

Alienated Children in Family Law Disputes in British Columbia

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Canadian Research Institute for Law and the Family
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I. Introduction

Family breakdown is complex and multidimensional. As a result, the legal issues triggered by separation cannot be approached as if the totality of the information necessary to address them is contained in the governing legislation, the rules of court and the parties' financial statements. This is especially so in cases where the parenting of children is in dispute.

We have come a long way from the days when fathers, as *patres familias*, were presumptively entitled to custody of their children after separation, and from the subsequent period when the tender years doctrine assigned post-separation custody of younger children to mothers. The loss of these presumptions, as brutally undiscerning as they were, requires families and decision-makers to make best-guesses about the parenting arrangements that are in children's short- and long-term best interests, taking into account a host of intangible factors particular to each family, such as the children's age, adjustment and stage of development, the parenting capacity and mental health of their parents, and the children's present and foreseeable financial and psychosocial needs.

Unfortunately, law schools teach little about parenting disputes beyond the governing legislation and the rules of court, and it is easy for counsel to be seduced into a rash pursuit of ill-considered claims that are not supported by the family's circumstances, seeking improbable results that are unlikely to address the family's needs. Most family law lawyers will not have had to practice for very long before encountering their first allegation of parental alienation. Such claims are always inflammatory; they're also often powerfully dramatic, invoking intense feelings of outrage for the injustices wrought and sympathy for the losses suffered. However, such claims are also often unfounded and, if so, can lead counsel and client down an expensive and highly litigious rabbit hole.

In this paper I will provide an overview of parental alienation from a mental health perspective and discuss the prevalence of such claims, and the rate at which they are proven, in British Columbia, as well as the options available to the court when alienation is established. I will also discuss the difficulty of identifying legitimate cases of alienation and canvass the warning signs which

suggest that the alienation of a child is a risk and preventative action must be taken.

II. Child Alienation and Estrangement

In the late 1970s and early 80s, psychologists interested in family breakdown began to observe that some children developed an alignment with one parent following separation that resulted in the child's rejection of the other parent and became a factor in the parents' litigation. In *Surviving The Breakup: How Children And Parents Cope With Divorce*, first published in 1980, prominent American psychologists Judith Wallerstein and Joan Kelly wrote about certain self-absorbed parents and vulnerable older children who "waged battle" together in an "unholy alliance" to hurt the other parent, drawing on the findings of the California Children of Divorce Project.¹ Five years later, in "Recent Trends in Divorce and Custody Litigation," a remarkably brief article given the fuss it caused, psychologist Richard Gardner used the term "parental alienation syndrome" to describe cases of alignment in which children not only engaged in a "campaign of denigration" against the other parent but were actually prepared to repudiate their relationship with that parent altogether.²

A. Gardner's Parental Alienation Syndrome

Gardner described parental alienation syndrome as a psychological disturbance brought about by custody litigation in which "children are obsessed with [the] deprecation and criticism of a parent." He wrote that such extreme alignments were caused by the efforts of one parent, usually the mother, to indoctrinate the children against the other parent, usually the father. Gardner proposed that parental alienation syndrome could be identified by the presence of eight "symptoms":

1. The alienating parent and child are engaged in a campaign of denigration against the rejected parent.
2. The child expresses inconsequential or frivolous explanations for not wishing to see the rejected parent.
3. The child displays a complete lack of ambivalence toward the rejected parent, such that the rejected parent is "all bad" while the alienating parent is "all good."

¹ J.S. Wallerstein and J.B. Kelly, *Surviving The Breakup: How Children And Parents Cope With Divorce* (New York, NY: Basic Books, 1996)

² R.A. Gardner, "Recent Trends in Divorce and Custody Litigation" (1985) 29:2 *Academy Forum* 3, available online at www.fact.on.ca/Info/pas/gardnr85.htm

4. The child claims that his or her beliefs about the rejected parent are the child's own and not those of the alienating parent.
5. The child reflexively supports the alienating parent in the conflict.
6. The child displays no feelings of guilt about his or her treatment of the rejected parent.
7. The child uses scenarios, language and descriptions of the rejected parent borrowed from the alienating parent.
8. The child's rejection extends to the family of the rejected parent.

Gardner's parental alienation syndrome triggered a flurry of follow-up research and quickly became a flashpoint of controversy. Men's rights groups loved the theory because most of the parents said to engage in alienation were mothers; women's groups loathed the idea as it seemed to downplay the impact of family violence on children's interests and preferences. Psychologists were skeptical because there was so little reliable research on alienation, the theory didn't meet the scientific criteria to be labeled as a diagnosable "syndrome," and the theory seemed overly simplistic and was frequently misapplied in court.³ The courts weren't fond of the idea as alienation claims were often difficult to establish and the recommended solution, removing the child from the home of the favoured parent, seemed drastic and dangerously at odds with the child's expressed preferences.

In 1997, Deirdre Rand, another psychologist, wrote in "The Spectrum of Parental Alienation Syndrome" that parental alienation syndrome is a risk *whenever* parents go to court about a custody dispute.⁴ She said that the risk of alienation increases: when one or both parents make claims that attack the integrity, moral fitness or character of the other parent; when the parent seen as responsible for the breakdown of the relationship becomes involved in a new relationship shortly after separation; and, when a parent leaves the relationship suddenly, with little or no warning.

³ Parental alienation syndrome was not included in the *Diagnostic and Statistical Manual of Mental Disorders* III-R, published in 1987, nor in the subsequent IV and IV-TR editions, and is likewise omitted from the current fifth edition (Washington, DC: American Psychiatric Association, 2013). See Robert Emery's comments in "Parental Alienation Syndrome: Proponents Bear the Burden of Proof" (2005) 43:1 Family Court Review 8 and Justice James William's remarks in "Should Judges Close the Gate on PAS and PA?" (2001) 39:3 Family Court Review 267 for interesting discussions of the debate over Gardner's theory within the mental health community.

⁴ D.C. Rand, "The Spectrum of Parental Alienation Syndrome (Part II)" (1997) 15:4 American Journal of Forensic Psychology 39, available online at www.fact.on.ca/Info/pas/rand11.htm

Drawing on work by James Garbarino, Edna Guttman and Janis Wilson Seeley in *The Psychologically Battered Child*,⁵ Rand described five types of parental behaviour that are hallmarks of parental alienation syndrome:

1. **Rejecting:** The alienating parent rejects the child's need for a relationship with both parents. The child fears abandonment and rejection by the favoured parent if he or she expresses positive feelings about the rejected parent.
2. **Terrorizing:** The alienating parent bullies the child into being terrified of the rejected parent, and punishes the child if he or she expresses positive feelings about the rejected parent.
3. **Ignoring:** The alienating parent withholds love and attention if the child expresses positive feelings about the rejected parent.
4. **Isolating:** The alienating parent prevents the child from participating in normal social activities with the rejected parent and that parent's friends and family.
5. **Corrupting:** The alienating parent encourages the child to lie and be aggressive toward the rejected parent. In very serious cases, the alienating parent recruits the child to assist in tricks and manipulative behaviour intended to harm the rejected parent.

(As a result of certain cases I've dealt with, two further behaviours have also struck me as indications that the alienation of a child is a risk:

6. **Distracting:** The alienating parent sets up activities, goals or interests which conflict with the rejected parent's time with the child, such as enrolling the child in a sports team and placing such a high value on the child's participation that the child is upset to miss a game or practice to spend time with the rejected parent.
7. **Resigning:** The alienating parent stops accepting responsibility for the child's time with the rejected parent, and leaves it up to the child to decide whether to spend time with the rejected parent or not. This puts the child in a loyalty bind by forcing the child to make the choice to see the rejected parent, knowing that the favoured parent doesn't want the child to go at all.)

⁵ J. Garbarino, E. Guttman and J. Wilson Seeley, *The Psychologically Battered Child* (San Francisco, CA: Jossey-Bass, 1986)

B. Kelly and Johnston's Reformulation

In 2001, however, Joan Kelly and psychologist Janet Johnston published a critically important article in *Family Court Review* called "The Alienated Child: A Reformulation of Parental Alienation Syndrome," which adopted a family systems approach to the problem and focused more on the alienated child than the alienating parent.⁶ In their view, parent-child relationships at times break down for reasons *not* involving the malicious interference of the favoured parent:

Allegations of PAS have become a fashionable legal strategy in numerous divorce cases in which children are resisting contact with a parent, without due regard for possible historic reasons for such resistance within the marital home nor for the children's relationship with both parents.

Kelly and Johnston argued that parent-child relationships can be described as lying on a continuum ranging between positive and secure on one hand and negative and alienated on the other:

Kelly and Johnston's Continuum of Parent-Child Relationships			
	Positive Relationships	Positive relationship with both parents <hr/> Affinity toward a parent	Child prefers contact and has secure relationships with both parents <hr/> Child prefers contact with both parents but prefers one parent over the other, by normal reasons of temperament, age, gender and so forth
		Alliance with a parent	Child has consistent preference for one parent and is ambivalent, but not rejecting, toward the other parent
		Estranged from a parent	Child rejects one parent and is either ambivalent toward that parent or expresses a dislike of that parent
		Alienated from a parent	Child rejects one parent and expresses a strong dislike for that parent without guilt or ambivalence
	Negative Relationships		

Kelly and Johnston recognized that there might be objectively valid reasons for the breakdown of a child's relationship with a parent, reasons that might actually justify the child's rejection of and refusal to visit that parent, for example:

⁶ J.B. Kelly and J.R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39:3 *Family Court Review* 249, available online at jkseminars.com/pdf/AlienatedChildArt.pdf

- a) the child witnessing or experiencing family violence at the hands of the rejected parent;
- b) the rejected parent having a rigid or authoritarian approach to discipline;
- c) the rejected parent displaying inconsistent and unpredictable expectations and behaviour;
- d) the immaturity and self-centredness of the rejected parent;
- e) the rejected parent being emotionally unavailable to the child; or,
- f) the rejected parent having substance abuse problems impairing his or her parenting capacity.

The presence of factors such as these in a family may cause a child to become reasonably *estranged* from a parent, rather than being *alienated* from the parent as a result of the favoured parent's efforts to poison the parent-child relationship. Kelly and Johnston wrote that children in such circumstances also typically wish to severely limit contact with rejected parent, like alienated children, but their estrangement from that parent is "reasoned, adaptive, self-distancing and protective." An alienated child, by comparison, is "one who expresses, freely and persistently, unreasonable negative feelings and beliefs ... toward a parent that are disproportionate to the child's actual experience with that parent."

The approach taken by Kelly and Johnston has the advantage of shifting the focus of enquiry away from the conduct of the allegedly alienating parent and toward the observable behaviours of the child and the characteristics of the parent-child relationship. Despite the benefits of this analysis, certain groups remain smitten with Gardner's original theory of parental alienation syndrome, as well as grotesque variants such as "divorce-related malicious mother syndrome,"⁷ ensuring its continuing prominence in the public imagination.

Unfortunately, it continues to be terribly easy, and rather tempting, to mistake cases of estrangement for cases of alienation. Many parents frankly find it easier to blame the other parent as the cause of the breakdown of their relationship with the children than to find fault with themselves,⁸ and the narrative of "all good" versus "all bad" is an alluring change of pace for family law lawyers

⁷ I.D. Turkat, "Divorce Related Malicious Mother Syndrome" (1995) 10:3 Journal of Family Violence 253

⁸ Counsel should also be mindful that clients are often inclined to present themselves to their lawyer in the best light possible, perhaps in the belief that the lawyer's favourable opinion will spur him or her toward greater heights of effort, or perhaps because human nature disinclines us toward voluntary confessions of our weaknesses.

accustomed to cases cast in varying shades of gray. It is sometimes difficult to resist the urge to assume the role of white knight.

C. Other Observations from the Research

Other researchers have also explored the phenomena of alienation and estrangement, chief among them being the psychologists Richard Warshak and Douglas Darnall. In his 2001 article “Current Controversies Regarding Parental Alienation Syndrome,” Warshak provides a helpful survey of the increasingly sophisticated debate on alienation, including Kelly and Johnston’s reformulation of the concept, and proposes three key traits by which alienation could be identified:⁹

- a) a persistent rejection or denigration of the rejected parent amounting to a “relentless campaign”;
- b) the child’s rejection is unreasonable and unjustified; and,
- c) the child’s rejection is at least partly a result of the alienating parent’s behaviour.

In his slightly earlier book *Divorce Casualties: Protecting Your Children from Parental Alienation*, Darnall notes that parental alienation may vary in intensity, from mild to severe, and, anticipating the work of Kelly and Johnston, observes that not all parent-child relationship problems are caused by alienating behaviour.¹⁰ Darnall also usefully identifies three types of alienating behaviour:

1. **Naïve alienators:** Alienating parents who are passive about the children’s relationship with the other parent but will occasionally do or say something that has an alienating effect.
2. **Active alienators:** Alienating parents who know better than to alienate, but whose intense hurt or anger causes them to occasionally lose control over their behavior or what they say. Such parents may later feel guilty about how they behaved.
3. **Obsessed alienators:** Alienating parents who have a fervent cause to destroy the rejected, or, as Darnall puts it, the “targeted” parent.

