implications of parental alienation by relying heavily upon developing scientific data. It will also include practical tips in helping to identify and avert parental alienation as it unfolds or develops. We hope to assist families and judges in moving these cases to a more positive place, especially considering the near impossibility of our court system being able to carve out the time needed to properly address these cases. There is no silver bullet in resolving these cases and there is no one kind of parental alienation. We do know, however, that the longer a case lasts, the more likely the alienation will persist and the more difficult it will be to reverse; early detection is key.[3] It is also important to explain the nomenclature that will be used throughout this article, as there is a lack of consistency in the publications. The parent who has maintained a relationship with the child(ren) will be called the favored parent, aligned parent or alienating parent. The parent who no longer has a bond with the

children, and is necessarily alleging parental alienation, will be called the rejected parent, disfavored parent, or alienated parent. These terms will be used interchangeably throughout this article.

The Applicability of Scientific Standards

When we think of a custody case, we immediately invoke the "best interests of the child" standard.[4] Matters of parental alienation must be handled differently. We must not be afraid of working with the developing social science studies on the topic. Our gateway to relying on such a scientific approach is New Jersey Rule of Evidence 702, which states that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."[5] This rule applies not only to jury trials but to bench trials as well, when a judge is the trier of fact.[6] The comment to N.J.R.E. 702 makes clear that "proferred expert testimony should not be rejected merely because it cannot be said that such testimony is unassailable and totally reliable, because in some areas...scientific theory of causation has not yet reached general acceptance."[7]

Furthermore, the *Frye* standard, named for *Frye v. United States*,[8] remains the standard in New Jersey in cases in which scientific evidence is to be introduced.[9] This standard affords three ways a proponent of scientific evidence can prove its general acceptance and reliability: "(1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert's premises have gained general acceptance."[10] This necessarily directs the inquiry to N.J.R.E. 803(c)(18): Learned Treatises, which reads as follows:

> [t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or by judicial notice. If admitted, the statements may not be received as exhibits but may be read into evidence or, if graphics, shown to the jury.[11]

Thus, the second way to prove acceptance under *Frye*, "legal writings," is permitted even if an expert witness fails to acknowledge it is authoritative, so long as the reliability of the authority is established by other testimony or judicial notice.[12] However, even after qualifying as a learned treatise, a text may still be excluded from evidence under N.J.R.E. 403 if the danger of prejudice outweighs its probative value.

This evidence refresher course is necessary because there is no definition of parental alienation in our New Jersey court case law. A LexisNexis search of New Jersey cases for the term only yields 19 cases and none of those gives a definition of parental alienation, or even factors to consider. Accordingly, we must take a more scientific approach to these cases.

Sister states have also struggled to define parental alienation and identify its impact on the matrimonial arena. For example, the court of appeals of Arkansas has held that alienation existed when a mother refused to keep the child's father apprised of medical information, to have the child ready for visitation or to spend time with his father, and did not permit the father the first right to babysit the child when she was away.[13] In *Ryder v. Mitchell*,[14] a therapist testified that one parent's false accusation of child abuse by the other parent constituted parental alienation, but the Supreme Court of Colorado was only faced with a question of fiduciary duty.

Perhaps the most unabashed attempt at defining parental alienation is the appellate court of Connecticut's adoption of psychologist Ira Turkat's definition: "parental alienation syndrome occurs when one parent campaigns successfully to manipulate his or her children to despise the other parent despite the absence of legitimate reasons for the children to harbor such animosity."[15]

The Search for a Working Definition of Parental Alienation

Before definitively identifying what parental alienation *is*, it is helpful to decipher what it is *not*. First, alienated children's behavior is not justified. Justified rejection due to a parent's egregious behavior is known as estrangement. Even the most extreme estrangement situations are not comparable to alienation. The two words should not be used interchangeably. As psychologist Barbara Jo Fidler, Ph.D., and child representation expert

Nicholas Bala, Esq., have written, "even abused children are likely to want to maintain a relationship with their abusive parents."[16] Second, the child's behavior is not proportionate to the rejected parent's shortcomings or mistakes. Once again, such proportionality is justified estrangement. As Fidler and Bala explain, "it is truly abusive behavior or extremely compromised parenting that differentiates alienation from a realistic estrangement."[17] Lastly, alienation is not a poor relationship that has developed over time. A child who has always had a negative relationship with a parent and rejects them accordingly is estranged, not alienated.

By process of elimination, we find our working definition for parental alienation: "a child's strong resistance or rejection of a parent that is disproportionate to that parent's behavior and out of sync with the previous parent-child relationship."[18] Inherent in this definition is the idea that alienation represents a *change* in the parent-child relationship, which usually coincides with either the separation, divorce, or the decision to divorce. This definition necessarily recognizes the three contributing factors the late Richard Gardner, who is credited with first coining the term 'parental alienation syndrome' in 1985, emphasized: "parental brainwashing, situational factors, and the child's own contributions."[19]

Gardner called parental alienation a 'syndrome' or 'disorder,' a labeling that has become controversial among mental health professionals. Parental alienation is not included in the fourth edition of *The Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) and, despite an intensive lobbying campaign, it will not be recognized in the updated DSM-V, due out in 2013, either.[20] The inclusion was so controversial that Dr. Darrel Regier, vice-chair of the DSM-V Task Force, told the Associated Press he received more mail regarding [parental alienation] than on any other proposed diagnosis.[21]

Perhaps the most relevant argument amidst the controversy, for purposes of this article, was the position that the proposal was driven by money-hungry custody attorneys: "it lines the pockets of both attorneys and expert witnesses by increasing the number of billable hours in a given case."[22] Opponents to parental alienation syndrome or disorder being included in the DSM-V do not believe children should be diagnosed and labeled with a mental disorder. Nevertheless, there is a recognition that alienation by a parent in child custody cases exists. From a practical standpoint, it does not matter to family law attorneys, nor judges, whether parental alienation is recognized as a mental disorder or syndrome. Its exclusion from the DSM is merely semantics for what we know exists in families.

Since we, as attorneys, have spent years perfecting the art of applying 'factors' and 'elements,' it is helpful to have such a checklist when defining parental alienation. Thus, attorneys, judges and mental health professionals should turn to the following eight primary factors that "must be identified in the child":

- Campaign of denigration;
- Weak, frivolous or absurd rationalizations for the deprecation;
- Lack of ambivalence;
- The "independent thinker" phenomenon (child claims these are his/her own, and not the alienating parent's beliefs);
- Reflexive support of the alienating parent in the parental conflict;
- Child's absence of guilt over cruelty to, or exploitation of, the alienated parent;
- Presence of borrowed scenarios; and
- Spread of rejection to extended family and friends of the alienated parent.[23]

The Spectrum of Alienation

Experts recognize that 'pure' or 'clean' cases of child alienation and realistic estrangement (those that *only* include alienating behavior on the part of the favored parent or abuse/neglect on the part of the rejected parent, respectively) are less common than the mixed or 'hybrid' cases, which will be explored later in this article.[24] That said, a review of the factors will help practitioners decipher how severe a case of alienation, if at all, we are dealing with.

Campaign of denigration: This attribute has been called the most "prominent" aspect of parental alienation.[25] Fidler and Bala explain that an alienated child's "tone and description of the relationship with an alienated parent is often brittle, repetitive, has an artificial, rehearsed quality, and is lacking in detail. The child's words are often adult-like."[26] Children may begin to assert their constitutional rights to privacy and freedom from the rejected parent.

Weak, frivolous or absurd rationalizations for the deprecation: This goes back to the disproportionate responses of children to an alienating parent's mistakes

or shortcomings. "Although there may be some kernel of truth to the child's complaints and allegations about the rejected parent, the child's grossly negative views and feelings are significantly distorted and exaggerated reactions."[27] This often starts with the report that the child is "just not comfortable" being with a parent, absent explanation. Weak rationalizations may include a child's refusal to eat a parent's food, wear certain clothes or perform homework in a parent's home because that parent traditionally did not prepare meals, buy the clothing or participate in schoolwork.

Lack of ambivalence: Children will believe that the favored parent is 100 percent good while the rejected parent is 100 percent bad. Their custodial preferences are clear that they want nothing to do with the rejected parent.

The 'independent thinker' phenomenon (child claims these are their own, and not the alienating parent's beliefs): Fidler and Bala write that children's memories are so influenced that "if shown video or photographs [depicting happy times with the rejected parent] they will claim the images have been doctored or they were just pretending."[28] The child will insist that the rejection is his or her own idea and will specifically report that he or she was not coached to say it.

Reflexive support of the alienating parent in the parental conflict: Fidler and Bala recognize that children may develop "an anxious and phobic-like response" as a result of their being "influenced to believe the rejected parent is unworthy and in some cases abusive."[29]

Child's absence of guilt over cruelty to, or exploitation of, the alienated parent: This often means that the child has no gratitude for the rejected parents' contributions to their rearing, and claims to have no recollection. A truly alienated child can be "rude and disrespectful, even violent, without guilt."[30]

Presence of borrowed scenarios: Mental health experts are not so unrealistic as to posit that there are any perfect parents. However, "[i]n child alienation, the aligned parent puts a spin on the rejected parent's flaws, which are exaggerated and repeated. "Legends" develop and the child is influenced to believe the rejected parent is unworthy and in some cases abusive."[31] The child may use words and terms that are identical to the favored parent's usage.

Spread of rejection to extended family and friends of the alienated parent: Warshak explains that some children even go so far as to reject the affection of a family pet they once loved, if the pet is viewed to be "aligned" with the rejected parent.[32] There are often changes in the relationships with the extended family.

A display of all or even the majority of these factors in a child represents a 'pure' severe case of parental alienation, which must be handled with extreme care. However, such cases are exceptionally rare. In a study of 55 children ranging in age from 2.5 to 18 years, 85 percent proved to be "hybrid" cases "including some with significant components of estrangement" and only 15 percent proved to be "uncomplicated or pure cases of alienation."[33] Friedlander and Walters differentiated between cases of "alignment" (wherein the child has a "proclivity or affinity for a particular parent" that is "a normal development phenomenon" and "not...divorce specific"); "enmeshment" (wherein the "psychological boundaries between the enmeshed parent and child have not been fully and adequately established" and "the child has had developmentally inappropriate difficulty separating from the parent"); and "alienation," and noted that the majority of the cases were hybrid cases.[34]

Possible Remedies and the Problem with Therapy

Just as there is a broad spectrum of alienation severity, there is also a broad spectrum of possible remedies. The United States Supreme Court has recognized that parents have a fundamental right to an unfettered relationship with their children.[35] New Jersey courts have also recognized that "security, peace of mind, and stability are every child's right."[36] In order to advocate for their clients practitioners must be extremely careful in selecting their experts, as well as their treating mental health professionals.

When a custodial expert is retained, he or she is bound by the provisions of the specialty guidelines for psychologists custody/visitation evaluations. The New Jersey Board of Psychological Examiners states that "allegations of acts of abuse by either parent or allegations of impairment of either parent require *specialized knowledge* and assessment skills above and beyond the general expertise required in custody evaluations."[37] Furthermore, the board's guidelines make clear that "under no circumstances should a treating psychologist agree to assume the role of evaluator...[i]f the psychologist is now or has been a therapist for any member of the family, the psychologist does not assume the role of evaluator in a custody case."[38]

It is not unusual in a case of alienation that the parties and children will find fault with the treating therapists and evaluators. The children may complain about the family therapist and refuse to return, claiming the therapist is on the side of the rejected parent. Courts, grasping for solutions, may seek to change the roles of therapists and evaluators while the matter is pending. In order to ensure that no one's professionalism is being challenged, adhere to the specialty guidelines.

Much has been written about what types of therapy are available for children who are rejecting their parents.[39] Gardner cautioned that family therapy interventions are extremely delicate, "a therapist working with a [parental alienation] case often only has one chance to be effective."[40] Gardner found that such interventions are often "no-win" if they involve any of the following:

- Trying to reason with the rejected child and convince him or her that the alienated parent really isn't that bad.
- Trying to confront the rejecting child with the reality that this parent has not done anything wrong.
- Trying to directly, or inadvertently, undermine the coalition between the child and the alienating parent by questioning or challenging the charges or beliefs expressed by the alienating parent.
- Trying to challenge the alienating parent in a direct confrontation of power struggle.[41]

Fidler and Bala further caution that "therapy, as the primary intervention, simply does not work in severe and even in some moderate alienation cases...*therapy may even make matters worse to the extent that the alienated child and favored parent choose to dig in their heels and prove their point, thereby further entrenching their distorted views.*"[42]

The counter-productivity of therapy is particularly applicable to individual therapy for the children. A study of 42 children from 39 families who were "resisting or refusing visitation during their treatment in the context of a custody or access dispute with an average duration of almost a decade" found that those "who had been forced by court orders to see a successive array of therapists of reunification counseling were, as young adults, contemptuous and blamed the court or rejected parent for putting them through this ordeal."[43]

This author believes it is counterintuitive to the court system that therapy, particularly for a child, could be harmful or exacerbate the problem. Nevertheless, much of the scientific data supports this and should be brought to the court's attention.

The Role of the Court

So if the court shouldn't necessarily order therapy, what *is* the role of the courts? As always, the court's primary concern is the best interests of the child: "it is the public policy of this State to assure minor children of frequent and continuing contact with *both parents* after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy."[44]

As the New Jersey Supreme Court stated almost 60 years ago, the court's paramount consideration is the child's safety, happiness, and physical, mental and moral welfare.[45] Welfare of the child includes many elements and concerns more than the physical well-being resulting from the furnishing of adequate food, clothing and shelter. It concerns, *inter alia*, the spiritual and social welfare of the child. The desire of the child to reside with either parent has, on occasion, been over-emphasized on the grounds of his or her so-called happiness. Happiness does not denote a state of mind that results from untrammeled or unchecked conduct. There should be no confusion between an unrestrained liberty or license that results in no check upon the child's conduct and the happiness that results from a well-adjusted mental outlook and genial social relationship.[46]

By this point, it should be clear that a loving relationship with *both parents* is in the best interests of the child, absent the justified estrangement discussed earlier. However, Warshak cautions that these matters should be handled extremely carefully:

> it is important to balance careful scrutiny with openness to new ideas. Judicial responses to children who reject a parent are best governed by a multifactor individualized approach. A presumption that allows children and one parent to regulate the other parent's access to the children is unsupported by research. A custody decision based solely on the severity of alienation leaves children vulnerable to intensification efforts to poison their affections toward a parent. Concern with possible short-term distress for some children who are required to repair a damaged relationship should not blind us to the long-term trauma of doing nothing.[47]

Warshak also described what he considers to be the four options for families with severely alienated children (which, again, is rare and requires that the court determine that "a child's rejection of a parent is unwarranted and not in a child's best interests"):

- Award or maintain custody with the favored parent with court-ordered psycho-therapy and in some cases case management.
- Award or maintain custody with the rejected parent, in some cases with court-ordered or parent-initiated therapy.
- Place children away from the daily care of either parent.
- Accept the child's refusal of contact with the rejected parent.[48]

However, Warshak cautions that each option "has advantages and drawbacks and raises controversial issues regarding the proper reach of the law with respect to the rights of parents and children."[49]

Unfettered parenting time is essential in cases where parental alienation is, or may be, present. The children should have parenting time that allows them to spend uninterrupted time with the rejected parent. Often, the favored parent insists on constant contact, via telephone calls, text messages, email or Skype. The rationale is the children are 'uncomfortable' with the rejected parent and need assurances from the favored parent. A truly alienated child is really being pressured from the favored parent and may feel the need to 'report' the rejected parent's shortcomings. Limiting contact may relieve some of the pressure and allow the rejected parent to rebuild the relationship. A court order that prohibits such contact can take the pressure off the children.

Experts agree that it is imperative for the rejected parent to remain in contact with the children without the influence of the aligned parent.[50]

In her study of adult children of parental alienation children, Baker found that creating opportunities for the child to spend time with the targeted parent is key: "[alienated] children need an excuse to spend time with the targeted parent in order to avoid the wrath of the alienating parent."[51] However, getting a court order that forbids contact from the alienating or aligned parent during the rejected parent's time is only the tip of the iceberg.

The courts are next faced with the question of how to enforce such an order. Often, it is as simple as putting money where the mouth is. There is a line of cases dating back to 1909, which states that a court may decrease child support for a custodial parent to force that parent to comply with unfettered parenting time for the noncustodial parent.[52] Baker found these sanctions or consequences can also be helpful in compelling the children to attend mandated parenting time, as children will be given "an excuse (to help the alienating parent avoid the sanctions) and can, therefore, be freed from the responsibility of appearing to choose or want this time with the targeted parent."[53]

In the most true, severe cases of parental alienation, unfettered parenting time may not be enough. Or, in some circumstances, it might be an option if the children are old enough to refuse to go. In such severe cases, a temporary or permanent change of custody might be necessary. If a parental relationship causes emotional or physical harm to the child, a court is authorized to restrict, or even terminate, custody.[54] Although this might sound extreme, mental health professionals have found that "in the severest of cases which may present as such at the outset or later after various efforts to intervene have failed, custody reversal may be the least detrimental alternative for the child."[55] Another option is for the court to order "a prolonged period of residence with the parent, such as during the summer or an extended vacation... and *temporarily* restricted or suspended contact with the alienating parent."[56]

In sum, the role of the court is "educational—an authoritative figure making clear to both parents how their behavior is affecting their children. The exhortations of a judge—setting out clear expectations and consequences for failures to comply—can move many parents and children, who may also be interviewed by the judge."[57]

The Decision to Walk Away

The potential damage to a rejected parent emotionally and financially can be devastating. In many ways, it is akin to the loss of a child. For many, the stamina and support needed by the rejected parent cannot be sustained over years of litigation. Parents may make the Solomon-like decision that their child may be better off without them in the hopes that somewhere down the road, the relationship will rekindle, or that once the child is outside the sphere of the favored parent efforts will be made to reunite.

Amy J. L. Baker's study of adult children who were once affected by alienated children serves as a compelling

call to action for the field of family law. Baker interviewed 40 adults between the ages of 19 and 67, all of whom felt that alienation was "a formative albeit traumatic aspect of their childhood."[58] When interviewed as adults, Baker found that remarkable percentages of her sample experienced the following:

- Low self-esteem (65 percent)
- Depression (70 percent)
- Drug and alcohol problems (35 percent)
- Lack of trust (40 percent)
- Alienation from their own children (50 percent)
- Divorce from their own marriages (57.5 percent)[59]

Baker also noted the following "less prominent effects of parental alienation:…problems with identity and not having a sense of belonging or roots; choosing not to have children to avoid being rejected by them; low academic and career achievement; anger and bitterness over the time lost with the alienated parent; and problems with memory."[60] She also reported that "while most of the adults distinctly recalled *claiming* during childhood that they hated or feared their rejected parent and on some level did have negative feelings, they did not want that parent to walk away from them and secretly hoped someone would realize that they did not mean what they said."[61]

Dr. Warshak also focuses much of his writing on a rejected parent's choice to "give up" on having a relationship with their child. He calls this "counterrejecting."[62] While Warshak recognizes that it is natural, particularly in the early stages, for a rejected parent to avoid the children just as they avoid him or her, Warshak cautions that such counterrejecting "breaks contact...which is so crucial to resisting and reversing alienation"; "[s]tings the children who, despite their overt belligerence, at some level continue to need [the rejected parent's] love and acceptance" and; "sets [the rejected parent] up to be seen by the children. . .as the bad guy who caused the alienation.[63] Fidler and Bala also note that "[r]ejected parents often react with passivity and withdrawal in an effort to cope with the parental conflict that may pre-date separation... these reactions may reinforce the allegations made against them by the alienating parent and the child, including abandonment, disinterest and poor parenting."[64]

Herein lies the reason why attorneys should advocate not just zealously but delicately and efficiently for clients and their children. This author believes the consequences to adult children of alienation should be a call to the bench that while 'walking away' may be the easier path for now, its long-term effects make it worth the effort to 'fight the fight.' Practitioners must not 'cry alienation' when it is not there or seek remedies that are known to be counterproductive. Practitioners must rely on the scientific evidence that exists. If one does, in fact, identify parental alienation in its true, severe form, this author believes it is important to preserve the parent-child relationship the Constitution seeks to protect.

Practical Tips

Each case of alienation is different. There is no foolproof remedy, solution or quick fix. The experts do not all agree on the appropriate solution to the problem, but developing social science data suggests these matters should be handled differently than the 'average' custody case.

The suggestions below are for lawyers and judges involved in cases that suggest parental alienation as defined above. These suggestions do not apply to true cases of estrangement based on a realistic rejection.

Practice Tips for Lawyers

Practice Tip #1: Before being quick to label a child's behavior or a familial situation as alienation, be sure to examine the history of the relationship. There must have been a *change* in the relationship in order for alienation to be present. If trying to establish alienation, provide proof that the relationship was once good by supplying to the court photographs, videos, emails, text messages and cards from happier days.

Practice Tip #2: If a client raises alienation, ascertain what the children will provide as their greatest complaint about the client's parenting and deal with it head on. Are the acts complained of exaggerated? Do the acts justify the rejection? Would these acts be considered detrimental to the child if the parents were still in a healthy relationship?

Practice Tip #3: When determining whether parental alienation exists in a given case, don't focus on the wrongdoing of the alleged alienating parent, but on the behavior being exhibited by the children. The analysis should include application of the eight factors discussed above. Submit certifications from individuals who have witnessed the change in behavior of the children, including family members, clergy, neighbors and friends. Attacks on a parent accused of alienating children put the case into the he said/she said arena and lose sight of the effect this behavior may be causing the children.

Practice Tip #4: When consulting with clients who may be estranged from their children or in the

earlier stages of alienation, advise them to do their best to maintain contact. It is important for a rejected parent to maintain ties, particularly early in the divorce process. This can be very painful for the parent, but the longer there is no contact between the rejected parent and the child, the more difficult it will be to reunify them. Also provide them with resources to better understand what is happening in their family dynamics. *Divorce Poison* by Richard A. Warshak, Ph.D., and the DVD "Welcome Back, Pluto," are some of the best primers for attorneys, judges and litigants in addressing this matter. Finally, recognize that the rejected parent is inevitably having considerable emotional difficulties dealing with the situation. Encourage them to seek professional help during the process to handle the grief and work on their parenting skills. During these times, it is nearly impossible for the rejected parent not to react poorly to the situation at hand. Poor responses will only reinforce the alienating parent and the children's campaign against the parent.

Practice Tip #5: Early on in the matter, educate the court about what parental alienation is. Hire a mental health expert in parental alienation who can submit a certification to the court describing parental alienation without opining about the family in question. This expert should also educate the court about the learned treatises that are accepted in the field and provide these documents to the court. Note, however, that this expert should not later evaluate the family. It is important to avoid any potential conflict.

Practice Tip #6: After identifying what is believed to be alienation, or the beginnings of same, ask the court to appoint a guardian *ad litem* for the children. This will help the court stay abreast of the children's development, especially as the case will most likely become a moving target. Some believe a lawyer would be a better guardian *ad litem* rather than a mental health expert, who may focus on healing the family rather than complete the task of reporting the facts for the court's benefit.

Practice Tip #7: When selecting mental health experts and treating therapists, ensure they are familiar with parental alienation and the developing social science data. These are not routine best interests custody evaluations. The Specialty Guidelines for Psychologists Custody/Visitation Evaluations mandate that the evaluator have specialized knowledge.

Practice Tip #8: The mental health expert and the treating therapist are not one in the same. It is essential that treating psychologists be permitted to care for clients, not evaluate.

Practice Tip #9: Unless a child has serious mental health issues, try to avoid providing individual therapy for the child. This is absolutely counterintuitive, but most of the social science supports it. If the matter is one of alienation, the child already has distorted views of the rejected parent. The therapist may ultimately become an unwitting advocate for the child, further entrenching the alienation. Most importantly, do not allow the treating psychologist to opine on custody. Only an evaluator who has met with the entire family can provide such an opinion.

Practice Tip #10: If there are allegations of undue influence by a parent during the other's parenting time, ask the court to provide for 'no contact' during the rejected parent's designated time. If a no contact order is entered during a client's parenting time, ask the court to provide strong sanctions for noncompliance. If granted, this could prevent an enforcement application down the road.

Practice Tip #11: Ask the judge to meet the parties and interview the children early on in the litigation. The children should know that they do not make the custody decision.

Practice Tip #12: On a *pendente lite* basis, ask the court to order some form of parenting time or consistent contact between the rejected parent and the children. Try to avoid a situation where contact between the children and the rejected parent is suspended or eliminated. Requesting a change in custody early on in the litigation (despite, perhaps, a client's urgings) is often not appropriate. Courts will want to save this for the last resort, after all other options have been explored. Often the 'threat' of a change in custody may, in and of itself, reinforce and further entrench the children's rejection.

Practice Tips for Judges

Practice Tip #1: Try to assess as early as possible whether the matter could potentially be one involving elements of alienation.

Practice Tip #2: Become familiar with the current learned treatises concerning parental alienation. Seek out experts who specialize in parental alienation, including family therapists and custody evaluators.

Practice Tip #3: Appoint a guardian *ad litem* who is familiar with the scientific data regarding parental alienation.

Practice Tip #4: Set up mechanisms for litigation funding for the family therapy, guardian *ad litem*, and mental health experts. Ordering a court-appointed evalu-

ation by an expert in parental alienation early on in the litigation may be the best-spent money for the family. If the funds are not designated early, the favored parent will use the inability to finance litigation as an excuse to delay the matter.

Practice Tip #5: If the case appears to be one with elements or nuances of parental alienation, meet with the children in chambers. Impress upon them that the court makes the decisions, not the children, and that children are better served in life with the presence of both parents. Emphasize that the court's orders are expected to be obeyed, and that there will be consequences for non-compliance. Communicate to the children that failure to establish a relationship with both parents is not an option.

Practice Tip #6: Be cautious when ordering counseling. Individual therapy for a child already carrying distorted views about the rejected parent can only worsen the situation. Therapists become advocates for their patient and indirectly make custody recommendations. Do not rely upon an individual therapist's recommendations about parenting time, even when it seems the most efficient way to address the issue.

Practice Tip #7: If alienation is suspected, be wary of allegations of abuse, complaints brought to the Division of Child Protection and Permanency (DCP&P formerly DYFS), and concerns raised by school officials on behalf of the children. Alienated children become adept at manipulating the system.

Practice Tip #8: Most importantly, enforce orders swiftly and unequivocally. When parents and children learn the court is not enforcing its own orders, they will not respect the court or the law.

Practice Tip #9: The hardest thing a court will do is remove children from a favored parent. The court will be told the child will despair, go into deep depression, have suicidal ideations or run away. These prognostications will be made by well-meaning individuals who are not familiar with the entire family dynamic. Removal from the favored parent may be preferable after a finding of parental alienation and all other options have been explored and failed.

Conclusion

Children take sides to protect their parents and protect themselves from losing both parents in a divorce or separation. They sense the loss of a parent and express anger and resentment, often parroting one of their parents. Parents may divorce, but children should not leave behind a parent. Hopefully, the background material and practice tips in this article can help practitioners and courts repair parent/child relationships, giving children a better chance for a happy and healthy future.

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Endnotes

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54. *Wilke v. Culp*, 196 N.J. Super. 487 (App. Div. 1984). The idea of "harm" was recently explored in the unpublished decision of *New Jersey Division of Youth and Family Services v. C.O.*, No. A-2387-11T2, (App. Div. decided Nov. 27, 2012) wherein the Appellate Division affirmed Judge Mizdol's holding that a mother's false allegations of child sexual abuse on behalf of the father, and her convincing the child that the allegations were true, constituted abuse and neglect. Judge Mizdol held that it did and modified residential custody to be with the father so as to avoid further injury to the child. The Appellate Division affirmed.
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The Psychological Underpinnings of Parental Alienation (Syndrome)

by Allison Heaney Lamson

The unfortunate prevalence of alienating behaviors by parents involved in high-conflict family disputes requires family law practitioners to spend more time learning about alienation in hopes of better understanding the problem. In its worst form, and under circumstances that are not yet entirely understood, alienating behaviors snowball into claims of full-blown parental alienation syndrome. A comprehensive understanding of parental alienation, and more specifically parental alienation syndrome, as these theories impact custody disputes requires practitioners to have at least a cursory understanding of the psychological underpinnings, research and literature giving rise to these terms. Extracting the theory of alienation from psychology and implementing it in day-to-day practice requires practitioners to generally understand its origins, some of the underlying empirical research and the divide in the psychological community with respect to its acceptance and inclusion in the Diagnostic and Statistical Manual of Mental Disorders (DSM or DSM-5). This would appear to be of particular importance today, given how liberally and frequently the terms are utilized among family law attorneys, custody evaluators and judges.