⁹ R.A. Warshak, “Current Controversies Regarding Parental Alienation Syndrome” (2001) 19:3 American Journal of Forensic Psychology 29, available online at www.fact.on.ca/Info/pas/warsha01.htm

¹⁰ D. Darnall, *Divorce Casualties: Protecting Your Children from Parental Alienation* (Dallas, TX: Taylor Publishing, 1998)

Needless to say, obsessive alienating behaviour is the most problematic. In “Three Types of Parental Alienators,” Darnall says that obsessed alienating parents:¹¹

- a) are obsessed with destroying the children’s relationship with the targeted parent;
- b) enmesh the children’s beliefs about the targeted parent with their own;
- c) sometimes become delusional and irrational, and cannot be convinced they are wrong;
- d) often seek support from family members, friends and political groups that share in their beliefs that they are victimized by the targeted parent and by the system;
- e) have an unquenchable anger because they believe that the targeted parent has victimized them and whatever they do to protect the children is justified; and,
- f) seek to have the court punish the targeted parent with orders that prevent the parent from seeing the children.

Darnall cautions that alienating parents may exhibit the traits of two types of alienating behaviour, usually a combination of naïve and active alienators, and notes that “rarely does the obsessed alienator have enough self-control or insight to blend with the other types.”

D. The Consequences of Child Alienation

From the client’s point of view, the personal consequences of alienation or estrangements are obvious and immediate: the client has lost a critically important relationship with his or her child and is experiencing the loss, sorrow, anger and grief that accompany the end of any important relationship. Although it can be tempting for counsel to simply stop there – the client, after all, is the person you’re working with and the person who’s paying your account – it is important to remember that the *child* has lost a relationship as well, a loss that has occurred in the context of intense psychological manipulation and pressure.

Allegations of alienation are generally not made in low- to medium-conflict family law cases; they most often arise in high-conflict disputes, frequently alongside allegations of abuse, addiction and mental disorder. As Kelly and

¹¹ D. Darnall, “Three Types of Parental Alienators” (1997), available online at www.parentalalienation.org/articles/types-alienators.html

others have noted, certain negative outcomes are normal for children of separated parents, including mental health problems, such as depression and anxiety, and maladaptive behaviours, such as delinquency and truancy. However, the probability of these outcomes occurring, and the severity of their impact when they do, correlates with the extent of children's exposure to parental conflict. Psychologists Amy Baker and Naomi Ben-Ami, in their 2011 article "To Turn a Child Against a Parent Is to Turn a Child Against Himself," write that:¹²

Children's exposure to and involvement in parental conflict has been identified as the single best predictor of outcomes for children after divorce, especially the degree to which children are drawn into parental conflict.

Fidler and Bala summarize the research on the impact of alienation on children in "Children Resisting Postseparation Contact with a Parent."¹³ They write that the qualitative and empirical studies to date "uniformly" indicate that alienated children may exhibit:

- a) problems with reasoning and information processing (poor reality testing, illogical cognitive operations, and simplistic and rigid information processing);
- b) difficulty in social functioning (inaccurate or distorted interpersonal perceptions, disturbed and compromised interpersonal functioning, aggression and conduct disorders, and disregard for social norms and authority); and,
- c) emotional and psychological problems (self-hatred, low or inflated self-esteem, pseudo-maturity, gender identity problems, enmeshment, poor impulse control, emotional dependency, and lack of remorse or guilt).

Baker and Ben-Ami looked at the long-term effects of alienation by examining the effect of common alienation strategies – such as badmouthing the rejected parent, telling the child the rejected parent is unsafe, and limiting contact with the rejected parent – on 118 adults who were children of divorce. They found that:

- a) participants' self-esteem inversely correlated with the number and frequency of alienation strategies employed;

¹² A.J.L. Baker and N. Ben-Ami, "To Turn a Child Against a Parent Is To Turn a Child Against Himself: The Direct and Indirect Effects of Exposure to Parental Alienation Strategies on Self-Esteem and Well-Being" (2011) 52:7 *Journal of Divorce & Remarriage* 472

¹³ B.J. Fidler and N. Bala, "Children Resisting Post-Separation Contact with a Parent: Concepts, Controversies and Conundrums" (2010) 48:1 *Family Court Review* 10

- b) participants who were alienated as children experienced reduced rates of self-sufficiency and educational attainment; and,
- c) participants who were alienated as children experienced higher rates of depression and alcohol abuse.

Summarizing their findings, Baker and Ben-Ami write that:

The findings reveal just how powerful an influence parental alienation strategies can have on children ... the data support the notion that to turn a child against the other parent is to turn a child against himself or herself. ... When children are told that a parent is not a good person, does not love them and does not care about them, children appear to conclude that the cause lies within themselves.

These conclusions are supported by Baker's earlier qualitative study of 40 adults who self-identified as having been alienated from a parent as a child.¹⁴ Among this population, Baker found high rates of:

- a) low self-esteem, "if not outright self-hatred";
- b) depression and serious problems with drugs or alcohol;
- c) difficulty trusting themselves, other people or both; and,
- d) divorce.

More alarmingly, Baker also found that half of the study participants who were parents reported being alienated from their own children.

The research to date establishes that parental conflict can have critical negative effects on children's mental health and overall wellbeing. These effects are all but assured when separated parents engage in protracted, high conflict and one of the parents is prepared to destroy the child's relationship with the other parent. Although the willful alienation of a child from a parent is – not "arguably is" but *is* – psychological maltreatment rising to the level of emotional abuse,¹⁵ it must be remembered that the impacts of parental conflict and alienation can survive childhood to impact on the child's functioning as an adult. As important as the impact of alienation is for rejected parents, I respectfully suggest that its impact

¹⁴ A.J.L. Baker, "The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study" (2005) 33 *American Journal of Family Therapy* 289

¹⁵ Fidler and Bala support this view, writing that cases of severe alienation "may be identified by child protection agencies as emotional abuse," suggesting that intervention is required, when the child "exhibits serious symptoms such as anxiety, depression, withdrawal, self-destructive or aggressive behaviour or delayed development."

on children is of greater consequence and deserving of immediate action by both bench and bar when suspected.

E. A Note About Language

Although the term “alienation” is value-neutral and merely describes the separation of a person or thing, in the remainder of this paper, I will use the term to refer specifically to situations in which a person has intentionally acted to sever or damage the relationship of a child with a parent. I will use “estrangement” to refer to situations in which a child’s relationship with a parent has been severed for reasons other than the interference of another person, usually because of the individual’s personality characteristics and past behaviours.

I will refer to the parent whose relationship with the child has been severed as the “rejected parent,” regardless of whether the relationship was severed because of alienation or estrangement, and to the other parent as the “favoured parent.”

III. Allegations of Alienation in Court Proceedings

The number of family law cases raising allegations of parental alienation has increased steadily since Gardner described his theory of parental alienation syndrome in 1985. Nationally, the rate of substantiation of such allegations held steady at about 60% between 1989 and 2008; however the rate of substantiation in British Columbia between 2009 and 2014 was much lower, at about 11%.

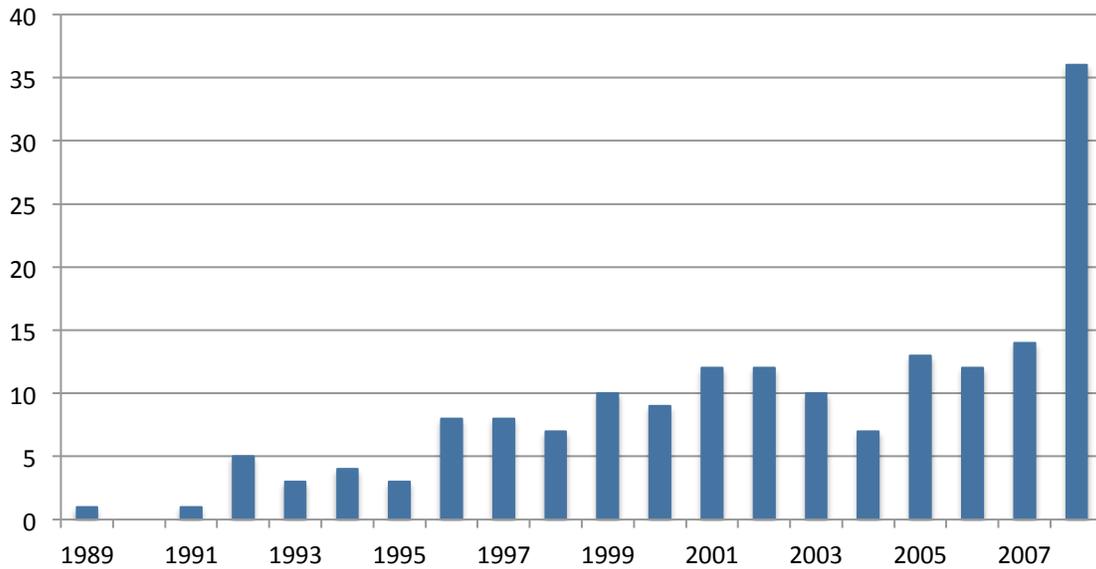
Mothers are, as Gardner suggested, more frequently accused of alienation than fathers across Canada, and in British Columbia in particular. However, it is unclear whether this results from the accuracy of this aspect of Gardner’s theory or the fact that it *is* an aspect of Gardner’s theory and popular among men’s rights groups as a result.

A. Prevalence

Professor Nicholas Bala and students Suzanne Hunt and Carolyn McCarney reviewed Canadian court decisions published between 1989 and 2008 and found 175 cases involving allegations of alienation.¹⁶ The annual number of cases raising such allegations hovered in the low teens between 1999 and 2007 but spiked to 36 in 2008.

¹⁶ N. Bala, S. Hunt and C. McCarney, “Parental Alienation: Canadian Court Cases 1989-2008” (2010) 48:1 Family Court Review 164

Canadian Cases Involving Allegations of Alienation



Of the 40 decisions made between 1989 and 1998, the court concluded that alienation had occurred in 24 cases, and of the 135 decisions made between 1999 and 2008, alienation had occurred in 82 cases, yielding a consistent rate of substantiation of about 60%.

Bala, Hunt and McCarney also found that in the majority of the cases where an allegation of alienation was not substantiated (62%), the court determined that the child had instead become *estranged* from the rejected parent:

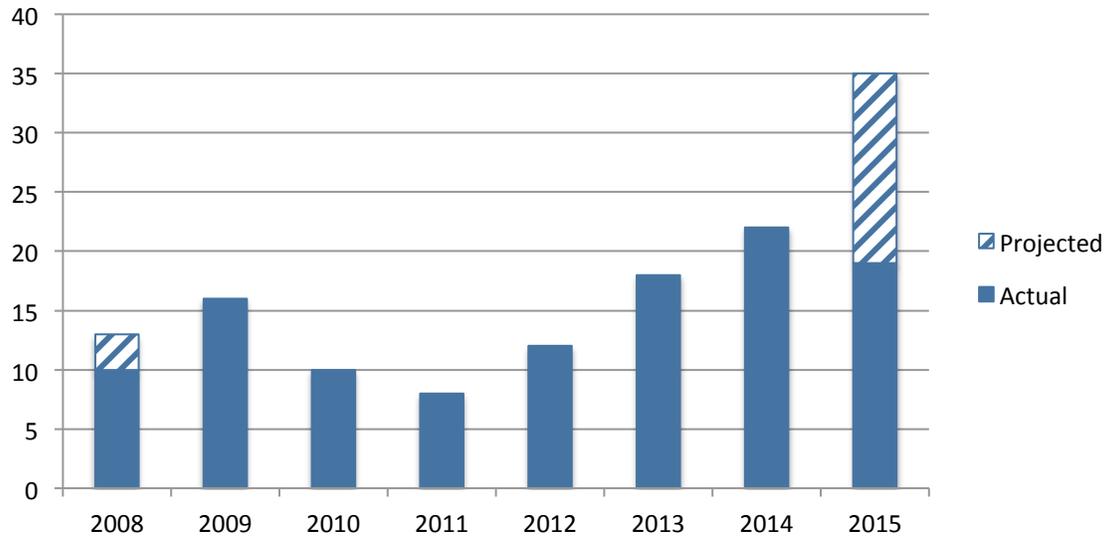
- a) in 7% of the cases in which the allegation was not substantiated, the court found justified estrangement resulting from abuse or violence;
- b) in 35% of these cases, the court found justified estrangement resulting from poor parenting; and,
- c) in 20% of the cases, the court held that the child was disengaged but not alienated from the rejected parent.

In the remaining 38% of cases, the court found insufficient evidence to establish that alienation had occurred.