This article is intended to provide an overview of psychological theories associated with parental alienation, the status of parental alienation syndrome as a recognized disorder in the psychological community and other related considerations that may further the reader's understanding of these theories.

Cognitive Dissonance and False Memory Syndrome

As a preliminary matter, there are several types of social psychological research that can inform a family lawyer's understanding of the construct of parental alienation, including cognitive dissonance theory and research related to memory. An understanding of this research is important for practitioners to be able to identify and address those situations that give rise to parental alienation.

In brief, cognitive dissonance is defined as:

> [T]he subjective perception of incompatibility between two self-relevant cognitions. A cognition can be any element of knowledge, belief, attitude, value, emotion, interest, plan, or behavior. In other words, cognitions are dissonant when one specific cognition implies the opposite of another cognition. The resulting cognitive discrepancy is associated with a psychological state of unpleasantness (cognitive dissonance) that motivates the individual to reduce this state of discomfort by reducing the discrepancy between the dissonant cognitions.[1]

Essentially, it is human nature to feel internally consistent and, if an individual's behavior contradicts his or her perception of a situation, he or she will try to figure out how the objectively conflicting behaviors can be reconciled with his or her feelings. A good example of cognitive dissonance in action is an individual who smokes cigarettes while objectively knowing cigarette smoking is bad for his or her health. As explained over 50 years ago by Leon Festinger, an American social psychologist perhaps best known for his cognitive dissonance and social comparison theory, the individual will figure out a way to reconcile these two conflicting ideas via rationalizations.[2] People who continue to smoke despite knowing it is bad for their health may reconcile their behaviors with their thoughts by beginning to believe, for example: 1) he or she enjoys smoking so much it is worth it; 2) the chances of negative health consequences are not as serious as some would make them out to be; 3) he or she cannot always avoid every possible dangerous contingency in life; and 4) stopping smoking would result in weight gain, which is equally bad for one's health. Of course, continuing to smoke is, after all, consistent with his or her ideas about smoking.

In the case of a high-conflict divorce, some of the stress on a child is related to cognitive dissonance

between his or her feelings for both parents. This issue has been titled a loyalty conflict.[3] The loyalty conflict arises when:

> [T]he child is with parent A, he misses parent B; when the child is with parent B, he misses parent A. The greater the degree of parental conflict, the more intense the loyalty conflict becomes for the child. When the loyalty conflict is more intense, the child experiences cognitive dissonance, an uncomfortable mental state that occurs when a person holds at the same time 2 thoughts that are incompatible or contradictory. The greater the cognitive dissonance, the greater the mental discomfort.[4]

Most children adapt by trying to stay out of the conflict, but some children adapt by "resolving their loyalty conflict in a manner that is clearly maladaptive, by aligning with parent A and rejecting parent B."[5]

Other psychological research related to memory may also be relevant to situations in which parental alienation is occurring. As part of the rationalization process, or as a result of the behavior of one parent and because memory is easily manipulated, a child may develop a 'false memory.' Although this theory is controversial, one principle that is generally agreed upon in the psychological literature is that memories may be created or altered through suggestion.

Elizabeth Loftus, an American cognitive psychologist and expert on human memory, studied misinformation and false memories finding that, with relative ease, a child could be convinced and made to form a memory of an event that never occurred. Loftus' studies revolved around making repeated suggestions to a child that he or she had been lost in a mall several years earlier.[6] Through these studies, Loftus ultimately found that external suggestions of an event that never occurred could drive an individual, specifically a child, to form a memory of a false event and then elaborate on the false event. When another individual, usually an older sibling, assisted in creating the memory, the studied individual became even more confident the suggested event had occurred.[7]

The potential for abuse in the context of parental alienation is obvious. If a trusted advisor, such as a parent, is suggestive about incidents that may or may not have taken place, a child could easily begin to believe that such an event did, in fact, occur. For example, a child has no firsthand knowledge of the relative involvement of each parent during his or her first several years of life. However, if the child were repeatedly told Parent B was never around by Parent A, or Parent A's family and friends, the child may form memories of Parent A solely caring for him or her. In its most extreme form, parental alienation may go hand in hand with false memories of sexual abuse.

Parental Alienation vs. Parental Alienation Syndrome

The terms 'parental alienation' and 'parental alienation syndrome' are often incorrectly utilized interchangeably. Parental alienation is defined as "any constellation of behaviors, whether conscious or unconscious, that could evoke a disturbance in the relationship between a child and the other parent."[8] Alienating behaviors by one parent, which can be either intentional or unintentional, mirror those that give rise to parental alienation syndrome, discussed in greater detail below.

Dr. Richard Gardner, an American psychologist perhaps best known for his research on the subject, coined the term 'parental alienation syndrome' in 1985, and he remains the predominant source for early scholarly articles on parental alienation syndrome.[9] Gardner based his observations on his clinical experience with cases of what he perceived to be false allegations of child sexual abuse.[10] He utilized the term parental alienation syndrome to refer to:

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

As indicated in this quote, Gardner differentiates parental alienation syndrome from parental alienation by clarifying that the former is marked by a child's denigration of one parent, resulting in part from parental indoctrination. Being able to select the appropriate language to describe an allegation of parental alienation versus an allegation that a child has parental alienation syndrome is not just a matter of severity, it also conveys the alienating parent is engaging in alienating behaviors

with intent. It is important to recognize these two terms convey extremely different meanings.

Determining the Source of the Estrangement

The psychological literature carefully distinguishes that parental alienation is found only when the estrangement from one parent and the child(ren) is a result of the other parent's intentional or unintentional conduct. To the extent the estrangement from the 'alienated' parent is a result of that parent's own conduct or some other source, it is not properly considered parental alienation. Scientific, medical and legal professionals who do not believe in parental alienation syndrome grapple with several interrelated issues.

Their disbelief is likely grounded in, "some underlying resistance to the notion that an otherwise 'good' parent could be so vehemently rejected by his/her child. Perhaps such skeptics hold the belief that a parent must have done something to warrant their child's rejection and/or the other parent's animosity."[11] However, as indicated above, the very definition of parental alienation is supposed to exclude situations where the estrangement is a function of the alienated parent's neglect or abuse, rather than the intentional indoctrination of the other parent. Gardner and his predecessors emphasize that the diagnosis of parental alienation syndrome is inappropriate if true parental abuse or neglect is present and, as a result of the behavior of the alienated parent, "the child's animosity is justified."[12]

Critics of the theory of parental alienation syndrome may also feel uneasy regarding the particularly subjective nature of the definition. The inherent difficulty in distinguishing whether estrangement is a function of purposeful parental alienation as compared to estrangement that is a result of the parent's own wrongdoing (whether perceived or real), is that it requires a determination regarding whether a parent's behavior is subjectively 'good.'

In this author's experience, in the majority of those cases involving allegations and/or findings of alienation, the source of the conflict is the alienated parent having had an extramarital affair. A child being made aware of such an extramarital affair, regardless of his or her age, could easily be perceived as alienating in and of itself, if the information is coming from the alienating parent. But, not all cases in which a parent has an affair result in the estrangement of the child from that parent.

The working definition of parental alienation indicates that if the source of alienation is the parent's own wrongdoing, then it is not alienation. For example, a child who becomes estranged from an abusive parent does not qualify as suffering from parental alienation syndrome. However, this type of definition, which requires making an assessment of how 'bad' a parent's behavior is and whether that behavior is sufficient to account for the feelings of alienation, is problematic. In the hypotheticals above, an extramarital affair is generally regarded as 'wrongdoing' in society, and to some extent a betrayal of both the spouse and the family. However, if cheating on one's spouse is considered as adequate wrongdoing to justify feelings of alienation from a child, then all parents who are alienated and have had extramarital relationships would technically be exempt from the working definition as a result of their wrongful conduct.

It would seem, however, that the process of distinguishing parental alienation from parental alienation syndrome by determining the source of estrangement and whether the estrangement is a function of the parent's own wrongdoing, is fundamentally flawed. It requires an assessment of whether the alienated parent's wrongdoing is perceived, real or exaggerated. Perhaps a better definition would specify that the wrongdoing to which Gardner referred was wrongdoing directly to the child.

Skepticism Regarding Parental Alienation as Syndrome and Inclusion in the DSM

It is important to recognize that parental alienation syndrome is not universally accepted by all professionals for whom such an understanding would be particularly relevant, such as therapists, family lawyers, family judges and custody evaluators. Generally, mental health and legal literature "debates the existence of Parental Alienation Syndrome; however, there is consensus that parental alienation does indeed occur."[13] The general public further does not have an understanding, or for the most part even an awareness, of the existence of parental alienation syndrome.[14] As a result, there has been considerable debate about the validity of parental alienation as a formal syndrome.

The debate surrounding parental alienation as a syndrome is underscored by the fact it has yet to be included in the Diagnostic and Statistical Manual of Mental Disorders (DSM). The DSM is the "handbook used by health care professionals…as the authoritative guide to the diagnosis of mental disorders."[15] It has been referred to as "the bible of diagnostic criteria" for mental health professionals and researchers and is used to determine

whether a cluster of symptoms is recognized as a disorder, according to the American Psychiatric Association.[16]

Healthcare coverage for mental health treatment frequently requires a treating therapist to identify which disorder the patient is being treated for based on the DSM.[17] Opponents of including the term 'parental alienation' in the DSM have expressed several concerns: 1) the research base is insufficiently developed; 2) children of high-conflict divorce should not be labeled with a mental condition; and 3) if parental alienation became an official diagnosis, it may be misused in legal settings.[18] In 2008, a group of mental health professionals made the first proposal to include parental alienation in the DSM. Since that time, several psychologists have weighed in on the issue, providing their professional opinions for and against its inclusion.

In an attempt to find a middle ground, Craig Childress, an American clinical psychologist specializing in treating children and families, coined the term 'attachment-based parental alienation.' Childress posits that mental health professionals can identify what he refers to as "pathogenic parenting" by grouping together three existing, well-established DSM-5-listed diagnostic indicators that have been associated with parental alienation over time.[19] There are other now commonly recognized disorders that took several years to be included in the DSM-5. Its absence from the DSM-5 at present is not determinative of its usefulness or reality; there are several other mental illnesses that are widely accepted but have not yet been included in the DSM-5, such as post-partum depression.[20]

However, the difficulties associated with conducting empirical research, as a result of ethics considerations and small sample sizes, will continue to make it difficult for proponents of the inclusion of parental alienation in the DSM to pass muster. One frequent and reoccurring criticism of parental alienation syndrome is that the term has not been generally accepted in the scientific field because it is difficult to perform experiments and gain scientific credibility as a function of the ethical considerations, small sample sizes and the subjective nature of how the term is defined.

Conclusion

Despite its omission from the DSM-5, family lawyers and judges will continue to experience cases involving potential parental alienation for the foreseeable future. It is this author's opinion that the goal for all practitioners should be to understand parental alienation and parental alienation syndrome, as maintaining such an understanding is in the best interests of clients and their children, and will make for a more well-informed practice moving forward. ■

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Does the Child Welfare System Alienate Children from Their Parents?

by Clara S. Licata

In 1985, Richard A. Gardner, MD, identified a disorder, where, in the context of child-custody disputes, a child conducts an unjustified campaign of denigration against a parent, due to indoctrination by an alienating parent and the child's own contributions to the vilification of the alienated parent.[1] Gardner described the primary symptoms of what he termed parental alienation syndrome (PAS) as a campaign of denigration; weak, frivolous or absurd rationalizations for the denigration; lack of ambivalence; reflexive support of the alienating parent in the conflict; presence of borrowed scenarios; and the spread of animosity to the extended family and friends of the alienated parent.[2] Although PAS is a common issue raised in child custody disputes,[3] there are no New Jersey published decisions discussing 'parental alienation' as a disorder or syndrome. In an unpublished decision, one Appellate Division panel held that a family part judge erred in basing a custody determination, in part, on eight PAS criteria.[4] The court noted that "neither the scientific reliability nor general acceptance of PAS" was established in the case and "the theory is still the subject of considerable controversy within the medical and legal communities and should not have played a part in the court's ruling."[5]

Dr. Janet R. Johnson, a specialist in research and clinical interventions with high-conflict divorcing families and alienated children, has criticized Gardner's approach as overly simplistic for focusing "almost exclusively on the alienating parent as the etiological agent of the child's alienation."[6] According to Johnson, "the problem of children's rejection of a parent is a family system's pathology exacerbated by an adversarial legal system, not an individual psychiatric disorder."[7] Johnson also supports a reformulation of the concept that focuses on the "alienated child," rather than "parental alienation."[8] Under this formulation, an alienated child is "one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent."[9]

Although the context of Johnson's article is divorce, the focus on child alienation echoes what can occur in child welfare matters. As time passes, a child's vilification of the parent from whose custody he or she was removed becomes more strident, suggesting that the child welfare system itself, including agency workers and even foster parents, may be the etiological agent of the alienated child.[10] That same system also has been known to alienate the removed child from his or her siblings,[11] and can alienate parents, discouraging, rather than encouraging them, from seeking help from the child welfare system.[12]

New Jersey's Legislative Policy to Preserve Families

In 1951, the New Jersey Legislature declared:

> That the preservation and strengthening of family life is a matter of public concern as being in the interests of the general welfare, but the health and safety of the child shall be the State's paramount concern when making a decision on whether or not it is in the child's best interest to preserve the family unit...[13]

The protection of parental rights continues when a child is placed in foster care and the length of time the child is in foster care does not affect the scope of parental protection.[14] This principle is so important that it is well recognized that even abandonment of a child, resulting in the placement of him or her in foster care, can be repented.[15] This legislative policy protecting parental rights is reflected also in older cases recognizing that foster care is intended to be temporary and palliative, with the goal of returning children to their parents.[16] These cases recognized that foster parents have no right to interfere with the function of the Division of Child Protection and Permanency (DCPP) and the paramount right of the parent to the family intact.[17]

The DCPP is required to encourage parental relationships and assist in efforts to reunify parents and chil-

dren.[18] Efforts must focus on reunification of the parent with the child and assistance to the parent to correct and overcome that which necessitated the placement of the child into foster care.[19] This requires DCPP to exert reasonable efforts "to assist the parents in remedying the circumstances and conditions that led to the placement of the child..."[20] These services include consultation and cooperation with the parent in developing a plan for appropriate services; providing services that have been agreed upon in order to further the goal of family reunification; informing the parent at appropriate intervals of the child's progress, development, and health; and facilitating appropriate visitation.[21]

Unfortunately, adherence to the reasonable efforts requirement is, for the most part, lackluster and perfunctory. In many cases, services provided are forensic and designed to help the division prove its termination case. The Appellate Division has characterized services such as psychological and psychiatric evaluations, substance abuse evaluations, and urine testing as "largely information-gathering in nature, rather than involving the actual provision of treatment, education, housing, occupational training, or other tangible forms of parenting support."[22] In another decision, the Appellate Division criticized the arbitrary ordering of services without determining the need for them.[23] Indeed, even the New Jersey Supreme Court has criticized the division for ordering "utterly irrelevant" parenting classes for a man who had successfully raised four children.[24]

The Federal Adoption and Safe Families Act Conflicts with New Jersey's Policy of Preserving Families

Federal legislation known as the Adoption and Safe Families Act (ASFA) imposes a policy making the safety of the child a paramount concern in considering whether reasonable efforts have been made to reunite a child with his or her family.[25] Although not directly stated, ASFA favors permanency for children by imposing timelines on the provision of reasonable efforts that require permanency hearings on their expiration.[26] ASFA's requirements apply to the states in order for them to continue to receive federal funding.[27] Therefore, once a child is removed, a stopwatch begins to tick signaling the beginning of federally imposed time constraints either toward reunification or termination of parental rights and adoption of the child. Thus, New Jersey's obligations under ASFA conflict with its legislative policy to preserve families. Adoption and severance of all parental ties place control over childrearing in the adoptive parent who can choose whether or not the child should have any relationship with his or her biological parents.