In reviewing the British Columbia decisions available on CanLII, I found 115 cases published between mid-2008 and mid-2015 in which claims of alienation

germane to the outcome of the application or trial were made.¹⁷ These cases showed the same generally increasing trend as the national sample.¹⁸

British Columbia Cases Involving Allegations of Alienation



Given the evidentiary complexity of advancing and defending claims of alienation, such allegations were most often determined at trial at (48%) and post-trial variation applications (33%), and least often addressed at interim applications (18%).¹⁹

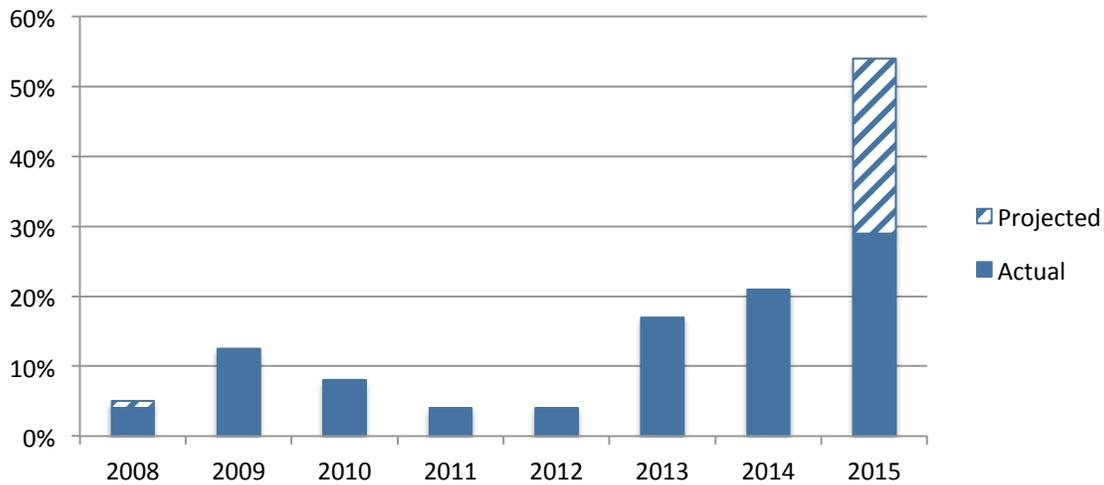
Allegations of alienation were substantiated in only 21% of the cases I looked at, a rate about one-third of that established in the national sample, but which increased significantly between 2012 and 2015:

¹⁷ My review excluded appeals, whether to the Court of Appeal or the Supreme Court, child welfare matters, costs applications and cases other than family law cases. My search was limited to the 500 results returned by CanLII for cases with variants of “alienate” in the document text.

¹⁸ “Projected” refers to data I have extrapolated in respect of two partial years. The earliest judgment CanLII returned was published in April 2008; assuming that the rate of 10 claims of alienation in 9 months prevailed between January and March of that year, I estimate that a further 3 claims were made in 2008. My original search was made on 16 June 2015; assuming that the rate of 19 claims in 6.5 months will continue until the end of the year, I project that a further 16 claims will be the subject of decisions made in 2015.

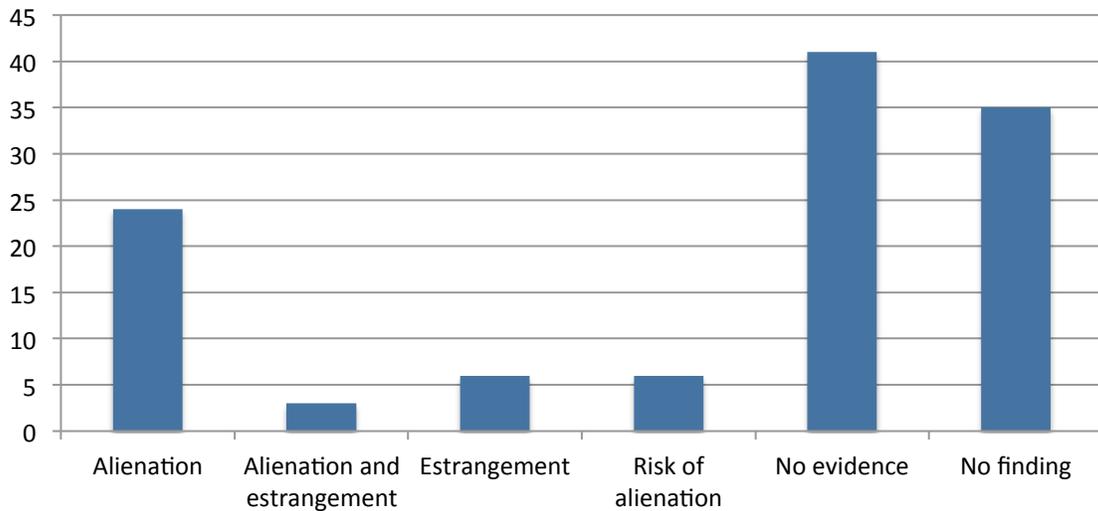
¹⁹ The judgments on interim matters included in my sample addressed applications directly related to the presence of alienation, such as applications for parenting time (9 cases), applications for custody or the primary care of a child (8 cases) and applications for protection orders or orders otherwise restricting contact (3 cases). I have not included judgments on applications for parenting or psychological assessments to determine the presence of alienation.

Rate of Substantiation of Allegations of Alienation in British Columbia Cases



In the majority of cases where such allegations were not substantiated, the court either did not make a finding on the allegation (30%) or dismissed the allegation for want of supporting evidence (36%).

Disposition of Allegations of Alienation in British Columbia Cases between 2008 and 2015



In six cases, the court reached the decision that the child had become estranged from the rejected parent as a result of the parent’s actions; in three cases, the court concluded that the child’s relationship had broken down because of both the alienating behaviours of the favoured parent and estrangement from the rejected parent. In six cases, the court concluded that although alienation had not been established, there was a risk of alienation that justified the making of prophylactic orders.

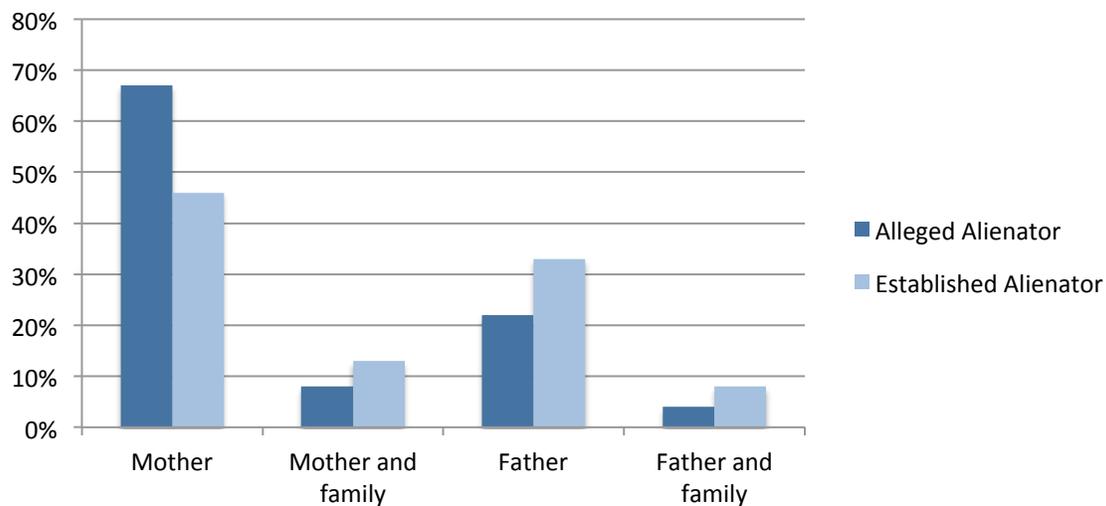
B. Alleging and Establishing Alienation

In 68% of the Canadian cases identified by Bala, Hunt and McCarney in which alienation was established, the mother was found to be the favoured parent. The father was the favoured parent in 31% of those cases and in one case, a case in which the parents had split custody, each of the parents was found to be responsible for the alienation of their children.

Similarly, in 67% of the British Columbia cases I studied, the mother was alleged to be alienating the children from the other parent. The father was alleged to be the alienator in 22% of those cases, and the parents made reciprocal accusations of allegation in 4% of the cases. The family or friends of a parent were alleged to be participating in efforts to alienate children in 12% of the cases.

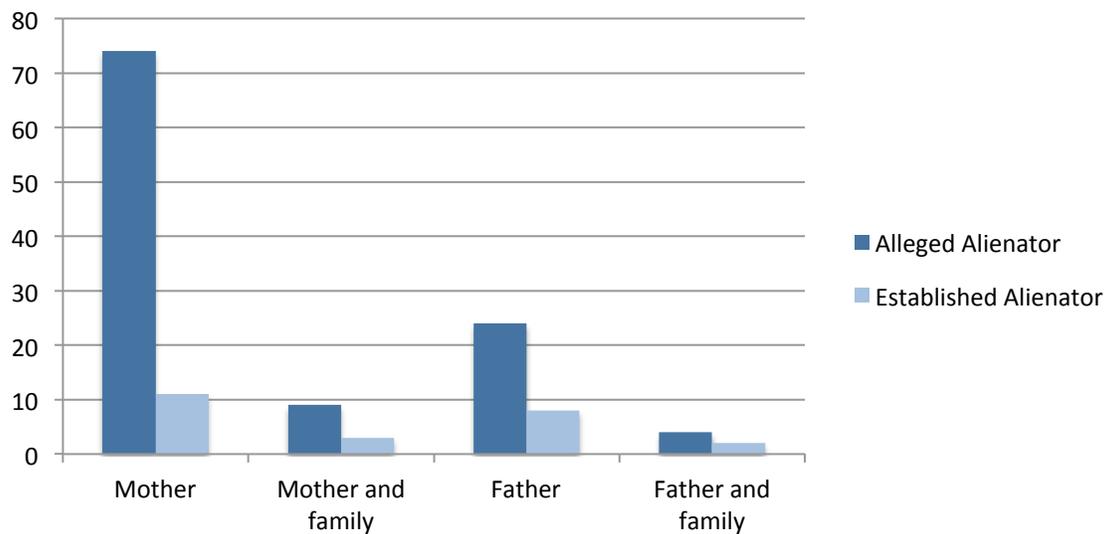
Among the British Columbia cases where allegations of alienation were proven, however, the mother was found to be the favoured parent 46% of time, with the father being found to be the favoured parent 33% of the time, suggesting that claims against mothers are less likely to be substantiated than claims against fathers. In 21% of these cases, the child's alienation was found to have resulted from the behaviour of a parent acting in concert with family or friends.

**Rate of Claimed and Proven Allegations of Alienation
by Gender and Family Participation**



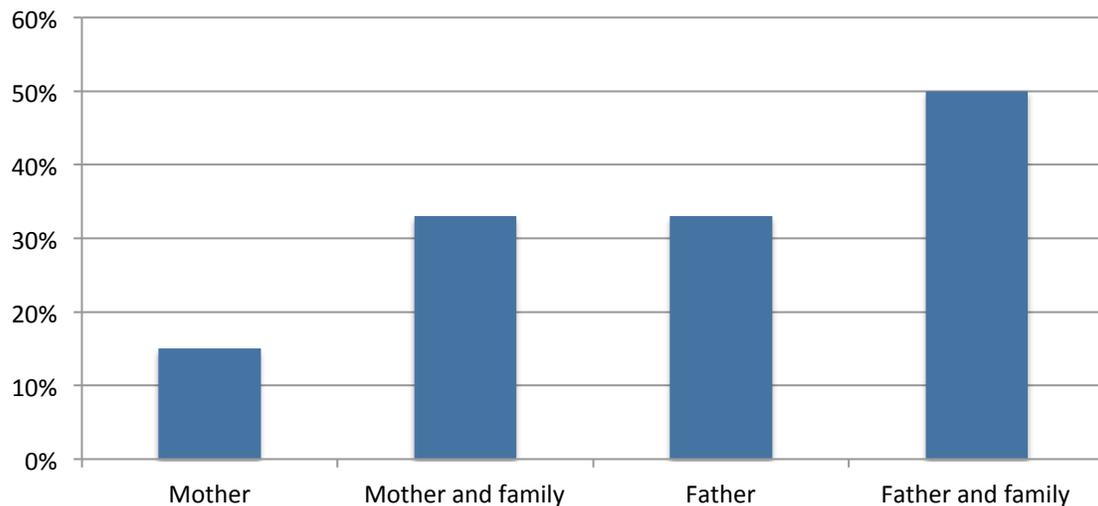
Comparing the number of cases in which allegations of alienation were made against the number of cases in which those allegations were actually proven illustrates the relatively low rates at which all such allegations are substantiated.

**Number of Claimed and Proven Allegations of Alienation
by Gender and Family Participation**



The mother was alleged to be the alienating parent in 74 of the cases I reviewed, but was only proven to have been engaged in alienating behaviours in 11 cases, yielding a substantiation rate of less than 15%. In contrast, one-third of the 24 allegations against fathers were proven, and 38% of the claims against parents and family members were proven.

**Substantiation Rate of Allegations of Alienation
by Gender and Family Participation**



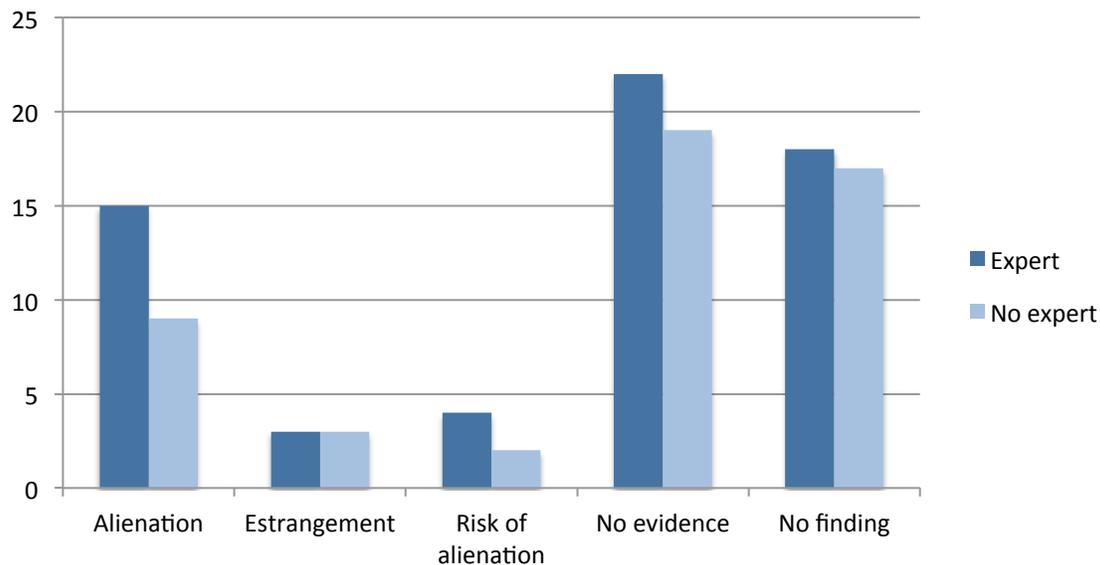
As these figures suggest, it's much easier to allege that a parent is engaging in alienating behaviours than it is to prove that alienation has actually occurred, suggesting that expert evidence might be of some assistance when prosecuting or defending such claims.

C. Expert Evidence

Given the complexity inherent in establishing that a child's relationship with the rejected parent has broken down because of the alienating behaviours of the favoured parent, the opinion of an expert on the issue is necessary or, if not necessary, at least helpful.²⁰ It is unsurprising, therefore, that Bala, Hunt and McCarney found that expert evidence had been presented in the vast majority of the cases they reviewed. What is less intuitive is their further finding that in the 13% of cases in which no expert evidence was provided, allegations of alienation were nonetheless substantiated in 41% of those cases.

Expert evidence, in a variety of formats including evaluative views of the child reports, parenting assessments and rebuttal reports, was presented in 57% of the British Columbia cases I reviewed. Although the use of expert evidence increased the likelihood that allegations of alienation would be proven (23% of the cases involving expert evidence), no expert evidence was adduced in almost two-fifths of the total number of cases in which such allegations were substantiated (18% of the cases not involving expert evidence).

Result of Allegations of Alienation by Use of Expert Evidence

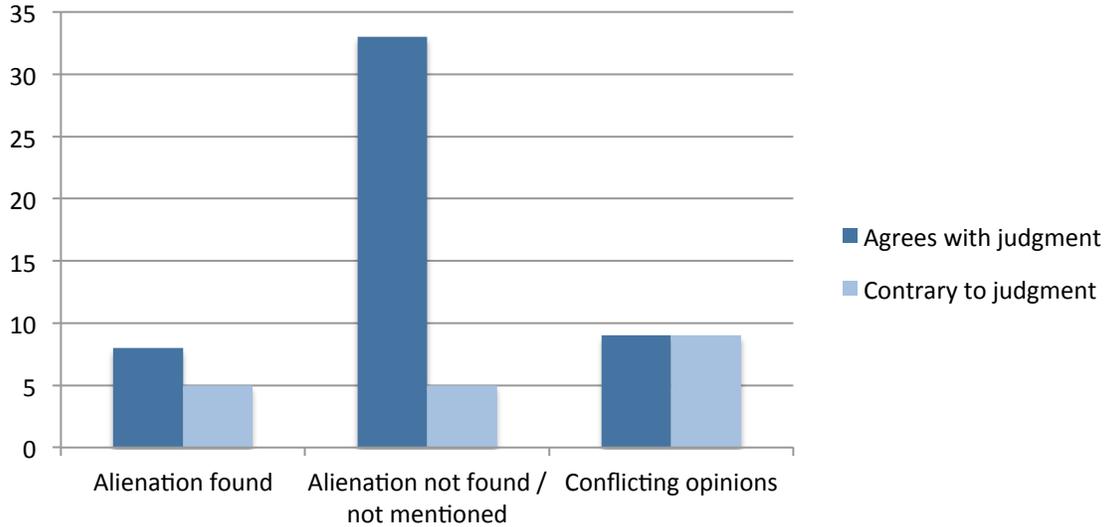


The decisions of the court on allegations of alienation generally track the conclusions of the experts, whether those experts concluded that alienation existed, that it didn't exist or drew no conclusions on the subject at all. Despite the apparent harmony between experts' recommendations and courts' determinations, the court is not bound by expert evidence, and in five of the

²⁰ The remarks of Judge MacCarthy in *L.D.M. v R.H.M.*, 2014 BCPC 98 are appropriately cautionary: "I cannot conclude on the basis of the evidence that is before me that this is a case of parental alienation or PAS. I have no expert report ... that would allow me to reach that conclusion about PAS."

cases I studied, the court concluded that alienation *did not* exist, contrary to the opinion of an expert that it did, and in a further five the court concluded that alienation *did* exist, contrary to the expert's determination that it did not. In nine cases, the conflicting opinions of multiple experts were provided.

**Concordance between Expert Opinions and Court Judgments
in Cases Involving Allegations of Alienation**



D. The Impact of Self-Representation

In 15% of the 115 cases I studied, both parties appeared without counsel (17 cases); in 14% of the cases, the mother appeared without counsel against a represented father (16 cases), and in 29%, the father appeared without counsel against a represented mother (33 cases). In total, 57% of the cases I reviewed involved at least one litigant without counsel.²¹ This number is somewhat higher than those reported by Justice Gray, who reviewed records of the British Columbia Supreme Court to conclude that an average of 40% of trials between 2006 and 2012 involved at least one litigant without counsel.²²

**Proportion of British Columbia Supreme Court Trials Involving
At Least One Litigant Without Counsel**

	Family	Non-Family Civil	Criminal	All
2006	36.3%	17.4%	4.4%	16.9%
2007	37.1%	18.6%	2.5%	16.4%
2008	31.4%	15.7%	3.7%	14.5%
2009	52.3%	12.1%	4.0%	18.1%

²¹ Of the cases I reviewed, 101 were decisions of the Supreme Court (88%) and 14 were decisions of the Provincial Court (12%).

²² Hon. V. Gray, "Filling in the Blanks: Towards a More Inquisitorial Process (with Relevant and Organized Evidence)" (Vancouver, BC: 2013)

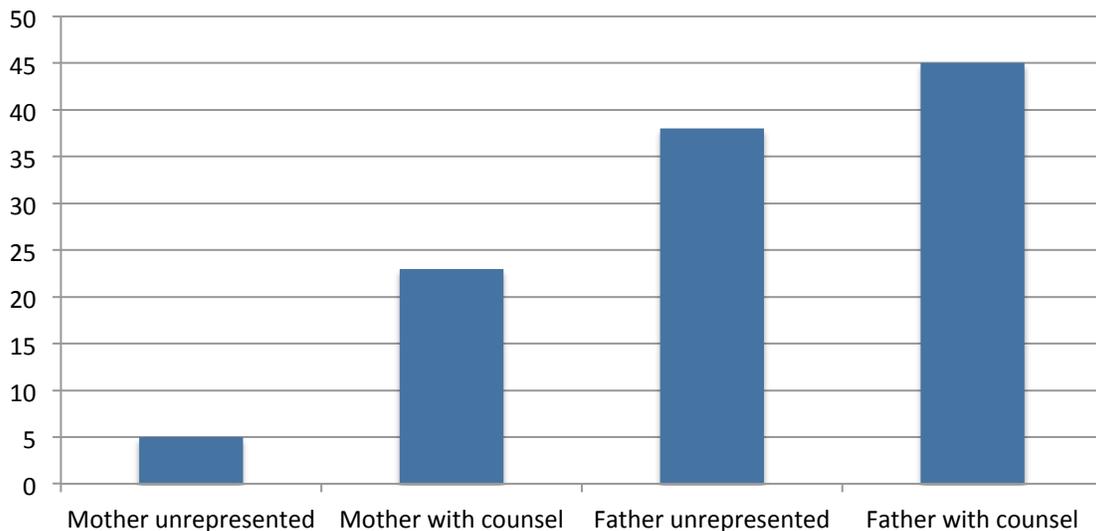
**Proportion of British Columbia Supreme Court Trials Involving
At Least One Litigant Without Counsel**

	Family	Non-Family Civil	Criminal	All
2010	45.9%	17.8%	2.6%	17.7%
2011	40.3%	17.7%	3.4%	16.8%
2012	36.6%	15.4%	3.3%	15.2%

The difference in the rate of self-representation in cases involving claims of alienation may be linked to the inflammatory nature of such claims, their relatively low rate of substantiation, particularly with respect to claims against mothers, and the tendency of litigants without counsel to nurture unreasonably high expectations as to the outcome of their cases.²³

In the cases I reviewed, allegations of alienation were made by five mothers without legal representation and by 23 mothers with representation. Allegations of alienation were made by 38 fathers without legal representation and by 45 fathers with representation.

**Allegations of Alienation by
Gender and Representation of Rejected Parent**



Although the sample size is low, particularly for mothers without counsel, it appears that for both fathers and mothers, having a lawyer increases the likelihood that allegations of alienation would be advanced.

²³ For discussions of the expectations of litigants without counsel, see: R. Birnbaum, N. Bala and L.D. Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants" (2012) 91 Canadian Bar Review 67; and, J.-P.E. Boyd and L.D. Bertrand, "Self-represented Litigants in Family Law Disputes: Contrasting the Views of Alberta Family Law Lawyers and Judges of the Alberta Court of Queen's Bench" (Calgary, AB: Canadian Research Institute for Law and the Family, 2014)

Having a lawyer also appears to:

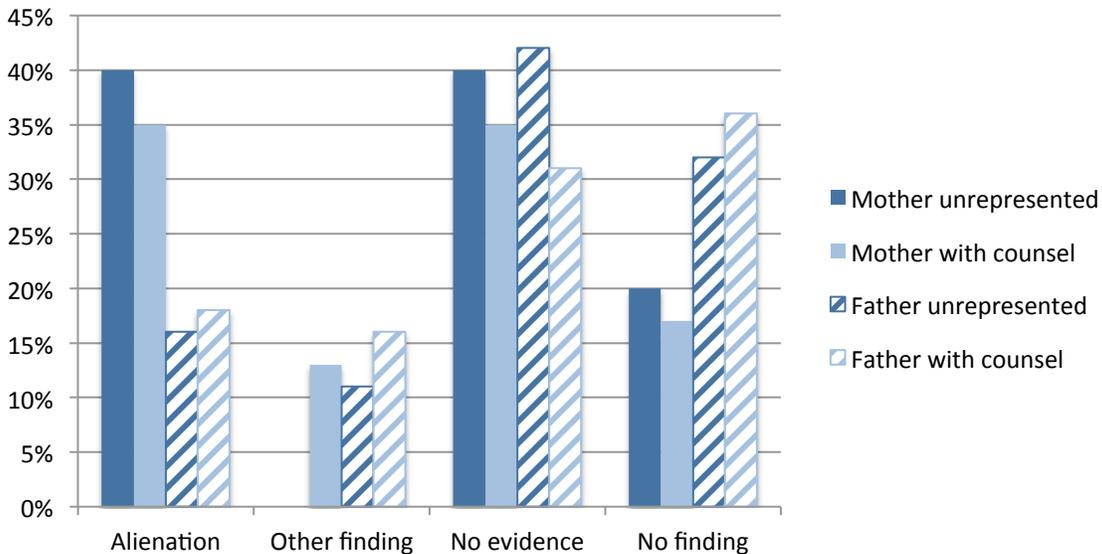
- a) decrease the likelihood that mother’s allegations of alienation would be substantiated, but increase the likelihood that father’s allegations would be proven; and,
- b) increase the likelihood that a finding other than alienation would be made for both fathers and mothers.

Result of Allegations of Alienation by Gender and Representation Status of Rejected Parent

	Unrepresented mother	Represented mother	Unrepresented father	Represented father
Alienation	2	8	6	8
Estrangement			2	3
Alienation and estrangement			1	2
Risk of alienation		3	4	2
No evidence	2	8	16	14
No finding	1	4	12	16

Parents, especially fathers, without counsel were much more likely to have their allegations of alienation dismissed as unsupported by the evidence than represented parents, however having a lawyer curiously increased the likelihood that no finding would be made on fathers’ allegations.

Rate of Result of Allegations of Alienation by Gender and Representation of Rejected Parent



IV. Assessing Allegations of Alienation

The decisions reviewed by myself and by Bala, Hunt and McCarney illustrate the challenges involved in proving allegations of alienation. Part of the difficulty with allegations like these lies in differentiating between alienation, estrangement and non-pathological explanations for a child's reluctance to spend time with a parent. "Normal" reasons why a child might resist contact with a parent, for example, include:²⁴

- a) age-appropriate separation anxiety;
- b) a reasonable reaction to the rejected parent's parenting style;
- c) fear for an emotionally vulnerable favoured parent;
- d) a reasonable response to the rejected parent's new relationship, new partner or new partner's family; and,
- e) a normal, age- or gender-appropriate preference for one parent over the other.