As a result of ASFA, numerous New Jersey cases stand for the proposition that children should not languish indefinitely in foster care while parents attempt to remediate conditions that resulted in out-of-home placement.[28] ASFA limits the amount of time a child is in out-of-home placement. Permanency hearings are required every 12 months.[29] In addition, when a child has been in out-of-home placement for 15 of the last 22 months, the state is required to file a petition to terminate parental rights.[30] Further, ASFA contains exceptions that permit parental rights to be terminated prior to 22 months out of the home.[31] Thus, ASFA curtails the reach of parental rights so extended separation of children and parents can itself be a basis of severance of family bonds.[32]

Prior to ASFA, the Adoption Assistance and Child Welfare Act (AACWA) required states to exercise reasonable efforts to prevent the need for removal of the child and to make it possible for the child to return to the home.[33] But ASFA's requirement that a termination of parental rights complaint be filed upon the expiration of timelines resulted in a judicial emphasis on stability.[34] This emphasis may benefit children involved in a particular case, but is a detriment to the system as a whole. The reasonable efforts requirement originally was borne out of a policy decision at the state and federal levels that children do best when raised by their family of origin, and that the family unit should be preserved.[35] In contrast, ASFA's policy declaration that the health and safety of the child are of paramount concern limits a judge's discretion in considering whether reasonable efforts have been made because whether the state has made such efforts is tied to child safety. This policy permits the state to be less aggressive with services, knowing the judge's primary consideration will be the safety of the child.[36]

This diluting of the reasonable efforts requirement is reflected in New Jersey cases citing the familiar refrain that reasonableness of services is not measured by a parent's successful completion of them.[37] It also is reflected in an implied policy that DCPP's obligation to offer services is contingent on parents fulfilling an obligation to work toward reunification, turning the focus on the reasonableness of the parents' efforts, as opposed to evaluation of whether DCPP has acted reasonably.[38] Court decisions

tend to catalog parents' failures, leading to a conclusion that parents have forfeited all right to services because of their bad behavior. This approach overlooks the agency's mandate to deal with dysfunctional, disturbed and/or irresponsible parents. One commentator concluded that "it seems only fair that the reasonable efforts requirement be tailored to meet the propensities of these parents, and not those of the average responsible parent who might be expected to eagerly accept available services."[39] Nevertheless, in cases where a parent is mentally ill or has a cognitive deficiency, it is not uncommon for experts to conclude that no services would be sufficient to enable the parent to raise his or her child independently.[40]

Unfortunately, despite the time strictures and permanency policy imposed by ASFA, termination of parental rights does not necessarily lead to adoption. Many difficult-to-adopt children remain in foster care and group homes after they are severed from their parents and become legal orphans, resulting in child alienation with no possibility of permanency.[41]

State-Induced Child Alienation

The longer a child is in foster care, the greater the risk the child becomes alienated from his or her parents. One evaluator, a clinical psychologist, noted, in successive interviews with a child, a strengthening in intensity of the child's stories of parental abuse.[42] The evaluator described this progression as a "hallmark of parental alienation," and expressed the opinion that "the system is alienating."[43] Another evaluator noted that a child was in the process of becoming alienated from his parent and bonding with his foster parent.[44] In another case, an Appellate Division panel found that "the parent-child separation has been substantially contributed to by public agencies whose mission it is to protect the family," and that foster parent bonding "appears to have resulted more from the worker's attitude and actions combined with the nature of the bureaucratic process itself than from any culpability in respect of the children attributable to the parents."[45] In another gut-wrenching decision, the Appellate Division affirmed the termination of parental rights occurring after the matter had been remanded to the family part to provide "liberal unsupervised visitation."[46] Despite the Appellate Division's directive of liberal unsupervised visitation, the trial judge ordered twice weekly *supervised* visitation for one hour with the biological parents, which permitted a very strong bond to develop between the child and the foster parents.[47] The panel found, "[o]n remand, the fault lay with both [DCPP] and the trial judge for continuing those inadequate efforts in direct contradiction of our remand." The Appellate Division found itself "with no realistic alternative but to affirm the termination order" because "removal from the foster family would be traumatic, if not catastrophic."[48]

In addition to the child welfare system itself, foster parents also have been found to be agents of alienation. In reversing a termination of parental rights judgment, another appellate panel noted that the foster parents had obstructed the biological parents' parenting time.[49] Similarly, a New York family court judge found a campaign of alienation engaged in by a foster parent that could not have occurred without the collective failure of Administration for Children's Services (ACS),[50] the children's attorney, and the family court to understand what was happening.[51] Nevertheless, the court found there was no alternative other than to issue a kinship legal guardianship judgment to the foster parent because there was nowhere else for the children to live.[52] The mother had surrendered her rights and the "children's minds ha[d] been poisoned against their father."[53]

Foster parent bonding, as a result of the bureaucratic process and the attendant alienation of children from their biological parents, has been documented in unfortunate cases of undocumented immigrants. Undocumented immigrant parents, picked up for simple infractions such as driving without a license, have their children removed by state child welfare agencies.[54] Detained parents are often prevented from accessing programs required by the state agency for family reunification.[55] This denial often results in the parents' inability to regain custody because the child has been in foster care for 15 out of 22 months and ASFA requires the state to initiate an action to terminate parental rights.[56] Therefore, even after the immigration proceeding concludes, and although it may be in the child's best interests to return to her parents, the child still may be permanently separated from them. In such cases, children frequently have been placed with non-relatives because of a 2014 change to policy of the Department of Children & Families, which made it harder for undocumented relatives to be approved for licensing.[57] This policy presumes that undocumented out-of-home caregivers will have difficulty providing children with permanency.[58] Thus, children removed at infancy from undocumented immigrants and placed with non-relative foster parents will naturally develop a bond with the foster parent over time.

Nevertheless, foster parent bonding is not supposed to be a justification for termination of parental rights.[59] New Jersey law theoretically safeguards a parent from losing a child because of a bond with a foster parent by compelling DCPP, in cases where the issue is not parental fitness but the bond between a child and his or her foster parents, to perform comparative bonding evaluations between the parent and the child and the foster parents and the child.[60] But, more is required than just compelling the division to perform a bonding evaluation between parent and child. In cases where a child is removed at infancy, there is no chance of demonstrating a bond with his or her parent unless DCPP has been diligent in setting up visitation.[61] In one case, a mother who had been gang raped placed the child born of that rape into foster care when she could not care for her.[62] Reversing the termination of parental rights on the ground of abandonment, the Supreme Court noted, "[w]e suspect that if the agency had allowed visitation and begun a process of reuniting B.F. with her daughter, it could have helped create a bond between the daughter and her mother that would have greatly mitigated any harm from being removed from foster parents."[63] But, the division frequently disregards its own regulations[64] requiring consultation and cooperation in setting up visitation.[65]

In other cases, a child may refuse visitation. A trial court will rely on a therapist's representations that the child does not want to visit without even conducting a hearing,[66] despite New Jersey legislative policy that visitation is the presumptive rule[67] and despite the necessity for clear and convincing evidence that such visitation is not in a child's interests.[68]

Thus, it is evident that the child welfare system can be an etiological agent of child alienation. But the system also results in alienated parents. State law encourages parents to seek help from DCPP.[69] Parents with limited incomes and unstable housing and employment should be able to turn to the foster care system without fear of losing their children.[70] Yet, it is not uncommon for a consensual placement to turn into a non-consensual loss of custody,[71] or a finding that a parent has abused or neglected his or her child,[72] or an action to terminate parental rights.[73] The Appellate Division observed that the "sad commentary here is the extent to which the combination of circumstances must surely reinforce the fear of alienated desperate parents that to seek DYFS' help in critical situations is to risk the loss of their children. Parents obviously must be encouraged to, not discouraged from seeking that help."[74]

Another unfortunate outcome of state-induced child alienation is the alienation of a child from his or her siblings. Under the Child Placement Bill of Rights,[75] the division is required to attempt to place siblings together and, if unable, to promote visitation between them.[76] Recently, the New Jersey Supreme Court reminded the agency that this obligation continues after termination of parental rights,[77] but the right of siblings to continued visitation is not absolute. Significantly, in criticizing the division for failing to fulfill its responsibilities under the Child Placement Bill of Rights in either the pre-adoption or post-adoption phase, the Supreme Court found the division treated the case as "zero-sum game in which the bond between the foster mother and the twins somehow negated any sibling bond, such that no bonding evaluation of the siblings ever took place."[78] This observation echoes the principle that foster parent bonding in and of itself is not to be a justification for termination of parental rights.[79] The Supreme Court also found that the agency "improperly ceded its decision-making obligations to the foster mother when she opted to withdraw her cooperation with respect to visitation."[80] This same concern is present when a court suspends parental visitation without a hearing at a therapist's recommendation because a child refuses to visit.[81] Notwithstanding these concerns, the Court failed to find a right to compel post-adoption visitation between siblings, absent a showing of harm to the siblings without visitation.[82]

Conclusion

Studies have shown that a child's continued contact with his or her biological parents leads to better mental health.[83] If foster parents have sensitivity, empathy, and values accepting of biological parents, they can help children understand membership in both families. Visitation arrangements are most successful when foster parents possess these qualities and see the potential value of contact and do not try to take the place of biological parents. When contact is characterized by cooperation, rather than conflict, children can maintain a sense of belonging to both families.[84]

New Jersey courts have suggested that where termination of parental rights is based solely on foster parent bonding, that judgment should be reversed in favor of alternatives that include either a gradual transition back to the custody of the biological family or continued foster care with regular visitation of the biological parents.[85] One dissenting member of the New Jersey Supreme

Court recommended an enforceable order mandating post-adoption visitation where expert evidence demonstrated continued contact with the biological parent was necessary to avoid harm to the child.[86]

These recommendations are not supported in current law, which this author believes legitimizes the alienation of the child from his or her biological family in the name of child protection and permanency. But, "[t]he reckless destruction of American families in pursuit of the goal of protecting children is as serious a problem as the failure to protect children. We need to understand that destroying the parent-child relationship is among the highest forms of state violence. It should be cabined and guarded like a nuclear weapon. You use it when you must."[87] ■

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11. *In re D.C.*, 203 N.J. 545, 564 (2010).
12. *Id.* n.3.
13. N.J.S.A. 30:4C-1(a). L.1951, c. 138, § 1.
14. *In re Guardianshi of K.H.O.*, 161 N.J. 337, 347 (1999); *N.J. Div. of Youth & Family Servs. v. I.S. and C.M.,,* 202 N.J. 145, 169-70 (2010).
15. *Lavigne v. Family & Children's Soc. of Elizabeth,* 11 N.J. 473, 480-81 (1953).
16. *State in Interest of L.L.,* 265 N.J. Super. 68, 78 (App. Div. 1993); *W.C. v. P.M.,* 155 N.J. Super. 555, 565-66 (App. Div. 1978).
17. *W.C., supra.*
18. N.J.S.A. 30:4C-15(a)(3).
19. *K.H.O., supra,* 161 N.J. at 354.
20. N.J.S.A. 30:4C-15.1(c).
21. *Ibid.*
22. *N.J. Div. of Youth and Family Servs. v. D.M.S.,* 2006 WL 941756 *15 (App. Div. 2006).
23. *N.J. Div. of Child Protec. & Permanency v. J.C.,* 440 N.J. Super. 568, 580 (App. Div. 2015); *see N.J. Div. of Child Protec. & Permanency v. A.S.K. and E.M.C.,* 2017 WL 2255444 *16 (App. Div. 2017)(Guadagno, J., dissenting) (criticizing the ordering of a "completely unnecessary psychological evaluation," noting that judges have an independent obligation to determine whether a service is necessary before ordering it).
24. *I.S. and C.M., supra,* 202 N.J. at 178.
25. 42 U.S.C. §671(a)(15)(A).
26. 42 U.S.C. §671(16) , §675(5)(A)(ii); §675(5)(C).
27. 42 U.S.C. §671(a).
28. *N.J. Div. of Youth & Family Servs. v. S.F.*, 392 N.J. Super. 201, 209–10 (App. Div.), *certif. denied*, 192 N.J. 293 (2007); e.g., *In re Guardianship of D.M.H.,* 160 N.J. 363, 383 (1999); *N.J. Div. of Youth & Family Servs. v. L.J.D.,* 428 N.J. Super. 451, 483-84 (App. Div. 2012); *K.H.O., supra,* 161 N.J. at 357-59; *N.J. Div. of Youth & Family Servs. v. C.S.,* 367 N.J. Super. 76, 111 (App. Div. 2004); *N.J. Div. of Youth & Family Servs. v. S.A.,* 324 N.J. Super. 324, 334 (Ch.