Psychologist Barbara Jo Fidler and Nicholas Bala provide a succinct illustration of this dilemma in their excellent 2010 article, "Children Resisting Post-Separation Contact with a Parent":

... children can refuse or resist contact with one parent for many reasons. A child while maintaining contact with both parents, may have an affinity toward one parent because of temperament, gender, age, familiarity, greater time spent with that parent, or shared interests. ... This normal and developmentally expected ebb and flow of preferences (affinity) and gender identification occurs in both divorced and nondivorced families, and is not the result of an alienation process. When it occurs in divorcing families, however, affinities and gender identities can be concerning to both parents; the preferred parent incorrectly concludes the other parent has erred in some significant way, and the resisted parent, feeling threatened, may incorrectly conclude that the other parent is trying to alienate the child.

Further, as Kelly and Johnston point out, even when a child's relationship with a parent has in fact broken down, the child might be justifiably estranged from the rejected parent, rather than alienated, for reasons including:

²⁴ J.R. Johnston, "Children of Divorce Who Refuse Visitation," in C. Depner and J.H. Bray, *Non-Residential Parenting: New Vistas in Family Living* (Newbury Park, CA: Sage Publications, 1993)

- a) the presence of intense conflict between the parents during their relationship and after their separation;
- b) the parents' involvement in hotly contested, highly conflicted litigation;
- c) the child witnessing or suffering emotional abuse or family violence;
- d) the rejected parent having an unpredictable, rigid or overly authoritarian approach to discipline;
- e) the rejected parent displaying inconsistent and unpredictable expectations and behaviour;
- f) the rejected parent being emotionally unavailable to the child; and,
- g) the rejected parent having substance abuse problems, especially problems that affect his or her parenting.

As a result, it is important to approach clients' complaints of alienation with a modest degree of skepticism. Psychologists Margaret Lee and Nancy Olesen have provided a number of cautions for parenting assessors that seem to me to be equally applicable to counsel.²⁵

1. Avoid oversimplifying the problem by focusing only on the allegation of alienation.
2. Do not assume that the allegation of alienation is true – or false! – merely because the allegation is strategically advantageous or popular among certain circles.
3. Do not assume that the rejected parent is wholly blameless in the circumstances that led to the impairment of his or her relationship with the child.
4. Do not assume that the child has been brainwashed by the favoured parent. A parent's alienating behaviours do not always result in an alienated child.
5. Bear in mind that qualities of the adversarial justice system can impact on the parent-child relationship and potentiate the breakdown of that relationship.

²⁵ S.M. Lee and N.W. Olesen, "Assessing for Alienation in Child Custody and Access Evaluations" (2001) 39:3 Family Court Review 282

(I would add two more points to this list:

6. Don't assume that the presence of alienation excludes the possibility of estrangement, or vice versa; alienation and estrangement can and do co-occur.
7. Don't assume that all efforts to alienate involve the fully engaged assault described by Gardner and others. Behaviours that have an alienating influence, yet are individually too trivial to bring to court, can accumulate over time and reach the same conclusive result.)

A. Recognizing the Risk of Alienation

Drawing on work by Baker and Darnall,²⁶ Fidler and Bala provide a helpful list of behaviours that, when exhibited by the favoured parent, suggest alienation may be a risk, including the following, some of which I have paraphrased and expanded upon:

Badmouthing the rejected parent

- portraying the rejected parent as dangerous or mean
- using the rejected parent's first name with the child

Limiting the child's contact with the rejected parent

- arranging activities that conflict with the rejected parent's contact with the child
- frequently calling or messaging during rejected parent's time with the child
- giving the child a choice about initiating or accepting contact with the rejected parent

Declining responsibility for parenting arrangements

- telling the child that the judge has tied his or her hands, and that the child's contact with the rejected parent is beyond his or her control
- giving the child a choice about attending scheduled visits with the rejected parent

Limiting the child's symbolic contact with the rejected parent

- removing photographs of the rejected parent from the child's room
- encouraging the child to call someone else mom or dad
- refusing to mention the rejected parent in the presence of the child

²⁶ A.J.L. Baker and D. Darnall, "Behaviours and Strategies Employed in Parental Alienation: A Survey of Parental Experiences" (2006) 45 *Journal of Divorce & Remarriage* 97

Limiting communication between the child and the rejected parent

- blocking telephone calls, text messages and email from the rejected parent
- intercepting letters and packages sent by the rejected parent
- monitoring or recording communication between the child and the rejected parent

Refusing to communicate with the rejected parent about the child

- not sharing information and notices from the child's school, sport teams and health care providers
- refusing to talk to the rejected parent about the child
- using the child to pass messages to the rejected parent

Emotionally manipulating the child

- withdrawing or threatening to withdraw affection if the child expresses positive feelings toward the rejected parent
- making the child feel guilty about spending time with or favouring the rejected parent
- interrogating the child about his or her time with the rejected parent
- putting the child in loyalty binds
- rewarding the child for expressing criticism or rejection of the rejected parent
- using the child to spy on the rejected parent or activities in the rejected parent's house
- encouraging the child to keep secrets from the rejected parent
- creating conflict between the child and the rejected parent

Interfering with other relationships

- badmouthing the rejected parent to friends, family, health care providers and so forth
- interfering with the rejected parent's professional relations with employers, licensing authorities or regulatory bodies
- needlessly involving police, child protection and taxation authorities with the rejected parent

In the event a risk of alienation is identified, Kelly and others recommend taking immediate action, including taking steps to restore contact between the rejected parent and the child and, if litigation is underway, applying for an order that the file be subject to strict case management, preferably by a single judge, as I will discuss further on in this paper.

B. Identifying Alienation

Kelly and Johnston describe alienated, as opposed to estranged, children as children who “express their rejection of that parent stridently and without apparent guilt or ambivalence, and who strongly resist or completely refuse any contact with that rejected parent.” They say that parents rejected as a result of alienation are generally reasonably competent parents who have no history of physically or emotionally abusing their children, and even where there is some truth to their children’s complaints, the children’s negative views are “significantly distorted and exaggerated reactions.” Kelly and Johnston write that such responses are pathological and represent “a severe distortion on the child’s part of the previous parent-child relationship”:

These youngsters go far beyond alliance or estrangement in the intensity, breadth and ferocity of their behaviours toward the parent they are rejecting. They are responding to complex and frightening dynamics within the divorce process itself, to an array of parental behaviours, and also to their own vulnerabilities that make them susceptible to being alienated. The profound alienation of a child from a parent most often occurs in high-conflict custody disputes; it is an infrequent occurrence among the larger population of divorcing children.

In their recent book *Children Who Resist Postseparation Parental Conflict*, Barbara Jo Fidler, Nicholas Bala and professor Michael Saini adopt the family systems approach proposed by Kelly and Johnston and describe the risk factors and indicators research has shown to be associated with alienation.²⁷

Favoured parent

- presence of psychopathology, mental illness, personality disorders
- favoured parent’s use of alcohol or drugs
- favoured parent denigration of the rejected parent
- separation experienced as humiliating by the favoured parent
- favoured parent limiting or interfering with contact between the child and the rejected parent and the relatives of the rejected parent
- favoured parent forcing the child to choose between parents
- role reversal between the favoured parent and child
- the presence of an enmeshed relationship between the favoured parent and the child
- favoured parent making unfounded allegations of abuse

²⁷ B.J. Fidler, N. Bala and M.A. Saini, *Children Who Resist Postseparation Parental Conflict: A Differential Approach for Legal and Mental Health Professionals*, (New York, NY: Oxford University Press, 2013)

Rejected parent

- presence of psychopathology, mental illness, personality disorders
- rejected parent's use of alcohol or drugs
- counterrejection of the child by the rejected parent
- rejected parent lacking adequate parenting skills and competencies
- rejected parent having a harsh, rigid or authoritarian parenting style
- rejected parent adopting passive response to conflict or withdrawing from parenting because of conflict

Child

- child is emotionally caught between parents engaged in high levels of conflict
- age of the child
- temperament, resilience and personality vulnerabilities of the child
- child demonstrating extreme oppositional behaviours
- presence of anxiety and phobias
- child lacking ambivalence toward the rejected parent
- child using scenarios and phrases borrowed from the favoured parent when discussing the rejected parent
- lack of external support from extended family, friends and counsellors

Factors relating to the parents' relationship

- history of family violence perpetrated by either parent
- parents' engagement in high levels of conflict, involvement in litigation
- parents' involvement with new partners
- duration of the rejected parent's isolation from contact with the child
- distance between the parents' homes
- involvement of polarizing professionals, including overly enmeshed counsel and mental health professionals

Fidler, Bala and Saini note that "no one factor provides sufficient evidence of the presence of alienation," and that "each case should be assessed for the presence of all potential factors ... to provide a more complete picture of the complex dynamics of alienation."²⁸

²⁸ Kelly and Johnston provide a helpful diagram illustrating the key background factors and "intervening variables" that contribute to shaping the child's response to alienation at page 255 of their article.

V. Judicial Responses to Alienation

In *A.A. v S.N.A.*, Justice Preston was required to determine the parenting arrangements best suited to a 10 year old caught up in the conflict between her parents and deeply enmeshed with her mother and her mother's venomous views toward her father:²⁹

[75] *The circumstances of this case present a stark dilemma.*

[76] *I am conscious of the recommendation of [the parenting assessor] which I have given great weight. However, I am constrained by the limitations on the ability of the court to control a day-to-day dynamically-evolving situation such as the apprehension of a child without the mechanisms of the Child, Family and Community Service Act. I am conscious, as well, that the future psychological damage to which [the parenting assessor] refers is, to some extent speculative because of the, as yet unknown, effect of future events. Beyond that observation, I do not mean to imply that I reject her analysis of the potential damage that [the mother] may inflict on [the child].*

[77] *If custody is transferred to [the father], the immediate effect of that change will be extremely traumatic to [the child]. She may or may not adjust in a reasonable length of time. She will have to be forcibly removed from the custody of her mother, either by the authorities arriving at her school and physically apprehending her or by forcibly apprehending her from her mother. Her mother will not cooperate. In my view, [the child] will, with much justification, conclude that she is being forcibly dealt with in a manner that completely ignores her integrity and her wishes. It is unlikely that she will initially accept the reassurance of therapists. ...*

[80] *The relationship that she is being removed from is a relationship that, in the long run, will be detrimental to her. It has already been detrimental to her. However, her relationship with her mother and with her grandmother, who supports [the mother] in her pathological antipathy to [the father], is the most powerful and constant relationship [the child] has ever known.*

I expect that most judges will sympathize with the dilemma faced by Justice Preston and the apparent paucity of options available to the court. Although there are some additional nuances and variants, Warshak outlined the four basic options in a 2010 article in *Family Court Review*:³⁰

²⁹ *A.A. v S.N.A.*, 2007 BCSC 594

³⁰ R.A. Warshak, "Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children" (2010) 48:1 *Family Court Review* 48

1. Award or maintain custody with the favoured parent, with court-ordered psychotherapy and, in some cases, case management.
2. Award or maintain custody with the rejected parent, in some cases with court-ordered or parent-initiated therapy.
3. Place children away from the daily care of either parent.
4. Accept the child's refusal of contact with the rejected parent.

According to Warshak, option one is most likely to be successful "in early stages with less severe problems and when the favored parent and child are likely to cooperate." Option two was Gardner's preferred solution - "the most important element in the treatment of these children is immediate transfer to the home of the so-called hated parent," he wrote - but comes at the steep emotional and psychological cost of placing the children in the home of the hated parent. Warshak described this option, as do the British Columbia case authorities, as the ultimate recourse, to be tried after all others. Option three places the children in the home of a third party, a boarding school or residential facility, but has the drawback of depriving the child of face to face contact with both parents and not guaranteeing isolation from alienating influences. Option four has the appearance of abject failure, but may be the only rational choice when it becomes the least harmful of all other alternatives. However, as Warshak wrote, withdrawal carries with it the consequence that:

... rejected parents suffer a searing pain described as worse than the grief associated with the death of a child, because it is an ambiguous loss that does not allow the closure of the normal grieving process.

Regardless of the approach that is ultimately taken to address a case of alienation, professor Peter Jaffe, psychologist Dan Ashbourne and lawyer Alfred Mamo have identified a helpful set of principles that should assist the court and counsel in balancing the competing priorities alienation invokes:³¹

1. Protect the child and the primary parent from abuse and family violence.
2. Protect the child from ongoing parental conflict and litigation.
3. Protect the stability and security of the child's relationship with the primary parent and respect the right of the primary parent to direct his or her life.

³¹ P.G. Jaffe, D. Ashbourne and A.M. Mamo, "Early Identification and Prevention of Parent-Child Alienation: A Framework for Balancing Risks and Benefits of Intervention" (2010) 48:1 Family Court Review 136

4. Respect the right of the child to have a meaningful relationship with each parent.
5. Promote the benefits of the child having a positive relationship with a co-parenting team of parents.

In selecting these priorities, Jaffe, Ashbourne and Mamo write that although they do not intend to downplay the harm of alienation, “the court and clinicians have to give a sober second thought to doing more harm than good in their interventions” when alienation is established.³² However, this is not an admonition to the physician’s principle of *primum non nocere*; in alienation cases, the best legal remedy is often the least bad legal remedy.

A. Addressing Alienation

Much has been written about the legal remedies available when allegations of alienation have been proven over the last three decades, the most recent authoritative commentary on which comes from Fidler, Bala and Saini. Although each remedy has its own benefits and drawbacks and is supported to a greater or lesser extent by the research to date, consensus seems to have gathered around three governing principles which I will briefly discuss: the need for rapid intervention when the potential for alienation is identified; the need for attentive case management when court proceedings are underway; and, the need to consider the long-term interests of the child when taking action.

Rapid Intervention. The reason for need for speed in dealing with allegations of alienation is likely obvious: the more time that an alienating parent has to sever the relationship between the child and the rejected parent, the more difficult it will be to repair the damaged relationship. Nicholas Bala, Barbara Jo Fidler, lawyer Dan Goldberg and student Claire Houston write that:³³

The success of legal and mental health interventions depends on establishing, as early as possible, the reasons a child rejects a parent, and responding before parents and children become set in their attitudes and patterns of behaviour. ... Bitter, protracted litigation may transform “reasonable” alignment with one parent into outright rejection of the other, and some cases of severe alienation may be effectively impossible to reverse during childhood.

Darnall echoes this opinion in his article, “Three Types of Parental Alienators”:

³² The same, I strongly suggest, goes for counsel.

³³ N. Bala, B.J. Fidler, D. Goldberg and C. Houston, “Alienated Children and Parental Separation: Legal Responses in Canada’s Family Courts” (2007) 33 Queen’s Law Journal 79

The best hope for children affected by an obsessed alienator is early identification of the symptoms and prevention. After the alienation is entrenched and the children become "true believers" in the parent's cause, the children may be lost to the other parent for years to come.

Case Management. Psychologist Matthew Sullivan and Joan Kelly argue that close case management is necessary in cases involving claims of alienation. They recommend that case management commence at the outset of the case and continue, if I understand their point correctly, after the final order has been made.³⁴ Fidler and Bala support this view, writing that "most experienced legal and mental health professionals emphasize the need for the court's early and vigilant involvement."

In light of the "interpersonal alignments and polarized negative views" that are common in these cases, Sullivan and Kelly see case management as playing a critical role in:

- a) preserving relationships between lawyers and clients, clients and counsellors and clients and parenting assessors;
- b) ensuring the continuity of parenting time between the child and the rejected parent; and,
- c) enforcing orders for parenting time, counselling and assessments.

(I see two other material benefits:

- d) controlling the favoured parent's efforts to delay and hinder the movement of the case toward resolution; and,
- e) ensuring that applications are heard expeditiously and the case proceeds to trial with a minimum number of delays and interruptions.)

Sullivan and Kelly recommend, and I agree, that these cases should be managed by a single judge:³⁵

This ensures continuity in decision making about early intervention, assessment, and later interventions, including treatment. As information emerges that

³⁴ M.J. Sullivan and J.B. Kelly, "Legal and Psychological Management of Cases with an Alienated Child" (2001) 39:3 Family Court Review 299

³⁵ See Donna Martinson's important discussion on the one-judge model in "One Case - One Specialized Judge: Why Courts Have an Obligation to Manage Alienation and Other High-Conflict Cases" (2010) 48:1 Family Court Review 180.

clarifies what factors are contributing to the child's alienations, the benefits of having the same judicial officer manage the case are enormous.

Long-term Interests. Finally, the steps to take when addressing a finding of alienation must always be guided by an assessment of their probable impact on the child, measured by the best interests of the child as required by s. 37(1) of the *Family Law Act*³⁶ and ss. 16(8) and 17(5) of the *Divorce Act*.³⁷ The complex dynamics of alienation often require a balancing of short-term pain against long-term gain, resulting in the “stark dilemma” faced by Justice Preston: is harm the child is *certain* to endure in the present, such as being forced to take counselling, enter a reunification program or reside with the rejected parent, outweighed by the *possible* benefits which the course of action may produce in the future?

Whether consensus on this issue has been reached or not, the Court of Appeal, in its opinion on Justice Preston’s decision, has decided that the focus of analysis must be on the child’s long-term best interests:³⁸

[27] ... We agree with counsel for the appellant that the trial judge wrongly focused on the likely difficulties of a change in custody – which the only evidence on the subject indicates will be short-term and not “devastating” – and failed to give paramountcy to [the child’s] long-term interests. Instead, damage which is long-term and almost certain was preferred over what may be a risk, but a risk that seems necessary if [the child] is to have a chance to develop normally in her adolescent years. ... The obligation of the Court to make the order it determines best represents the child’s interests cannot be ousted by the insistence of an intransigent parent who is “blind” to her child’s interests.

Although I am inclined to agree with the Court of Appeal, I do not envy the burden this places on trial judges who must attempt to peer into the dim and distant future and discern the probability of outcomes in deciding how to act. Here’s how the Court of Appeal managed the task:

[28] While it is obvious that no court should gamble with a child’s long-term psychological and emotional well-being, the trial judge’s findings show that the status quo is so detrimental to [the child] that a change must be made in this case. Although [the child] has not been permitted to have a normal relationship with her father for two years, the expert opinion suggests she will succeed in adjusting, although the process will be difficult. ... We also note that [the child] is by all accounts a bright girl who has shown a “desire to connect with others” when she is out of her mother’s control, and that the chances she will weather this change, if it is properly carried out, seem good.

³⁶ *Family Law Act*, SBC 2011, c. 25

³⁷ *Divorce Act*, RSC 1985, c. 3 (2nd Supp.)

³⁸ *A.A. v S.N.A.*, 2007 BCCA 363 (emphasis in original)

One hopes, however, that the degree of certainty trial judges have in future outcomes is somewhat greater than “the chances seem good.”

1. Initial Interventions

Early Assessment. Fidler, Bala and Saini recommend the early appointment of a mental health professional to conduct an assessment. Given the difficulty in discriminating between cases in which a child’s reluctance to visit a parent stems from the normal factors related to age, gender and other circumstances identified by Janet Johnston in “Children of Divorce Who Refuse Visitation,”³⁹ a damaged relationship with the rejected parent due to estrangement or a damaged relationship with the rejected parent due to alienation, I can see two key purposes for a speedy assessment:

- a) determining the intervention best suited to the child and the circumstances, as the optimal intervention will vary depending on the child’s age and temperament and whether the child’s resistance to spend time with a parent is non-pathological in nature, caused by estrangement or caused by alienation; and,
- b) initiating the preferred intervention as soon as possible, to minimize the damage to the parent-child relationship.

Care must be taken in selecting the mental health professional who will perform the assessment.⁴⁰ In my view, the assessor should: be a registered member of the appropriate provincial regulatory body; be recognized by his or her peers as an authority on children who resist contact with a parent after separation; and, comply with commonly accepted empirical standards for forensic psychological investigations.⁴¹

Counselling. The court may order that one or more of the parents and child attend counselling pursuant to s. 224(1)(b) of the *Family Law Act*. Kelly and Johnston identify a number of characteristics of the favoured parent, the rejected

³⁹ *Supra*, fn 23

⁴⁰ I raise this caution as a number of the British Columbia judgments I reviewed for this paper included evidence from experts who were prepared to conclude that alienation had occurred without meeting the favoured parent or the children, an approach which struck me as somewhat peculiar; see, for example, *K.M.M. v D.R.M.*, 2014 BCSC 569, *D.S.W. v D.A.W.*, 2014 BCSC 514 and *Crerar v Crerar*, 2013 BCSC 2244.

⁴¹ See P.M. Stahl and R.A. Simon, *Forensic Psychology Consultation in Child Custody Litigation: A Handbook for Work Product Review, Case Preparation and Expert Testimony* (Chicago, IL: American Bar Association, 2013) for an excellent review of the investigatory standards and ethical issues involved in parenting and other assessments in family law matters.

parent and the child that contribute to alienation and can be addressed through counselling.⁴²

1. **Favoured parent:** Counselling may be aimed at reducing the frequency with which negative comments about the rejected parent are expressed, building awareness of unconscious and indirect expression of negative sentiments toward the rejected parent, educating about the short- and long-term consequences of alienation on children, and supporting the child's relationship with the rejected parent. Counselling may also be useful in providing a reality check to adjust the parent's distorted beliefs about the rejected parent.
2. **Rejected parent:** Counselling may be necessary to address the rejected parent's reaction to the breakdown of the parent-child relationship, including by withdrawing from or adopting a passive attitude toward the conflict with the favoured parent, counterrejecting the child and withdrawing from the parent-child relationship. Counselling may also: help to address any parenting or personality deficits that may be contributing to the alienation; support the parent through the pain associated with the breakdown of the relationship; and, provide the parent with guidelines for responding to the child's negative comments.
3. **Child:** The first objective of counselling for children will be to repair, or at least shore up, the child's relationship with the rejected parent and ease the child's resistance to visiting that parent. Counselling may also help children to address any traits, such as being anxious, fearful or passive, or having low self-esteem, that increase their vulnerability to the efforts of the favoured parent to damage their relationship with the rejected parent.

Note that counselling for alienated children will require significant support if the intervention is to be successful in the long run. Such support might include setting parameters on the content and frequency of the favoured parent's communication with the child, limiting the child's contact with the favoured parent or removing the child from the home of the favoured parent.

Fidler, Bala and Saini provide a helpful checklist for drafting orders for counselling which I have taken the liberty of adapting:

- a) identify the objectives of the therapy;
- b) identify the therapist, or provide a process for selecting the therapist;

⁴² For a more expansive discussion of therapeutic approaches aimed at favoured parents, rejected parents and children, see J.R. Johnston, M. Gans Walters and S. Friedlander, "Therapeutic Work with Alienated Children and Their Families" (2001) 39:3 Family Court Review 316.

- c) specify the minimum duration for therapy, or the terms on which parents may withdraw and the process for selecting a new therapist;
- d) precisely identify any decision-making powers to be exercised by the therapist, for example concerning the favoured parent's communication with the child or the rejected parent's parenting time, and any limits to those powers;
- e) identify any educational or therapeutic programs the parents are to attend, such as a high-conflict parenting after separation program;
- f) state that the professionals involved may communicate with each other as necessary, and specify that the parents are to execute such authorizations as may be necessary for that purpose;
- g) state that the parents are required to cooperate with the therapy process;
- h) identify any abridgments to the patient-therapist relationship, including any reporting requirements;
- i) specify the consequences of non-compliance; and,
- j) specify how the therapist's services will be paid for.

As a general principle, orders for interventions using the services of third parties should be as complete and specific as possible. Lacunae and imprecisions will usually result in delay and costly reappearances for clarification and direction.

Restore Contact. When parenting time between the child and the rejected parent has been interrupted, Sullivan and Kelly recommend that visits be restored as soon as possible, even if such visits must be supervised or facilitated by a third party. They propose that "there should be a presumption that parent-child contact will be continued (or initiated) if alienation is suspected." They write that:

When there is no access between the child and rejected parent, the child's resistance to visit often becomes more entrenched. Delays in court hearings and deferred judicial decisions contribute greatly to the problem.

Eliminate Ambiguity. Parenting plans can often be improved at an early stage to reduce ambiguities and eliminate any areas of discretion that allow the favoured parent to obstruct the rejected parent's parenting time. Sullivan and Kelly write that:

Ambiguous orders with insufficient detail provide fertile ground for conflict and acting out, thereby undermining and sabotaging well-intentioned interventions. The alienated child and the aligned parent should not have discretion about whether visits occur.

The refinement of parenting plans is a strategy commonly used to reduce tensions in high-conflict family law cases, but is especially useful when the alienation of a child is a possibility; as Fidler, Bala and Saini put it, parenting plans must be “detailed, explicit and comprehensive.”

Child Protection. If one accepts the proposition that the intentional manipulation of a child in an effort to destroy the child’s relationship with a parent constitutes maltreatment rising to the level of emotional abuse, it follows that cases of parental alienation must be reported to child protection authorities by those under an obligation to report, and that those authorities may elect to intervene.⁴³ Although the involvement of child protection in a family law dispute is rarely welcome, Fidler, Bala and Saini suggest that “when parents have limited resources, a child protection agency may ... provide counselling and support services for the children that would otherwise be unavailable.”

2. Subsequent Interventions

Monitor Compliance. Fidler, Bala and Saini state that “non-compliance with court orders and separation agreements is common in high-conflict cases,” particularly those involving allegations of alienation:

This in part reflects the fact that alienating parents often persuade themselves that non-compliance is promoting the interests or protecting the rights of their children. It also reflects the high incidence of personality disorders, and the corresponding distortion in perception, in this high-conflict population.

Sullivan and Kelly observe that “the authority of the court ... will be weakened in the eyes of the child and the aligned parent if visits and other mandates of the court are ignored or sabotaged,” and suggest that violations of court orders be addressed expeditiously, cautioning against the “variety of tactics” that may be employed to undermine orders.