Div. 2005); *In re Guardianship of D.J.M.,* 325 N.J. Super. 150, 154-55 (Ch. Div. 1999).
29. 42 U.S.C. §675(5)(C).
30. 42 U.S.C. §675(5)(E).
31. These exceptions relate to whether the parent has been found guilty of crimes such as murder, manslaughter or has inflicted serious bodily injury on the child or another child in the family, or has abandoned the child. 42 U.S.C. §675(5)(3); N.J.S.A. 30:4C-15(e), (f).
32. *See D.J.M., supra,* 325 N.J. Super. at 155.
33. Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15).
34. 42 U.S.C. §671(16) , §675(5)(A)(ii); §675(5)(C); *see, e.g., K.H.O., supra,* 161 N.J. at 358.
35. Jeanne M. Kaiser, Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases, 7 *Rutgers J.L. & Pub. Pol'y* 100, 103 (Fall, 2009).
36. Kaiser, *supra,* at 108.
37. *E.g., N.J. Div. of Youth & Family Servs. v. F.M.,* 211 N.J. 420, 452-53 (2012); *In re Guardianship of D.M.H., supra,* 161 N.J. at 393; *N.J. Div. of Child Protec. & Permanency v. L.J.D., supra,* 428 N.J. Super. at 488.
38. Kaiser, *supra,* at 117-18; *see, e.g., D.M..H., supra,* 161 N.J. at 392; *N.J. Div. of Youth & Family Servs. v. J.S.,* 433 N.J. Super. 69, 90 (App. Div. 2013); *C.S., supra,* 367 N.J. Super. at 119.
39. Kaiser, *supra,* at 117-18.
40. *E.g., N.J. Div. of Child Protec. & Permanency v. A.A.,* 2017 WL 2953392 *8 (App. Div. 2017). One Appellate Division panel has found that "[e]ven if the Division has[ ] been deficient in the services offered to a parent, reversal of the termination order is not necessarily warranted because the best interests of the child controls the ultimate determination regarding termination of parental rights," *N.J. Div. of Youth & Family Servs. v. F.H.,* 389 N.J. Super. 576, 621 (App. Div. 2007), a statement clearly at odds with the Division's burden to prove all four prongs of the best interest test by clear and convincing evidence, *N.J. Div. of Youth & Fam. Servs. v. A.W.,* 103 N.J. 591, 611 (1986); *N.J. Div. of Youth & Fam. Servs. v. R.G.,* 217 N.J. 527, 554 (2014).
41. *See N.J. Div. of Youth & Family Servs. v. E.P.,* 196 N.J. 88, 109 (2008).
42. *C.J. and J.J., supra,* 2014 WL 3881311 *32.
43. *Ibid.*
44. *W.B., supra,* 2011 WL 2314543 *8.
45. *T.C., supra,* 251 N.J. Super. at 437, 440; *see* Johnson, *supra,* 38 *Fam.L.Q.* at 760.
46. *N.J. Div. of Youth & Family Servs. v. J.M.*, 2006 WL 1509931 (App. Div. 2006).
47. *Id.* at *12.
48. *Ibid.*
49. *N.J. Div. of Youth & Family Servs. v. J.V.*, 2009 WL 1658608, at *11 (App. Div. 2009).
50. ACS is New York City's child welfare agency.
51. *In re N.L.G.,* 57 N.Y.S.3d 634, 642 (Family Ct., Queens Cty. 2017).
52. *Ibid.*
53. *Ibid.*
54. Applied Research Center, Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System, 12 (Nov. 2011).
55. Sofia Iqbal, Reforming New Jersey Resource Family Licensing: Placing Children in the Care of Their Undocumented Family and Friends, 40 *Seton Hall Legis. J.* 435, 436-37 (2016). There are legal bans on undocumented immigrants' access to many public programs such as Medicaid and Temporary Aid for Needy Families (TANF). In addition to denying low-income immigrants basic needs such as food and shelter, this policy can prevent them from being able to access providers for a required psychiatric evaluation. Applied Research Center, Shattered Families, *supra,* at 18-19. Further, detained parents are almost universally denied access to services needed to comply with reunification plans because Immigration & Customs Enforcement or the counties and private companies contracted to run many detention centers do not provide detainees access to any services. *Id.* at 38.
56. *See* n. 30, *supra.*
57. N.J. Dep't of Children & Families Policy Manual, *Placement of Children with Kinship Caretakers Who are Undocumented Immigrants,* CP&P-IV-A-11-200, available at http://www.nj.gov/dcf/policy_manuals/CPP-IV-A-11-200_issuance.shtml (last viewed on Dec. 5, 2017).
58. *Ibid.*
59. *See N.J. Div. of Youth & Family Servs. v. G.L.,* 191 N.J. 596, 608-09 (2007).
60. *In re Guardianship of J.C.,* 129 N.J. 1, 18-19 (1992).
61. *G.L., supra,* 129 N.J. at 609.
62. *Matter of Guardianship of K.L.F.*, 129 N.J. 32, 35 (1992).

63. *Id.* at 46.
64. DCPP has an obligation under N.J.S.A. 30:4C-15.1(c)(4) to "facilitate appropriate visitation." The agency's own regulations interpret this statute. Visits are to take place "in the least restrictive, most comfortable setting possible" and may take place "in the home of the parents, relatives or friends or in other suitable locations." N.J.A.C. 3A:15-1.9(a). The regulations call for a visitation plan to be completed within five working days of the date of placement. N.J.A.C. 3A:15-1.5(b). Where, the child is placed with a resource family, the plan is to be negotiated and developed through agreement with DCPP, the parent, and the resource family. N.J.A.C. 3A:15-1.5(d). DCPP's regulations also address supervision. Those regulations unequivocally provide that visits are to be unsupervised unless DCPP or the court finds a need for supervision. N.J.A.C. 3A:15-1.10(b)). Supervision requires a finding that it is necessary to protect the child, or the child or parent must request it. N.J.A.C. 3A:15-1.11(c).
65. *See, e.g., I.S. and C.M., supra,* 202 N.J. at 183; *A.S.K. and E.M.C., supra,* 2017 WL 2255444 *18-19.
66. *E.g., N.J. Div. of Child Protec. & Permanency v. C.B. & J.B.,* A-4265-14, slip op. at 4-5, 6, 9 (App. Div. March 2, 2017). In *S.M. v. K.M.*, 433 N.J. Super. 552, 558 (App. Div. 2013), the Appellate Division reaffirmed the importance of a parent's right to visit his child and the child's right to visit his parent, even when the child is verbalizing a desire not to see the parent.
67. *Beck v. Beck*, 86 N.J. 480, 495 (1981); *V.C. v. M.J.B.,* 163 N.J. 200, 228-29, *cert. denied*, 513 U.S. 926, 121 S. Ct. 302, 148 L. Ed.2d 243.
68. *Wilke v. Culp*, 196 N.J. Super. 487, 503 (App. Div. 1984), *certif. denied*, 99 N.J. 243 (1985); *see N.J. Div. of Child Protec. & Permanency v. K.M. & F.K.,* 2015 WL 10767254 *5 (App. Div. 2016)(reversing placement of child with other parent based only on caseworker representations as to child's mental status as explained in expert reports not admitted into evidence).
69. N.J.S.A. 30:4C-11 permits a parent to apply to the division for care and custody when it is needed to safeguard a child's safety or welfare. The division may provide care, custody or supervision, with the parent's consent, if it determines after investigation that it is necessary.
70. *See Doe v. G.D.*, 146 N.J. Super. 419, 431-32 (App. Div. 1976), *aff'd sub nom*, *Doe v. Downey,* 74 N.J. 196 (1977).
71. *See N.J. Div. of Youth & Family Servs. v. I.S.,* 214 N.J. 8, 16-17, 38-39 (2013); *Doe, supra,* 146 N.J. Super. at 431-32.
72. *See N.J. Div. of Child Protec. and Permanency v. L.W.* 435 N.J. Super. 189, 192-93 (App. Div. 2014) and *N.J. Div. of Child Protec. & Permanency v. C.Z. and E.Z.,* 2017 Wl 2666382 *8 (App. Div. 2017) (reversing a trial court's determination that parents abused and neglected their children, which originated with the parents contacting DCPP for assistance because of impending homelessness).
73. *T.C., supra,* 251 N.J. Super. at 437.
74. *Ibid.*
75. N.J.S.A. 9:6B-2, *et seq.*
76. N.J.S.A. 9:6B-4(f).
77. *In re D.C., supra,* 203 N.J. at 564.
78. *Id.* at 566.
79. *See* n. 59-60, *supra*.
80. *In re D.C., supra*, 203 N.J. at 566.
81. *See* n. 66, *supra.*
82. *Id.* at 573-74 (2010). This is the same standard applied in cases where grandparents or unrelated third parties, such as persons alleged to be psychological parents seek visitation. *Id.* at 572-73, *citing Watkins v.* Nelson, 163 N.J. 234, 248 (2000) and *V.C. v. M.J.B.,* 163 N.J. 200, 220 (2000).
83. *E.g.,* Lenore M. McWey, Ph.D., Alan Acock, Ph.D., and Breanne Porter, M.A., The Impact of Continued Contact with Biological Parents Upon the Mental Health of Children in Foster Care, *Child Youth Serv. Rev.* 2010 Oct. 1; 32(10:1338-1345.doi:10.1016/j.childyouth.2010.05.003.
84. *Ibid.*
85. *B.G.S., supra,* 219 N.J. Super. at 597-98, *citing T.C., supra,* 251 N.J. Super. at 440-41.
86. *In re Guardianship of J.N.H.,* 182 N.J. 29, 32 (2004) (Long, J., dissenting).
87. MacFarquhar, Larissa, When Should a Child Be Taken From His Parents, *The New Yorker*, Aug. 7-14, 2017, available at https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents at 48 (quoting Martin Guggenheim).

Litigating the Parental Alienation Case

by Sheryl J. Seiden

When a client consults with legal counsel and advises that his or her children are being alienated by the other parent against him or her, one must first assess whether the case is one of parental alienation or estrangement. This is the essential question presented in parental alienation cases. Parental alienation is a serious problem that plagues families, particularly when parents are involved in divorce proceedings, where one parent successfully manipulates a child against the other parent. Parental alienation is also a term that has been overused and misused in family law practice. Estrangement, by contrast, is a term used to describe a situation where a child's disrespect, hatred, and/or refusal to exercise parenting time with a parent is justified. Often, these cases have elements of both alienation and estrangement.

Parental alienation cases present some of the most toxic custody cases in family law practice. They can consume considerable time for an attorney and can be emotionally difficult for the client and for the lawyers as well. Litigation of a parental alienation case requires significant resources, knowledge and patience.

Filing the Initial Motion in the Parental Alienation Case

When presented with a case of parental alienation, time is of the essence. The longer the parental alienation continues, the worse the relationship between the alienated parent and the children becomes. In a pre-judgment divorce matter, the time between the filing of a complaint for divorce and the adjudication of a trial will be significant. In a post-judgment matter, the time from the filing of a motion to the adjudication of a plenary hearing can also be significant. Thus, addressing the parental alienation issue in either context must be expedited.

To bring the issues of parental alienation to the attention of the court, the alienated parent should consider immediately filing a motion to commence steps to repair the relationship between the children and the alienated parent. The prayers for relief in the notice of motion should focus the court on addressing the alienation. The motion should include the following requests: 1) uninterrupted parenting time with the children, 2) no contact with the children by the favored parent during the alienated parent's parenting time, 3) an evaluation by a forensic psychologist or psychiatrist who has expertise addressing parental alienation issues, 4) that the children ultimately be enrolled in a program designed to remedy parental alienation, and 5) counsel fees.

Shared and/or Extended Parenting Time

In cases where the divorce matter is first commencing, the motion should request shared joint legal and physical custody of the children *pendente lite*. Uninterrupted time with the children outside the presence of the alienating parent is essential to provide the alienated parent with the opportunity to repair the relationship with the children. In her study of adult children of parental alienation children, Amy Baker, Ph.D., a well-known author and developmental psychologist, found that creating opportunities for the child to spend time with the rejected parent is key: "[Alienated] children need an excuse to spend time with the targeted parent in order to avoid the wrath of the alienating parent."[1]

If the parties are both living in the marital residence, consider requesting a nesting arrangement where the parties alternate use of the marital residence during their parenting time. While it would be ideal for the alienated parent to have more than 50 percent of the time with the children, often that is not realistic. In such a case, the attorney for the targeted parent should request a shared physical custody arrangement plus extended time with the children during summers and/or extended vacations to provide him or her the opportunity for uninterrupted time with the children. It is during this uninterrupted parenting time that the alienated parent and the children can reunite and rebuild the bond that was broken by the alienation.

Change in Custody

In the most true, severe cases of parental alienation, prohibiting contact with the children by the alienating

parent during the targeted parent's parenting time may not be enough. Or, in some circumstances, it might not be an option if the children are old enough to refuse to go with the targeted parent. In such severe cases, a temporary or permanent change of custody might be necessary. If a parental relationship causes emotional or physical harm to the child, a court is authorized to restrict or even terminate custody.[2] Although this might sound extreme, mental health professionals have found that "in the severest of cases which may present as such at the outset or later after various efforts to intervene have failed, custody reversal may be the least detrimental alternative for the child."[3]

The idea of 'harm' to a child through alienation was explored in a 2012 unpublished Appellate Division decision in which the court affirmed Judge Bonnie J. Mizdol's holding that a mother's false allegations of child sexual abuse on behalf of the father, and her convincing the child that the allegations were true, constituted abuse and neglect.[4] At the trial level, Judge Mizdol held that this behavior by the mother did constitute abuse and neglect, and modified residential custody to permit the child to be with the father to avoid further injury to the child. The Appellate Division affirmed.

No Contact Provision

When the alienated parent has parenting time with the children, it is imperative that the alienating parent have no contact with the children. While it is quite customary to permit one parent to have constant contact with the child during another parent's parenting time via telephone calls, text messages, email, or Skype, in cases addressing parental alienation issues such contact should be discouraged. The rationale is that a child alienated from the rejected parent will be 'uncomfortable' with the rejected parent, and will seek the approval of the favored parent.