Failure to enforce court orders for parenting time risks the child perceiving the parent as withdrawing from the parent-child relationship or acquiescing to the

⁴³ This actually happened in *Mitchell v Mitchell*, 2015 BCSC 355. In his reasons for judgment, Justice Groves wrote that the Ministry for Child and Family Development had taken “the unusual step of apprehending the children, at least notionally, out of concern about what I would call parental alienation.” The Ministry then obtained a supervision order and “worked towards ensuring that the father had contact with his children.”

child's reluctance to visit, but also risks emboldening the favoured parent. Fidler, Bala and Saini write that "failure to enforce an order against alienating parents only reinforces their narcissism, false sense of power and disregard for authority."

The need to monitor compliance with orders for parenting time, and respond quickly when breaches occur, underscores the utility of case management and the benefits of having a single judge assigned to the task.

Enforce Orders. Orders for parenting time are commonly enforced by:

- a) the admonishment and castigation of the breaching party by the court;
- b) the provision of make-up time, now available under s. 61 of the *Family Law Act*;
- c) the payment of costs thrown away, such as the cost of airfare, hotel room, movie tickets and so forth incurred in respect of an anticipated but frustrated visit with a child, likewise now available under s. 61;
- d) the payment of legal costs; and,
- e) the remedies available where a party is found to be in contempt of court.

The less onerous enforcement mechanisms may prove ineffective in alienation cases, especially where the favoured parent is utterly convinced of the intrinsic and immalleable virtue of his or her position. However, caution must be taken when considering genuinely burdensome enforcement processes for fear of inadvertently worsening the situation. Fidler, Bala and Saini write that:

... punitive judicial actions may be counterproductive to the extent that the punished alienating parent is then portrayed to the child as a "martyr," which in turn only serves to reinforce the child's negative reaction and alienation.

Depending on the circumstances and the personality of the favoured parent, it may be better to avoid a punitive approach to the enforcement of orders for parenting time and vary them instead.⁴⁴

Adjust Parenting Arrangements. Parenting plans may be varied on a temporary or permanent basis in an effort to control or ameliorate the effects of the

⁴⁴ Fidler, Bala and Saini note that some researchers are of the view that "while judges should 'encourage' custodial parents to support their children's relationships with non-abusive, noncustodial parents, coercive judicial action to enforce contact between a child and parent is not appropriate."

behaviour of the favoured parent on the child, or to support the child's relationship with the rejected parent. Adjustments that are made on a temporary basis may be in place for a fixed period of time, or be subject to review once a fixed period of time has expired or upon the occurrence of a specified event. Parenting plans are most often varied for curative reasons after settlement or trial, but may also be varied on an interim basis prior to trial.

1. **Reduce contact with favoured parent:** The parenting time of a favoured parent may be reduced, as may the extent of the child's communication with the favoured parent when with the rejected parent. The reduction of the favoured parent's time with the child may be used to support counselling efforts, reduce the child's exposure to alienating behaviours and send a signal to the parent and child that the child's relationship with the rejected parent is important and will be protected by the court.

Restrictions on the favoured parent's communication with the child may be of critical importance if the favoured parent is attempting to disrupt or undermine the rejected parent's time with the child through frequent phone calls, texts and emails. Requiring all communication to proceed by text or email can be used to monitor the content of communication between the child and the favoured parent and establish a helpful record.

2. **Expand contact with rejected parent:** Increasing the amount of communication and parenting time the rejected parent has with the child can help to restore the parent-child relationship and reduce the child's exposure to the favoured parent's negative views of the rejected parent.

Equalizing the time the child spends with each parent, which will not always be warranted, sends a strong message to the favoured parent that the rejected parent has equal standing in the child's life, that he or she has lost dominance in the child's life, and may engender a useful fear that his or her parenting time may further diminish without the demonstration of good behaviour. It may also help to undermine claims that the rejected parent is a threat to the child, incompetent or unworthy.

3. **Decision-making:** Making both parents responsible for decision-making in matters concerning the child can be useful where the favoured parent has used his or her authority to: make appointments, enroll the child in activities or plan outings that conflict with the parenting time of the rejected parent; withhold or block information from the child's school and healthcare providers from the rejected parent; or, restrict the rejected parent's attendance at school and other events. In addition to improving the continuity of the child's time with the rejected parent, giving the

rejected parent a role in decision-making can be a tangible demonstration of the rejected parent's involvement in the child's life.

Options for including the rejected parent in decision-making include: making both parents responsible, with neither having the final say in the event of disagreement; making both responsible, and giving the final say to the rejected parent; making both responsible, with the favoured parent having the final say in some matters and the rejected parent the final say in others. It is also possible to switch responsibility for decision-making altogether, such that the favoured parent has no further involvement in decisions concerning the child.

4. **Primary residence with rejected parent:** The child may be placed in the primary care of the rejected parent on a temporary rather than permanent basis. Such orders are usually made to give the child the chance to re-acclimate to life with the rejected parent, reduce the child's demonization of the parent, reduce the child's exposure to the influence of the favoured parent and attempt to rebuild the parent-child relationship.

Note that a temporary transfer of primary residence to the rejected parent may be necessary to support counselling programs and services.

5. **Suspend contact with favoured parent:** Where the rejected parent has the child's primary residence, it may be necessary to terminate all contact between the favoured parent and the child if the parent cannot be brought to refrain from overtly, covertly, intentionally or unconsciously attempting to impart negative impressions of the rejected parent to the child. The suspension of the favoured parent's time with the child may: improve the success of counselling efforts; give the child's relationship with the rejected parent time to heal by removing the child from the poisoning influence of the favoured parent; and, signal to the child the court's strong belief that the rejected parent is a good, competent parent.
6. **Supervision of parenting time:** Where the rejected parent has the child's primary residence, the parenting time of the favoured parent may be supervised by a neutral third-party. Supervision is primarily useful for the strong message it sends to the favoured parent, however supervision cannot prevent nonverbal alienating behaviours and may backfire if the child perceives the supervision requirement to be an unjust hardship for the favoured parent.

Fidler, Bala and Saini suggest that supervised parenting time may only be appropriate where there are "reasonable fears" for the child's safety or, if there are no fears, when it is used for short transition periods.

Parenting Coordinator. Parenting coordinators can be appointed to manage the implementation of parenting plans, oversee the family's participation in counselling services or programs and manage contact issues as they arise.⁴⁵ In alienation cases, it is particularly important to delineate the scope of the parenting coordinator's authority in the appointing order:

- a) identify the parenting coordinator, or the means by which the parenting coordinator will be chosen;
- b) specify the duration of the parenting coordinator's appointment, the terms on which parents or the parenting coordinator may withdraw, and the process for selecting a new parenting coordinator;
- c) state that the parenting coordination process is transparent and not subject to lawyer-client and patient-therapist confidentiality;
- d) identify any counselling processes or therapeutic programs the parents are to attend;
- e) state that the parenting coordinator may communicate with the professionals involved, the children's medical and mental health providers, the children's school and other individuals as needed, and specify that the parents are to execute such authorizations as may be necessary for that purpose;
- f) state that the parenting coordinator will have the power to make binding determinations on matters related to the implementation of the parenting plan;
- g) identify any special decision-making powers the parenting coordinator may exercise, for example concerning the temporary suspension of parenting time or contact, longer term adjustments of parenting time, or the parents' communication with the child and with each other;
- h) identify any reporting requirements;
- i) specify the consequences of non-compliance; and,
- j) specify how the parenting coordinator's services will be paid for.

⁴⁵ Fidler, Bala and Saini also note that where multiple professionals are engaged with a family, parenting coordinators may be especially useful in "ensuring team consistency and continuity to avoid the splitting or pitting of one professional against the other," as the polarization of helping professionals is fairly common in alienation cases.

Orders appointing parenting coordinators are especially likely to cause delays and further court appearances to correct ambiguities and omissions.

As a result of parenting coordinators' power to make determinations that are binding on the parties, parenting coordinators should only be appointed to assist with the implementation of *final* parenting plans, reached through settlement, trial or the variation of a settlement or trial order, to avoid conflict with the court. Ideally, parenting coordinators assume a hybrid role of case manager, mediator, judge and therapist when appointed, relieving the court of the obligation to entertain further disputes arising from the family except in an enforcement capacity.

Care must be given to the selection of parenting coordinator, in particular when choosing between a parenting coordinator with a background in mental health or a lawyer parenting coordinator. Although the psychosocial factors at play in alienation cases are complex and interwoven, suggesting the use of a mental health professional, these cases involve an enormous amount of conflict, some of which will be directed at the parenting coordinator, suggesting the use of a lawyer. In some cases, the choice of mental health professional versus lawyer as parenting coordinator will be obvious. Where the choice is less clear, I see two options.

1. Retain a parenting coordinator, along with an individual from the other profession as consultant to the parenting coordinator, whether a lawyer is being hired as parenting coordinator with a mental health professional as consultant or vice versa. The parenting coordinator remains responsible for the day-to-day management of the family but can call upon the consultant to provide insight, advice and opinions as needed.
2. Separately retain a lawyer as parenting coordinator and a mental health professional as therapeutic lead. The parenting coordinator and therapeutic lead will work in tandem to jointly manage the family, with the expertise of each informing the other, while preserving the different purposes and objectives of their two roles.

Security. The court may require favoured parents to pay a sum of money into court as security for their future good behaviour. The amount of money payable must be an amount that the parent would be loathe to lose, but cannot be so high that the payment impacts the parent's ability to provide for the child.

Costs. Costs are rarely awarded in family law proceedings, despite the rule in *Gold v Gold* that costs should follow the event in family law matters as they do in

civil matters.⁴⁶ When costs are awarded, the award is often made to signal the court's disapprobation of the conduct of a party in the litigation, and orders for costs and special costs are somewhat more commonly awarded in alienation cases than they are in other family law disputes. Fidler, Bala and Saini write that

Courts will not only award legal fees to alienated parents who have had to take legal action to enforce orders that give them a relationship with their children, but they may also award legal fees to a custodial parent who has been subject to unfounded claims of parental alienation.

Although the court will generally not award costs where the parent is impecunious or the payment would impact the parent's ability to provide for the child, be wary that interventions which can be characterized as punitive give the favoured parent the opportunity to portray the intervention as another example of the rejected parent's unrelenting depravity.

3. Interventions of Last Resort

Contempt. Favoured parents, especially alienating parents falling within Darnall's "obsessed" category who are likely to continuously breach or frustrate orders for parenting time, often in the belief that they must breach or frustrate the order to protect the child, may be addressed through the court's power to "punish" for contempt. The parent seeking a finding of contempt must show that the other parent has willfully contravened a court order;⁴⁷ as contempt hearings are quasi-criminal in nature, the applicant must prove his or her allegations beyond a reasonable doubt.⁴⁸

When a parent is found in contempt, the primary object of sentencing is not to punish the contemnor but to achieve his or her compliance with the orders and directions of the court.⁴⁹ Courts generally punish for compliance through orders for fines and committal although other orders, such as for community service, may also be made. However, because of the potentially serious consequences findings of contempt can bring, parents are often given the opportunity to purge their contempt by compliance with the breached order or sentencing is deferred. In the 2008 case of *M.M. v N.M.*, for example, the court found the favoured parent to be in contempt of a number of orders yet treated the finding as a warning, with sentencing to be considered in the event of further breaches:⁵⁰

⁴⁶ *Gold v Gold* (1993), 49 RFL (3d) 56 (BCCA)

⁴⁷ *G.S. v L.S.*, 2013 BCSC 1725

⁴⁸ *Goyert v Goyert*, 2008 BCCA 196

⁴⁹ *Larkin v Glase*, 2009 BCCA 321

⁵⁰ *M.P. v N.M.*, 2008 BCSC 1501

[28] While I have found the defendant to be in contempt of court in multiple instances, I am adjourning the matter of punishment. I intend to give the defendant one more chance to abide by the orders of this court. If there is any breach of the orders that I make, the plaintiff is at liberty to ask the court that the defendant be found in contempt. If this occurs, and if the defendant is found to be in contempt of any of the orders that I make today, the defendant may be subject to fine, imprisonment, or both. If those circumstances arise, I will address the matter of penalty in regard to the contempt findings that I have made here today.

Fidler, Bala and Saini raise a further caution against contempt proceedings that goes to the core of the alienating behaviours sentences for contempt are intended to address:

... a sanction for contempt may not help to secure compliance with the order, especially in the long term. When alienating parents are sent to jail, they will inevitably tell, or it will be evident to the children, that they are sacrificing their liberty as a result of their efforts to protect what they perceive to be the rights or interests of their children not to see the rejected parent; this “martyr-like” response is unlikely to help the child reestablish a relationship with the rejected parent.

Despite this drawback, a sentence of imprisonment may nonetheless improve the child’s relationship with the rejected parent by severing his or her contact with the favoured parent for a period of time, eliminating the possibility of continued efforts to alienate the child and improving the overall counselling environment.

Peace Officer Enforcement. Peace officer enforcement clauses were commonly used under the *Family Relations Act* as means of enforcing – or threatening to enforce – orders for access.⁵¹ Although peace officers rarely consider themselves bound to actually carry out the instructions of the court,⁵² they were theoretically empowered to apprehend and deliver a child to the person entitled to custody.

In cases of alienation, peace officer enforcement clauses should be used with caution, for two reasons. First, while the mere presence of the clause may have a salutary effect on the attitude of the favoured parent and improve the probability that an order for parenting time will be complied with, if the clause is likely to be acted upon consideration must be given to the impression apprehension would leave on the alienated child. Second, in the event the attending officers choose not to enforce the order for parenting arrangements, the favoured parent may be inadvertently empowered and reinforced in the belief that his or her views and beliefs are of primary importance.