A truly alienated child will be pressured by the favored parent and may feel the need to 'report' the rejected parent's shortcomings observed during the child's time with the rejected parent. Experts addressing parental alienation agree it is imperative for the rejected parent to remain in contact with the child without the influence from the favored parent.[5] It is for this reason that limiting the contact between the child and the favored parent during the rejected parent's parenting time will assist in relieving some of the pressure on the child and will allow the rejected parent to rebuild the relationship. A court order that prohibits such contact can take the pressure off child victims of parental alienation. A motion should include a request for this relief in parental alienation cases.

Parental Alienation Programs

It is important for the children and the alienated parent to be enrolled in an appropriate program to address the alienation and reunify their relationship. While it is unusual for a court to order the children to attend these programs on the initial motion, it is important to include a request that the children and the alienated parent attend such a program as part of the relief requested. As detailed below, the filing of the motion will likely lead to the appointment of a custody expert and scheduling of a trial. Only after the court determines that parental alienation has occurred will it require the children and parent(s) attend a reunification program.

It seems logical that while the process is ongoing, the children should be enrolled in therapy to address their issues with the other parent. However, therapy is contraindicated in these cases. Much has been written about what types of therapy are available for children who are rejecting their parents. The late well-regarded psychiatrist Richard Gardner cautioned that family therapy interventions are extremely delicate, "a therapist working with a [parental alienation] case often only has one chance to be effective."[6] Gardner found that such interventions are often 'no-win' if they involve trying to: 1) reason with the rejected child and convince him or her that the alienated parent really isn't that bad, 2) confront the rejecting child with the reality that the targeted parent has not done anything wrong, 3) directly, inadvertently, undermine the coalition between the child and the alienating parent by questioning or challenging the charges or beliefs expressed by the alienating parent, and/or 4) challenge the alienating parent in a direct confrontation of power struggle.[7]

Canadian research psychologists Barbara Jo Fidler and Nicholas Bala further caution that "therapy, as the primary intervention, simply does not work in severe and even in some moderate alienation cases...therapy may even make matters worse to the extent that the alienated child and favored parent choose to dig in their heels and prove their point, thereby further entrenching their distorted views."[8]

The counter-productivity of therapy is particularly applicable to individual therapy for the children. Organizers of a study of 42 children from 39 families who were "resisting or refusing visitation during their treat-

ment in the context of a custody or access dispute with an average duration of almost a decade" found that those "who had been forced by Court orders to see a successive array of therapists of reunification counseling were, as young adults, contemptuous and blamed the Court or rejected parent for putting them through this ordeal."[9]

In this author's experience, it is counterintuitive to the courts that therapy, particularly for a child, could be harmful or exacerbate the problem. However, much of the scientific data supports this theory. Therefore, on the initial application, an attorney for an alienated parent should bring the high risk of harmful effect of individual therapy on rejecting children to the court's attention to defuse the court of the presumption that therapy could assist the family while the application is pending when, according to the scientific data, the opposite is likely true.

The Evaluation

A court met with conflicting certifications from each parent will have great difficulty adjudicating the application. The alienating parent will claim the behavior of the children toward the other parent is justified, while the targeted parent will claim the favored parent's alienation causes the children's rejecting behavior. How, then, can a court decide which parent to believe? Rule 5:8-6 requires the court to conduct a plenary hearing where it finds that a genuine and substantial issue of custody of children exists. This hearing shall occur within six months after the last responsive pleading is filed.

The court may appoint a custody expert (or each party may retain their own custody expert), in which case a trained mental health professional will assist the court by opining upon the reasons for the children's behavior. If the alienated parent plans to hire his or her own custody expert, he or she should consider consulting with that expert prior to the filing of the motion. The expert can provide the targeted parent with guidance regarding any appropriate programs for the family to attend. He or she can also assist in crafting the notice of motion to ensure the rejected parent requests the appropriate safeguards from the outset of the case. It is important when selecting a custody evaluator that the evaluator be a psychologist or psychiatrist with experience in parental alienation, who will interview collaterals (*e.g.*, family members, teachers, friends, and the like) to compare the historical relationships of the parents—and grandparents, in extreme cases—and the children to the current relationships. These qualifications are also critical for any expert called upon to opine on whether the case is one of parental alienation or estrangement.

Enforcing the Court's Order

Obtaining an order forbidding contact by the favored parent during the rejected parent's parenting time is difficult, and it is only the tip of the iceberg. Once an order is entered, the court is next faced with the question of how to enforce the order. The courts do have some remedies available. For example, a line of New Jersey cases dating back to 1909 state a court may decrease child support for a custodial parent to force that parent to comply with an order for unfettered parenting time for the rejected parent.[10]

In addition, the Baker literature found sanctions and other consequences can help encourage the child to attend court-mandated parenting time with the rejected parent, because the child will have "an excuse (to help the alienating parent avoid the sanctions) and can, therefore, be freed from the responsibility of appearing to choose or want this time with the targeted parent."[11]

Obtaining an order to allow unfettered parenting time for the rejected parent in parental alienation cases is important. Aggressively enforcing such an order in these cases is even more important. An alienated child will be more likely to comply with a parenting schedule when he or she understands it is a directive from the court. This provides an excuse for the child to exercise parenting time with the disfavored parent and gives him or her a means of complying without betraying the favored parent.

Bifurcation under Rule 5:7-8; Expedited Trial under Rule 5:8-6; Financial Issues

In divorce proceedings involving parental alienation, it is critical to address the custody and parenting time issues immediately. However, adjudication of a complex matrimonial matter often takes more than a year from the date the complaint for divorce is filed. The alienated parent should consider asking the family presiding judge to bifurcate the custody and parenting time issues from the financial issues. This requires a demonstration of extraordinary circumstances.[12] Rule 5:7-8 permits bifurcation of the trial of the custody dispute from the trial of disputes over support and equitable distribution "only with the approval of the Family Presiding Judge, which approval shall be granted only in extraordinary circumstances and for good cause shown."[13] Thus, a lawyer faced with a parental alienation case is encouraged to argue

parental alienation as an extraordinary circumstance adversely affecting the wellbeing of the rejecting children and the alienated parent.

In requesting the matter be bifurcated, practitioners should also cite Rule 5:8-6 for authority to expedite the matter. Rule 5:8-6 provides where custody is a genuine and substantial issue, a hearing date must be set no later than six months after the filing of the last responsive pleading.[14] Moreover, "in order to protect the best interests of the children, [the court may] conduct the custody hearing in a family action prior to a final hearing of the entire family action."[15] Therefore, there is ample opportunity to argue the custody matters in parental alienation cases be expedited.

Combining these two concepts in the recent unreported Appellate Division case *M.A. v. A.I.*, the trial court bifurcated the custody and financial issues in a divorce matter to permit the court to address the custody issues on a more expedited basis.[16]

In post-judgment parental alienation cases, advocating to protect the best interests of the children supports a request for expedition of the plenary hearing.

The Trial

The notice of motion provides the client's wish list for what he or she believes is needed to address and repair the damage caused by the parental alienation. Several of these provisions may require a plenary hearing to be adjudicated. At the hearing, the attorney for the rejected parent should focus on demonstrating the normal relationship that existed between the targeted parent (and that parent's family) and the children, and how that relationship has dissipated or become damaged over time. Often with parental alienation cases, the children not only reject the disfavored parent, but they also reject the disfavored parent's family. A child who had a great relationship with his or her grandparents on the targeted parent's side often also is taught to hate those grandparents as a product of the alienation. To establish that this rejection is not justified, demonstrating the strength of the relationship before the acts of alienation began is essential. In order to demonstrate the deterioration of the relationship, both the parent, the parent's family and close family friends can be called as witnesses at trial.

The custody evaluator can also be called as an expert if his or her report is helpful to establish the alienation. Not only should the custody evaluator's opinion regarding the alienation be testified to but his or her suggestions for remedying the alienation should be explored.

Several of the programs that provide reunification for the family may require strict orders to admit the children into their programs. If this is the case, consider calling a professional from the reunification program as a fact witness to educate the court regarding the strict provisions the program requires and explain the rationalization for each of these provisions. For example, one of the reunification programs requires that the alienated parent have sole legal and physical custody of the children, with no contact for the other parent for at least 90 days. When presenting this requirement to the court, a court may be quick to reject it provision and, in doing so, inadvertently disqualify the family from the reunification program. By calling a professional from the program to explain the basis for these requirements, the court can understand the basis for these provisions, which the court may then be more willing to enter as part of an order.

Conclusion

In sum, as an advocate for the alienated parent, by filing a motion early in the case, one can shape the direction of the litigation while focusing the court on the remedies that are critical to repair the relationship. It will take time to achieve the goals of the alienated parent, but with focus, dedication, and education, one can help rebuild a family destroyed by parental alienation, one block at a time. ■

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Endnotes

1. Amy J. L. Baker, *Adult Children of Parental Alienation Syndrome: Breaking the Ties That Bind* at 233 (W.W. & Norton Company 2007).
2. *Wilke v. Culp*, 196 N.J. Super. 487 (App. Div. 1984).
3. Barbara Jo Fidler and Nicholas Bala, Children Resisting Postseparation Contact with a Parent: Concepts, Controversies and Conundrums, 48 *Fam. Ct. Rev.* 1, 35 (2010).

4. *N.J. Div. of Youth & Family Servs. v. C.O.*, 2012 N.J. Super. Unpub. LEXIS 2591, 2012 WL 5907077 (App. Div. Nov. 27, 2012)
5. *See, e.g.,* Richard A. Warshak, Ph.D., *Divorce Poison* at 50 (HarperCollins Publishers, Inc. 2010).
6. Richard A. Gardner, Richard S. Sauber and Demosthenes Lorandos, *The International Handbook of Parental Alienation Syndrome* (Charles C. Thomas Publisher, Ltd. 2006).
7. *Id*.
8. Fidler and Bala, *supra* at 11.
9. Janet R. Johnston and Judith Roth Goldman, Outcomes of Family Counseling Interventions with Children who Resist Visitation: An *Addendum* to Friedlander and Walters, 48 *Fam. Ct. Rev.* 1, 112-113 (2010).
10. *See, e.g., Von Bernuth v. Von Bernuth*, 76 N.J. Eq. 200 (1909); *Daly v. Daly*, 39 N.J. Super. 124 (1956); *Smith v. Smith*, 85 N.J. Super. 462 (1964).
11. Baker, *supra* at 233.
12. *See* New Jersey Court Rule 5:7-8.
13. New Jersey Court Rule 5:7-8.
14. New Jersey Court Rule 5:8-6.
15. *Id*., *see also Leventhal v. Leventhal*, 239 N.J. Super. 370 (Sup. Ct. Chan. Div. Family Part Bergen Co. 1989) (recognizing that although New Jersey generally disfavors bifurcation in family matters, custody hearings may be bifurcated to ensure that the best interests of the children are achieved).
16. *M.A. v. A.I.*, A-4021-11T1, 2017 N.J. Super. Unpub. LEXIS 818, 2017 WL 1229946 (App. Div. April 4, 2017).

The Alienated Child: Choosing the Right Interventions

by Amy Wechsler

New Jersey law presumes that parents are equally entitled to a relationship with their children.[1] As the legislative findings and declaration to N.J.S.A. 9:2-4 announced, the public policy in the state is:

> to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and…it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.[2]

Following suit, the Supreme Court has interpreted this statute to bestow "equal rights and equal responsibilities regarding the care, nurture, education and welfare of their children."[3]

Assuming children want and need the care and affection of both parents, a primary goal in any divorce or separation should be to facilitate parent-child relationships. As family lawyers and judges know, that is not always the case. In some of the most contentious and challenging divorces, children become alienated from a parent and either resist or completely refuse continuing contact.

A child's natural attachment to both parents does not rupture spontaneously.[4] Given the presumption that children need and want the care and affection of both parents, children who resist or refuse contact with a parent in the context of separation or divorce do so because something has gone wrong.[5] In these instances, the child's rejection of a parent has no rational justification. The alienated child freely and persistently displays unreasonable dislike or hatred toward a targeted parent, based on cognitive distortions that do not reflect the reality of the child's actual experience.[6] The child, who is triangulated into the parents' high-conflict divorce, has come to fear the rejected parent, despite a prior positive relationship in which the parent presented no objective threat to the child.[7] This most often occurs in high-conflict divorce and separation, in which the issues do not drive the alienation; rather, it is the high-conflict personalities of one or both parents.[8]

Richard Gardner, a child psychiatrist, researcher and author, coined the term 'parental alienation syndrome' (PAS) in the mid-1980s.[9] He suggested intervention in severe cases to isolate the child from the favored parent through placement in the custody of the rejected parent. However, this remedy did not fit in all instances, such as a case of actual abuse by the rejected parent, which would result in leaving the child in the care of an abuser while limiting or eliminating contact with the supportive parent.[10] PAS is not an accepted scientific theory, and has not been accepted for inclusion in the Diagnostic and Statistical Manual (DSM), which identifies psychiatric disorders.[11] As a result, some courts have questioned whether the label has any credibility.[12]

Although PAS is not itself a recognized disorder, other accepted diagnostic categories in the DSM can explain severe alienation, particularly when the rejection is attributable to the conduct of the favored parent. Attachment theory views the favored parent's conduct as 'pathological parenting,' constituting a form of child abuse in the context of the DSM.[13] Briefly stated, attachment theory holds that a child is naturally bonded to a parent and, when that attachment ruptures, the child experiences pathological mourning for the loss of the relationship. In contentious divorces, the favored parent experiences loss of the marital relationship, translates that loss into anger and resentment toward the other parent, and then transfers that anger and resentment to the child through manipulation in a way that effectively hijacks the child's relationship with the other parent. The alienated child then comes to fear and reject a parent, and develops an anxious, phobic-like response that is often shared by the favored parent.[14]

While some cases of alienation are clear-cut instances of one parent engaging in alienating behaviors, many cases involve a combination of factors that may also include the child's vulnerabilities or a targeted parent who lacks good parenting skills but whose behavior is neither abusive nor inappropriate. Children with cognitive, emotional or physical deficits may have a compromised ability to

handle the loss and stress of a contentious divorce.[15] These vulnerabilities may lead to alignment with one parent simply because it is the easiest way to resolve the child's dilemma about choosing which parent is right and which is wrong. Although this alignment helps the child escape the conflict, it reinforces the maladaptive black-and-white thinking characteristic of alienation, inhibits the child's problem-solving skills, and limits the child's ability to cope with stressful or difficult situations.[16]

Deficits in parenting can lead to alienation. Some parents make little effort to spend time with a child and appear to lack interest. This may be because of job requirements or because the parent is uncomfortable in a child-rearing role. A child who cannot distinguish between these causes still may feel the sting of rejection by the parent. Some parents are overly harsh or critical of a child. In these situations, if the child experiences a loss of the parent, this can lead to sadness, resentment and eventually outright rejection. In a contentious divorce, these children may be more apt to align with a favored parent who is struggling with anger and resentment over the loss of the marital relationship.

Intervention and Treatment

Whether the alienation is the product of a favored parent's conduct or a combination of factors, the ultimate goal of intervention is the restoration and maintenance of healthy relationships between the child and both parents. Because rigid, polarized views quickly become entrenched and intractable, and, therefore, less amenable to intervention, it is critical to act swiftly as soon as a child begins resisting contact with a parent.[17] Interventions range from psychotherapy to changes in custody, depending on the severity of the alienation. Whatever the process, it should aim at modifying distorted cognitions and unhealthy alliances within the family, promote resilience on the part of the child and parents, and enhance family members' problem-solving skills. Because multiple family members usually play a role in creating and perpetuating the alienation,[18] intervention plans should be family-focused, and involve the child, both parents, siblings, and others who contribute to the dysfunctional dynamics.[19] Treatment should coordinate co-parental functioning, support each parent in providing the child with warmth and nurturance, and contain the problem so it is not further exacerbated.

Eliminating contact between the child and the targeted parent is not recommended because it sends a message to the child that no contact is acceptable, devalues the child's relationship with that parent, provides further justification for the child's alienating behaviors, and reinforces the child's distorted and polarized view of the targeted parent.

Intervention that limits the focus only to the targeted parent and his or her relationship with the child, such as reunification therapy, is unlikely to be effective, particularly when alienation is entrenched and the child's enmeshment with the favored parent is evident. Whenever possible, the favored parent should be involved in the process. A favored parent who feels excluded from the process may become more polarized and anxious, which spills over to the child and diminishes the chances that an intervention will succeed. The favored parent who has custody is responsible for making sure the child shows up for appointments, but often comes up with excuses or cannot manage the child's resistance when it is time to go. When that parent "feels engaged and valued and has begun to trust the therapists involved, the child is likely to feel the same."[20]

Psychotherapy

Traditional forms of therapy are not indicated in alienation cases. Given that a primary goal is to dislodge rigid distorted views, 'talk therapy' has little impact. It may actually do more harm by providing a forum for the child or parent to become more entrenched in those distorted views with the aid of the therapist's perceived or actual alignment. As one author notes, most therapists "are unfamiliar with alienation issues, personality disorders and [high conflict people], and family court cases, so they can potentially make things worse." Instead, "the whole family needs to learn and strengthen basic skills for future conflict resolution and close relationships."[21] Even forensic 'reunification' therapy is viewed by some as inadequate to the extent it may be the only intervention utilized, it is not a recognized defined form of therapy, and it often excludes the alienating parent while relying on that parent to insure the child's compliance and participation in the process.[22]

Involving the entire family, the therapeutic process can provide cognitive behavioral therapy (CBT), desensitization and psychoeducation within the context of family therapy. CBT helps identify and modify unwanted and maladaptive thoughts, beliefs and behaviors in a supportive therapeutic relationship, so all family members establish more realistic views of one another.[23]

Psychoeducation consists of education, coaching and development of conflict resolution skills, resilience and problem-solving skills for children and parents.

Therapists should be knowledgeable about family systems, attachment system theory and personality disorders, have significant experience working with alienation cases, and understand the importance of facilitating the child's relationship with both parents.[24] One therapeutic model involves individual therapists for each family member, with the entire process coordinated by an overarching family therapist who develops and monitors the intervention plan.[25] Each therapist should be skilled and experienced in working with alienation cases. In this model, confidentiality within the therapeutic setting is relaxed in order to foster communication among the therapists to minimize alignments, verify facts, and coordinate efforts to build healthy relationships.[26]

Clearly, many families cannot afford the cost of multiple therapists. When the only option is to use one therapist, the challenge is to select someone who not only is knowledgeable about attachment family systems and alienation, but also is a highly skilled professional able to clearly define roles and boundaries and establish alliance with all family members. Whether using multiple therapists or one, it is critical to avoid separate therapists who do not work in concert with each other. Otherwise, the process is limited in its ability to teach parents and children to communicate and negotiate with one another, reestablish lines of communication between parents, and minimize manipulations by children who report different things to each parent.[27]

Despite best efforts, when there is no progress in on-going therapy, more intrusive and intensive intervention may be warranted. There are a handful of intensive therapeutic and psychoeducational programs developed specifically to work with these families. The following section provides brief descriptions of these programs.

New Ways for Families (New Ways)[28]

New Ways is a family-focused program designed to reduce the risk of alienation by intervening early in high-conflict divorce and separation cases. The program includes individual counseling, parent-child counseling and family decision-making, often with multiple (two or three) therapists. It is highly structured and uses sessions, exercises, notebooks and homework to teach parents skills to help them recognize their own rigid thinking patterns, modify unmanaged emotions, and reduce extreme negative behaviors. Parents learn to manage the contagious anxiety and upset that is common in these cases, in order to protect children from overexposure to negativity.

There are four stages to the New Ways process: 1) a court order or signed agreement requiring participation in the process, along with establishment of behavioral objectives; 2) individual parent counseling in which parents complete six weekly sessions that include workbook and other written exercises, followed by a formal verification issued by the counselor that the parent has completed this stage of the process; 3) six weeks of parent-child counseling, which is not a confidential process such that the counselor can be called to testify regarding each parent's cooperation with the process and ability to change maladaptive behaviors that contribute to the alienation; and 4) family (or court) decision-making to establish the on-going parenting plan.

The program encourages judges to take a hands-on approach to monitoring progress by requiring parties to report back to the court and demonstrate that they have learned and incorporated conflict-reducing behaviors and are better able to foster the child's relationship with both parents. Unlike other more intensive interventions noted below, New Ways does not offer a residential multi-day program. The cost will depend on the hourly rates of the therapists involved. Although New Ways was developed by the High Conflict Institute in San Diego, California, there are mental health professionals and attorneys around the country who have been trained in the New Ways methods and can work locally with families.

Transitioning Families[29]

Transitioning Families was originally designed to address reunification of families following abduction, but has been adapted to address alienation cases. In high-conflict divorces, the program provides therapeutic interventions of varying duration based on "brief and strategic, solution-focused, and cognitive behavioral therapy." Interventions seek to repair and strengthen parent-child relationships, break down barriers between family members to foster a working relationship for the entire family, and build compassion and communication skills.

Transitioning Families offers varying options, including: an experiential/educational workshop (three-and-a-half to five days in duration) for families that incorporates several elements: equine-assisted experiences and learning techniques; an alternative workshop

that does not include an experiential element; and weekly sessions with the child and rejected parent, focusing on reunification. Families can participate via court order or voluntarily. The workshops are not residential programs, are conducted for approximately eight hours each day, and generally take place in Sonoma County, California.

Families Moving Forward[30]

This is a Toronto-based intensive, multi-day therapeutic and psychoeducational program for the entire family when children resist contact with a parent. It is designed as an early intervention program for mild to moderate cases, and provides an individualized program tailored to the needs of each family member. Early screening to determine the type and intensity of the problem is key to preventing further deterioration of the parent-child relationship.

The program combines therapy and psychoeducation to address unresolved feelings, promote healthier individual and family functioning, correct cognitive distortions, and teach skills to improve effective parenting, communication and critical thinking. Intake begins after a conference call with the parties' attorneys and after the parents complete questionnaires and submit an initial retainer. Staff review relevant court orders and conduct individual meetings with each parent, and may contact relevant collateral sources familiar with the family, such as therapists, teachers, etc. Post-intervention monitoring is recommended in order to support lasting positive changes in the family.

Overcoming Barriers[31]

Overcoming Barriers (OB) offers intensive programs, including a five-day family camp and two-and-a-half-day interventions. The program started 10 years ago and has served 75 families. Interventions involve children, both parents, and any step-parents and significant others, in a team approach that provides intensive immersion and desensitization experiences. The camp includes children ages nine to 18 years of age. OB provides three hours of psychoeducation separately to groups of children, to rejected parents and to favored parents. There is substantial work with the child and targeted parent, including milieu therapy to create safe connections and opportunities for interaction, observing and sharing activities, attending family meetings, exchanging written communication and role-playing exercises. The program includes individual therapy, parent coaching, and co-parenting and family therapy sessions to resolve old issues, develop collaborative co-parenting, improve communication, and develop problem-solving skills. Program leaders note that aftercare planning is crucial to success.

OB is revamping the camp experience based on evaluations and feedback about past programs. The next camp program is planned for Nov. 2018. The cost is $60,000 or more for a family of four to attend the camp. Reduced rates are offered on a limited basis for families with combined annual incomes under $150,000. OB also provides a 28-hour training program for mental health professionals working with high-conflict cases involving children who resist contact with a parent.

High Road to Unification[32]

This four-day intensive educational and coaching workshop is provided by the Conscious Co-Parenting Institute. For cases that are not high conflict, there are trained instructors who can provide co-parenting classes and coaching. For families experiencing difficulty convincing the court or mental health professionals that there is a serious alienation issue, the institute helps the targeted parent gather evidence, such as emails and texts; reviews that evidence based on a diagnostic indicator checklist created by Craig Childress, Ph.D.;[33] and helps depict patterns of behavior to demonstrate whether alienation is occurring.

For more severe alienation, the institute offers a workshop that is a highly structured series of 'transformative interventions' delivered sequentially over four consecutive days. The cost is $20,000. Two coaches deliver the workshop, usually near where the family lives. The program seeks "to activate and restore the child's normal-range and health emotional and psychological functioning" in order to restore family communications, promote empathy and reactivate bonding. Families must participate pursuant to a court order, which includes a temporary separation between the "pathogenic parent" and the child. There are four phases to the program: family stabilization; family maintenance; reintegration; and the new family paradigm. The institute offers individual coaching and free online training programs for targeted parents. The program founder notes that High Road has served 70 families, with 100 children, and had had a 100 percent success rate as of this writing.

Although High Road is based on California, the Conscious Co-Parenting Institute trains professionals in other states, so the program can be delivered in other parts of the country.

Family Bridges[34]

Family Bridges is a four-day intensive program for families experiencing moderate to severe alienation, particularly families that "courts and therapists have traditionally viewed as beyond help." Program goals include facilitating, repairing and strengthening children's ability to maintain healthy relationships with both parents, help children find ways to remove themselves from their parents' conflict, strengthen children's critical thinking and help them gain a more balanced view of their parents. Although the program founder, Richard Warshak, no longer conducts workshops, he has trained others to deliver them. The workshop is currently offered in a number of states, as well as other countries.[35]

To be eligible for the program, families must present a court order transferring sole temporary custody to the rejected parent and suspending contact between the children and the favored parent. The format involves two professionals working with the children and the rejected parent, one family at a time, over four consecutive days. It reconnects children with a rejected parent, teaches them to think critically and view their parents in a more realistic and compassionate way, and provides tools to improve communication and manage conflict.

Family Bridges reports that at the conclusion of the workshop, 95 percent of the children had recovered a positive relationship with the rejected parent. Follow-up indicated that 83 percent continued positive relationships with the formerly rejected parent.

Building Family Resilience[36]

This is an intensive treatment program for families in which a child resists contact with a parent. It is typically a two-and-a-half- to three-day program held at New Jersey venues, although the intervention could be only one or two days without an overnight. Programs are flexible and designed after an in-depth intake process that results in an individualized schedule and agenda to meet each family's needs. The entire family is involved, and children are supervised during the day as well as at night by staff when not working with them directly.

The program requires a court order specifying that the family must cooperate with the intake process and the program. Court orders must include the name of the program and the names of the psychologists who will run it, and must address responsibility for payment, signing of releases and other details that may vary from family to family. There is an intake fee of $3,000, and the total cost varies depending upon the length of the program, whether it takes place at a hotel or office setting, and the number of children involved.

The Court's Authority to Order Intervention

New Jersey judges have broad discretion and authority to devise one or a combination of remedies, including ordering therapy, transferring custody (either temporarily or on a more permanent basis, provided it is in the child's best interests), ordering community service, and levying economic sanctions.[37] What is critical is that those making decisions about interventions have a basic understanding of the nature of alienation, the importance of involving the entire family, and the types of interventions that are appropriate and available, as well as those that are inappropriate and either unlikely to succeed, or potentially likely to do more harm.

What Can Attorneys Do?

Attorneys may see signs of alienation as early as in an initial consultation with a client, and have the best chance to help fashion appropriate interventions early in the process. Clients choose attorneys based on their reputations, expertise and experience. This provides a platform of credibility from which attorneys can have constructive discussions with clients that can take a case from polarized combat to an approach that fosters and focuses on the child's wellbeing. Commonsense dictates that the child's best interests will be served by having a positive relationship with both parents. The adversarial system is more likely to foster alienation than collaboration, so attorneys have a choice: They can fuel the flames or work toward a positive outcome for the child. The quandary is how to be an effective legal advocate while addressing the best interests in the face of continued alienating behaviors.

As soon as the issue arises, either explicitly or implicitly, the attorney should provide as much information to the client as possible about alienation. Material is available in numerous articles and books on the subject. Rather than relying on labels and conclusions, attorneys should inquire about the actual behaviors of the child and the parents.

When a client is the targeted parent, the attorney should fight against any hiatus in parenting time.[38] When the client's behavior appears to contribute to the alienation, the lawyer should counsel against continuing destructive behaviors and refer to an experienced mental

health professional to further coach the client. It is easy for a sympathetic attorney to be swept up in the strong emotional aspect of the case, so attorneys should remain mindful that the alienation is dysfunctional, destructive to the child, and must be addressed swiftly and constructively, focusing on objective behaviors and evidence rather than fears and unsubstantiated allegations.

Attorneys can suggest using a coach, guardian *ad litem* (GAL) or family therapist to help clients understand that it not only in their child's best interests, but in their own best interests to have a child who is able to have healthy relationships with both parents. A GAL is in a position to gather information and provide it to the court, serving as a neutral, objective voice in the process.

For families engaged in a collaborative law process, the team should select coaches or child specialists who have extensive knowledge and experience in family systems and alienation cases to help devise appropriate interventions. In some instances it may be necessary to bring in an expert to perform an evaluation that includes an assessment of the rejection/resistance and alienation. The expert should be experienced with high-conflict families in divorce and separation, and have a good working knowledge of family systems theory and alienation.

Less Costly Interventions

Most of the options described above involve additional substantial expense. For families with limited resources, clients may look to the courts for assistance. While these options may strain the already overburdened Judiciary, they may be a parent's only way to preserve a relationship with his or her child.

Investigation by Family Division Court Staff

A parent can request an investigation by Family Division court staff.[39] If the court orders one, the Family Division is to investigate the matter and submit a factual report within 45 days from the entry of an order requiring the investigation. The report must provide factual information about the family, including the fitness and character of the parties, their economic and financial circumstances, a description of the place where the child will live or visit, any safety concerns and other household members.[40] When alienation is an issue in the case, the party requesting the investigation should ask that the court order include this as part of the investigator's focus.

Reports to the Court

Once custody has been awarded, judges have discretion to enter orders that require the Family Division to submit periodic reports to the court concerning the status of custody.[41] Counsel or the party must file copies of the custody order or judgment with the Family Division within two days, and advise of the child's place of residence. When a periodic report is filed, the court may, on its own motion, reopen the case and schedule a formal hearing if the judge deems this necessary.

Requesting Sanctions

Parties can request sanctions against the favored parent who does not comply with court orders. Those sanctions can be built into orders as a means of encouraging cooperation, and may range from monetary sanctions to changes in custody.

There are many barriers to successful intervention. These include: slow responses by the judicial system; failure to promptly investigate allegations of abuse; inappropriate empowerment of the child to make decisions; focusing on blame rather than resolution; lack of expertise and clarity of the therapists' roles; and lack of knowledge and experience on the part of attorneys and judges. Mental health professionals, attorneys and judges all play a role in properly identifying the problem, assessing its severity, and getting the right help for the family. It is, therefore, incumbent upon professionals working with these families to educate themselves about the nature of the problem and the options for intervention. Whatever the severity of the problem, it is critical in these cases to act quickly, involve the entire family, find the most appropriate and affordable intervention, and craft orders that clearly specify each party's obligations and include sanctions for non-compliance. ■

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Endnotes

1. N.J.S.A.9:2-4.
2. *Id.*
3. *Beck v. Beck*, 86 N.J. 480, 485 (1981).
4. *See* Craig Childress, *An Attachment-Based Model of Parental Alienation: Foundations*, Oaksong Press, Claremont, CA 2015.

5. This is not to say that a child's rejection of a parent is never justified. There are instances in which rejection of a parent is based on abuse, intimate partner violence, substance abuse, a parent's consistent lack of involvement with a child, or a difficult or contentious relationship between a parent and a child. These cases are not the subject of this article.
6. J.B. Kelly and J.R. Johnston, The Alienated Child: A Reformulation of Parental Alienation Syndrome, *Fam. Ct. Rev.*, Vol. 39(3) July 2001, 249-266 at 251.
7. Benjamin D. Garber, Cognitive-Behavioral Methods in High-Conflict Divorce: Systematic Desensitization Adapted to Parent-Child Reunification Interventions, *Fam. Ct. Rev.* Vol. 53, No. 1, Jan. 2016, 96-112, 97.
8. Bill Eddy, *Don't Alienate the Kids!* HCI Press, Scottsdale, Arizona 2010.
9. Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation,* Academy F., vol. 29, No. 2 (American Academy of Psychoanalysis 1985).
10. Paul Fink, M.D., former president of the American Psychiatric Association, referred to PAS as "junk science at its worst."
11. DSM-5.
12. *See, e.g.*, *In the Interest of T.M.W.*, 553 So. 2d 260, 261 n.3 (Fla. Dist. Ct. App. 1989); *Hanson v. Spolnik*, 685 N.E.2d 71, 84 n.10 (Ind. Ct. App. 1997).
13. DSM-5 Diagnosis for this form of attachment related pathology is a combination of factors: 309.4 (Adjustment disorder with mixed disturbance of emotions and conduct); V61.20 (Parent-Child Relational Problem); v61.29 (Child Affected by Parental Relationship Distress); and v995.51 (Child Psychological Abuse, Confirmed—Pathogenic Parenting).
14. *See* Garber, *supra*, at 98.
15. Marjorie Gans Walters and Steven Friedlander, When a Child Rejects a Parent: Working with the Intractable Resist/Refuse Dynamic, *Fam. Ct. Rev.*, Vol. 54, No.3, July 2016, 424-445, at 425-426.
16. *Id.*
17. Walters and Friedlander, *supra*, at 429;
18. Kenneth H. Waldron and David E. Joanis, Understanding and Collaboratively Treating Parental Alienation Syndrome, *Am. J. of Fam. Law*, Vo.10, 121-133 (1996).
19. J.R. Johnston, V. Roseby, and K. Kuehnle, (2009) *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*. New York, NY, Springer Publishing Company, at p. 373. *See also* Garber, *supra*, and Walters and Friedlander, *supra*.
20. Garber, *supra*, at 108.
21. *Id.* at 222-24.
22. Garber, *supra,* at 102-103; s*ee generally*, Walters and Friedlander, *supra*.
23. *Id.* at 97.
24. Eddy, *supra,* at 224-30.
25. Garber, *supra*, at 102-03.
26. Richard Warshak, *Divorce Poison*, HarperCollins Publishers, New York, NY 2010
27. *Id.*at 243-51.
28. https://www.newways4families.com/.
29. http://transitioningfamilies.com/. For a more detailed description of this program, see R. Bailey, J. Behrman-Lipopert, E. Bailey, C. Psaila and J. Dickel, The Transitioning Families Therapeutic Reunification Model in NonFamilial Abductions, *Fam. Ct. Rev.*, Vol. 54 No. 2, pp. 232-249, April 2016.
30. https://familiesmovingforward.ca/program.html.
31. http://overcomingbarriers.org/.
32. http://www.conscioustoparentinginstitute.com/programs/.
33. C. Childress, *An Attachment-Based Model of Parental Alienation: Single Case ABAB Assessment and Remedy,* Claremont, CA: Oaksong Press 2015.
34. www.warshak.com/services/family-bridges.html.
35. According to Dr. Warshak, the workshop is currently offered in: Bozeman, Montana; Columbia, South Carolina; Denver, Colorado; Los Angeles, California; the San Francisco Bay Area; locations in Texas, and will be offered in the future in Atlanta, Georgia and in Michigan; and Virginia. Outside the U. S. the workshop is currently offered in: Ontario, Canada; Saskatoon, Canada; and Cape Town, South Africa, and will be offered in the future in either Melbourne or Perth, Australia; Manitoba (Winnipeg), Canada; and Slovenia.
36. buildingfamilyresilience@gmail.com (their website is currently under construction)
37. *See* N.J.S.A. 5:3-7. Although this rule specifically authorizes these remedies when a parent violates a court order relating to parenting time, there is no reason to expect the court's authority is limited in

these respects in the absence of a prior court order when it appears judicial action is warranted.

38. *See* Mathew Sullivan and Joan B. Kelly, Legal and Psychological Management of Cases with an Alienated Child, *Fam. Ct. Rev.*, Vol. 39 No. 3, July 2001 pp. 299-15.
39. R. 5:8-1.
40. *Id.* Although the rule states that only a licensed mental health professional can make recommendations as to character and fitness of the parties, it does not appear to prohibit the Family Division investigator from providing related factual information.
41. R. 5:8-2.

In Memory of William Schreiber, 1948-2018

by John P. Paone Jr.

The family bar was saddened on March 29, 2018, with news of the passing of William (Bill) Schreiber. Bill was only 70 years of age and a vibrant part of the family law community.

Bill was a former chapter president of the American Academy of Matrimonial Lawyers and was certified by the New Jersey Supreme Court as a matrimonial law attorney. He was a longtime and distinguished member of the Monmouth bar, practicing at Hoffman & Schreiber in Red Bank for many years, and most recently at Lomurro, Munson, Comer, Brown & Schottland in Freehold.

I always referred to Bill affectionately as Mr. Sunshine. That is because he always had a positive disposition no matter how difficult the case, the litigant, the adversary, or the judge. Having Bill as your adversary was a pleasant experience, as the combination of his professionalism and wit was certain to bring a smile to your face. While he was an extremely talented family law attorney, Bill represented his clients without ever being discourteous or engaging in sharp practices. With Bill, the high blood pressure level that exists in the average family law case was reduced dramatically.

The manner in which Bill practiced and conducted his life stands as a beacon for all family law attorneys. Bill demonstrated that you can approach the most difficult cases without losing collegiality and good will and…yes…adding a ray of sunshine to all of our lives. The passing of Bill Schreiber is not only a great loss for his wife Elaine and his family, it is also a great loss for the entire family bar. ■

In Memoriam—William Mark Schreiber

by Richard M. Sevrin

(Editor's Note: *The following is from the author's April 2, eulogy at the funeral of William Mark Schreiber.)*

Bill passed on his 70th birthday, March 28, 2018. However, today, I celebrate his life, his philosophy, his enjoyment of life and that which made Bill celebrate the joy of life every day.

Bill was my brother from a different mother. Years ago, we were adversaries in a case and bonded as friends and brothers. He and Debbie became friends with Shelley and I. When she passed away unexpectedly, Bill held my hand and was there for me every day as a family brother.

Bill and Debbie became devoted friends to my wife, Irene and me, and we all shared great times—family events, bar retreats, weddings, dinners, weekends at the pool, and conversations with Billy on all topics and subjects, which are engrained in my memories. Bill and I talked about almost every topic—the law, the kids, a good scotch (his favorite, Johnny Walker), and my vodka. I hold a bottle in my cabinet with Bill's name on it.

Bill was my hero, and I can in every way recognize his bravery and courage.

Bill's first priority was family. Debbie, who he robbed from the cradle at age 15 (we kidded him a lot about this), their 48 years together, 43 in a wonderful, loving marriage. We talked about our lives and how lucky we were, Bill with Debbie and me with Shelley and Irene, all these years. We talked about the children, Mark and Rachel, and how proud he was of them and their accomplishments. He talked about Mark and Vanessa and how great they were together. He loved his granddaughter, Evelyn, who he cherished—"his gem." Bill spoke of David and Alan, his brothers, and their accomplishments.

Bill was an icon. He was a great lawyer. He spent 33 years with Bernie Hoffman at Hoffman & Schreiber, their partnership, and was proud of the professional and personal relationship they had. I remember discussions about their two-hour lunches. I remember spending time with both Bernie and Bill at bar and dinner meetings, and just being friends. They were a great partnership, which ended when Bernie retired and then passed.

Bill came to Lomurro, Munson, Comer, Brown & Schottland, and was loved by everyone in the firm, and he loved them.

Bill practiced law proudly and most competently. He was a great lawyer. His accomplishments were numerous. His membership in the American Academy of Matrimonial Lawyers made him proud, and he was proud of his success. He became president of the American Acamdemy of Matrimonial Lawyers for the State of New Jersey. He was a member of the Monmouth County Bar Association. He co-chaired the Family Law Committee of the Monmouth County Bar. He was a member of the New Jersey State Bar Association and was proudly a member of the Family Law Section Executive Committee for over 25 years. He received the Monmouth County Bar Professional Lawyer Award for the Family Law Section. He was a Super Lawyer, a certified matrimonial lawyer and trained mediator. He was a collaborative lawyer and served on the Monmouth County Early Settlement Panel for years.

Bill was the person who was loved by everyone. He loved his colleagues of the bar. He loved his adversaries. He loved his co-members of the Family Law Section Executive Committee. As a member of the American Academy of Matrimonial Lawyers, he created friends all over the country. Every November, he went to the AAML Convention in Chicago and he talked about it for weeks before and weeks after. When he and Bernie were partners, they loved to go to Chicago.

Bill loved the practice of law. He loved his colleagues, his clients, the judges, the attorneys who he was involved with, and they all loved him.

Bill, most importantly, was the most positive, enthusiastic and happiest person I have ever known and will ever know. He cherished every day. He walked into the office every morning with his special smile and grin

and greeted everyone. He treated everyone respectfully, with great dignity. He kept a bowl of candy outside of his office in order that everyone knew to stop by and say hello and he would say hello to them. There was sweetness to the day.

Bill was the bravest man I ever knew. When he became ill three years ago, he took it as a challenge. He never complained and never felt sorry for himself. He never said, "why me" and he never complained about his illness, but took every day as a challenge. He cherished every day and let everyone around him know that he loved every day and every day was special. Every day was to be lived and enjoyed and every day was to be better than the next day, no matter what his challenge was. His treatments, which included surgeries and constant trips to Sloan Kettering, were just defiantly stated as another, "pain in the ass." His courage in the face of his illness and ultimate outcome was unimaginable.

He loved the firm of Hoffman & Schreiber. He loved the firm of Lomurro, Munson, Comer, Brown & Schottland. He loved coming to work. He loved dealing with people and lawyers. He often spoke with me about how lucky we were and how lucky he was to be a member of our firm.

Every August, Bill and Debbie and the family, would gather in Long Beach Island for a family vacation. For weeks before, we would talk about his going to LBI with the family and the enjoyment he had year to year of this great family event. He loved it, and we can presume the family will carry on this cherished vacation every year in the future.

In the face of his disease, and knowing of the ultimate outcome, Bill would say that "every day is a good day; I will feel good until I don't." No matter how things were going, he looked at every day positively.

This is a day of celebration of the man, my brother, who was there as the best that God and humanity had to offer. He was my friend, my brother, my icon, and I am sad and will be sad today and every day that I miss him, but I must celebrate his life today. I will always remember the brother he was to me. He was a champion of courage to me. I would hope that I could emulate his courage every day.

I am so thankful for the many years I spent with Bill, talking about the law; having him teach me about wine; sipping scotch and vodka on my deck; going to the pool; watching his face while he drove his Corvette, which he loved; sitting at numerous dinner tables, eating sushi, Italian food and whatever; just being with my brother, talking and appreciating life. I will celebrate his memory for the rest of my life.

Rest in peace my brother, Billy. I love you. ■