⁵¹ *Family Relations Act*, RSBC 1996, c. 128, s. 36

⁵² J.-P. Boyd, “Enforcing Orders for Access: The Views of the Family Law Bar” (2013) 32:2 *Canadian Family Law Quarterly* 173

Reverse Parenting Arrangements. Transferring the child's residence from the home of the favoured parent to the home of the rejected parent, often with the transfer of sole custody to the rejected parent as well, is the nuclear bomb of alienation remedies. It is a tool of last resort because of the trauma the child will likely suffer from being taken from the home of the loved parent to the home of the hated parent against the child's will. It is also only *one* of the available tools for addressing parental alienation, despite the frequency with which the threat of reversing parenting arrangements is mentioned in the case authorities.

A number of factors must be taken into account before reversing the child's parenting arrangements:

- a) the change must be likely to result in the restoration of the child's relationship with the rejected parent (if the child's alienation is too deeply entrenched, the change may not repair the parent-child relationship);
- b) the short-term distress of the change must be outweighed by the long-term benefit the change will yield for the child;
- c) the rejected parent must have the parenting capacity and emotional health to provide a positive, nurturing environment for the child (arguably, the parenting offered by the rejected parent should be at least as good, if not better, than the parenting offered by the favoured parent); and,
- d) the vigour with which the child will resist the change in residence, and the likelihood that the child will engage in adverse behaviours such as running away, self-harm and substance abuse.

The "stark dilemma" described by Justice Preston really boils down to the second of these factors and the fruits of the fourth. As Fidler, Bala and Saini put it,

... which risk is greater: separation from an unhealthy or enmeshed relationship or remaining in that relationship? ... is custody reversal likely to cause more harm than good; that is, do the short- or long-term benefits of placing the child with the once loved, now rejected parent outweigh the risks ... of temporarily separating the child from the alienating parent?

Unfortunately, each family must be considered in light of its own unique circumstances and there is little good research from which generalizable conclusions may be drawn. Fidler and Bala summarize the research thusly, citations omitted:

The negative short-term and long-term effects of alienation, including intrusive parenting have been well documented. While there is general recognition that a

reversal of custody may be warranted in severe cases, debate continues with respect to identifying which cases are in fact severe enough.

Indeed, some writers, including Jaffe, Ashbourne and Mamo, are of the view that the separation of a child from a primary attachment figure, even when the attachment is pathological, places the child at risk of worse consequences than those which result from losing contact with a rejected parent.

Nevertheless, the court will make orders reversing children's parenting arrangements when moved to do so. When this happens, Bala, Fidler, Goldberg and Houston, in their article, "Alienated Children and Parental Separation," recommend that the implementation of the order should be monitored by a court-appointed mental health professional "with on-going judicial supervision":

It may be appropriate to suspend or supervise contact between a severely alienating parent and child, for a period of time, if a reversal of custody is to be effective. This is because the alienating parent is very likely to undermine the development of a positive relationship with the other parent.

4. Taking No Further Action

Do Nothing. Finally, there is the choice of doing nothing, or, as Warshak put it, the choice of accepting the child's refusal of contact with the rejected parent. This may be the only rational alternative remaining if:

- a) the child is close to the age of majority and is more likely to vote with his or her feet that remain in the home of the rejected parent;
- b) the child is so deeply enmeshed in the perspective of the favoured parent that no intervention is likely to assist;
- c) the trauma to the child of any other approach, including being placed in the home of the rejected parent, exceeds the benefits that would be realized from the restoration of the parent-child relationship;
- d) the severance of the parent-child relationship is partly due to a justified estrangement resulting from the rejected parent's past behaviour, parenting and personality deficits, or both;
- e) the parental conflict likely to result from continuing the litigation is not in the child's best interests; or,
- f) the rejected parent is emotionally or financially exhausted and can no longer carry on the struggle against the favoured parent.

The impact on the rejected parent of deciding to do nothing, whether the decision was his or her own or imposed by a judge, is staggering. Still, there are circumstances in which this approach is the most rational course of action, especially if one accepts – as the legislation and case law require – that the interests of the child is the only yardstick that matters.

There are two uncomfortable truths of parental alienation cases. First, the child's feelings toward the rejected parent are the child's feelings, whether those feelings were engendered by the unconscionable malevolent actions of a parent or arose as a result of the child's reasonable response to historic stimuli. Second, the moral blameworthiness of a parent's conduct is: always subordinate to the child's wellbeing; and, irrelevant to the determination of the course of action that is in the child's long-term best interests. Although our native sense of fairness rails against the injustice of allowing the hateful actions of a parent to prevail without retribution, doing nothing may nonetheless be the course of action most closely serving the best interests of the child.

Spontaneous Reconciliation. Making the decision to take no further legal steps should not foreclose all hope. Fidler, Bala and Saini note that “in some cases, children do resume a relationship with a rejected noncustodial parent, though sometimes on in adulthood.” Researchers following cases into alienated children's adulthood, including Baker, Darnall and Rand, have noticed various types of what they call “spontaneous reconciliation.” Fidler, Bala and Saini say that:

Maturation, independence, emancipation, and life cycle trigger events have been identified by these writers and clinicians as precipitants for reconciliation of parent-child relationships, sometimes years after the conclusion of court proceedings.

However, Fidler, Bala and Saini also observe that the existing data on spontaneous reconciliation later in life are “preliminary and mixed,” and far from conclusive.

In order to preserve the possibility for future reconciliation, there are simple steps that parents making the choice to down tools can take to ensure that the children know that their doors remain open and have a means to initiate contact. Whether they receive them, read them or neither, rejected parents should regularly send the children cards on important holidays and the children's birthdays, wishing them well and including their current contact information. Parents should be careful to avoid:

- a) overwhelming the children with cards, two or three a year will likely do;

- b) using passive-aggressive language and saying anything which might trigger feelings of guilt in the children;
- c) discussing the events of the past, particularly those relating to the court proceedings and conflict with the favoured parent;
- d) speaking negatively of the children or of the favoured parent;
- e) writing at too much length; and,
- f) lachrymose expressions of love, loss, regret and grief.

The content of these cards should be brief and to the point, factual, and as unemotional as possible and reasonable.

Rejected parents might also consider setting up a special Facebook account or website that the children can access as they wish, to provide updates on events in their lives and provide the children with another avenue of contact. Parents must assume that the favoured parent will have access to the material and write accordingly. Parents should adopt a similarly careful approach to the content of these materials and avoid using passive-aggressive language, saying anything which might trigger feelings of guilt, discussing the events of the past, speaking negatively of the children or of the favoured parent, and misty-eyed expressions of emotion.

B. Legal Options Available and Exercised in British Columbia

In British Columbia, the legal responses to allegations of alienation are primarily governed by the provincial *Family Law Act*, the federal *Divorce Act*, the rules of court and the Supreme Court's inherent and *parens patriae* jurisdiction. The new *Family Law Act* provides a wide range of tools, much improved over the former *Family Relations Act*, that can be applied to deal with such allegations, most importantly a range of enforcement mechanisms that range from make-up time to fines to imprisonment and can be exercised by the Provincial Court as well as the Supreme Court.

1. Options Available Under the *Family Law Act*

Expert Opinion. Expert evidence on the potential alienation of a child may be obtained through a combination of orders available under the *Family Law Act*, and under the Supreme Court Family Rules as I will discuss shortly.⁵³

⁵³ Supreme Court Family Rules, BC Reg. 169/2009

1. Under s. 211(1) of the *Family Law Act*, the court may order a person to assess the needs of a child, the views of a child and “the ability and willingness of a party to a family law dispute to satisfy the needs of a child,” and, under s.-s. (5), allocate the costs of the assessment among the parties.⁵⁴ Questions about the “needs of a child” and the “ability and willingness of a party” certainly encompass concerns about alienation sufficient to direct an inquiry into the issue.

Decision-Making Responsibility. Cases of alienation may be managed by adjusting the distribution of decision-making authority between parents. Under s. 40(1), only guardians have parental responsibilities.

2. Where both parents are guardians, the court may, under s. 40(3), allocate some or all parental responsibilities to both guardians or to one guardian, failing which the guardians are presumed to share all parental responsibilities.⁵⁵
3. Under s. 45(1), the court may make orders about how shared parental responsibilities are exercised, allowing the court to assign final decision-making authority to a guardian in the event of disagreement, as was the case with the Joyce model of joint guardianship commonly used under the *Family Relations Act*.⁵⁶ A guardian who disagrees with a decision may apply to court for directions on the matter under s. 49.
4. Note that under s. 218, the court may include in any order “any terms or conditions the court considers appropriate in the circumstances.”

Parenting Time. The court may also make orders distributing parenting time between parents, and, in the case of parents who are not guardians, contact. Pursuant to s. 42(2), during parenting time a guardian has “the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.” Persons with contact have no similar rights.

5. The court may allocate parenting time equally or unequally between guardians under s. 45(1), and order that the transfer of the child between guardians or a guardian’s parenting time be supervised under s. 45(3).

⁵⁴ Note that persons preparing such assessments are subject to special requirements as to the form and content of their reports and obligations to the court at SCFR 13-1, 13-2 and 13-6.

⁵⁵ Pursuant to Parts 3 and 4 of the *Family Law Act*, a child may have more than two parents and more than two guardians.

⁵⁶ I have proposed drafts of the Horn and Joyce models of guardianship, adapted for the *Family Law Act* and the *Divorce Act*, in a post to the Courthouse Libraries BC blog, available at www.courthouselibrary.ca/training/stream/jpboyd/the-stream-jp-boyd-guest-blogger/2014/08/01/jp-boyd-adapting-joyce-and-horn-models-for-divorce-act-and-family-relations-act.

6. Likewise, the court may make an order that someone other than a guardian have contact with a child under s. 59(1), in whatever amount of time it sees fits, and may order that the transfer of the child between the guardian and the person or the person's contact be supervised under s. 59(3).
7. Where a parent should not have even day-to-day care and control of the children during parenting time or it becomes necessary to send a strong message to the parent, the court may remove a person as guardian under s. 39(2), if the order is made close to the time of separation, or under s. 51(1)(b) if it is not.

Enforcement. Parenting time or contact provided in an order or agreement may be enforced in a variety of ways.⁵⁷

8. Under ss. 44(3) and 58(3), agreements for parenting time can be filed in court and upon filing are enforceable in the same manner as orders are enforced.⁵⁸
9. Where parenting time or contact provided in an order or agreement has been wrongfully withheld, under s. 61(2) the aggrieved party may apply for:
 - a. make-up time;⁵⁹
 - b. reimbursement of costs thrown away;
 - c. an order that the transfer of the child be supervised;
 - d. an order that the withholding guardian post security; or,
 - e. an order that the withholding guardian pay up to \$5,000 to the applicant or as a fine.

⁵⁷ Note that under s. 195 of the *Family Law Act*, orders of the Supreme Court respecting parenting arrangements or contact may be enforced by the Provincial Court.

⁵⁸ The filing of an agreement allows the agreement to be enforced *as if* it were a court order but does not *make* the agreement a court order. See *Cominetti v Cominetti*, (2 July 1993) New Westminster, A910693 (BCSC), *Loos v Loos*, BCSC 1413 and *B.M.D. v C.N.D.*, 2010 BCSC 1785 on the point.

⁵⁹ Prudent counsel should heed the caution of Justice Rogers in *K.L.K. v E.J.G.K.*, 2013 BCSC 2030 that "missed parenting time should be assessed on a qualitative rather than a quantitative basis" and "access days should not be totted up or traded back and forth like poker chips."

However, such applications must be made within 12 months of the withholding and may be defended under s. 62(1) on the basis that the withholding was not wrongful.

10. In the event that enforcement under s. 61 bears no fruit, application may be made under s. 231 for:
 - a. the imprisonment of the withholding guardian for up to 30 days;⁶⁰ and,
 - b. the apprehension and delivery of the child to the aggrieved party by a peace officer.

Note that the court must be satisfied that the party has failed to comply with an order and that no other order will secure the party's compliance before acting under this section.⁶¹

Protection Orders. Where family violence is an issue, certain protection orders are available which may address some of the issues that arise when alienation is a concern.

11. Under s. 183(3), the court may make an order restraining a party from communicating with another person or attending at places the person frequents, or an order restricting the party's manner and means of communication with a person.

Note that protection orders may only be enforced under s. 127 of the *Criminal Code*,⁶² and not by any means under the *Family Law Act*.

Conduct Orders. A number of conduct orders may also be useful, providing the circumstances of the case satisfy the threshold criteria at s. 222 that the conduct order would facilitate settlement, manage behaviours which might frustrate the resolution of the case, prevent misuse of the court's process or "facilitate arrangements" pending the resolution of the case.

12. Under s. 223(1), the court may strike all or part of a claim or application, seize itself of further applications or prohibit a party from bringing further applications without leave.

⁶⁰ See the decision of Judge Bond in *J.R.B. v J.H.F.*, 2015 BCPC 70 for an outline of the factors the court should consider in determining whether to jail someone pursuant to s. 231.

⁶¹ Among other things, this means that peace officer enforcement orders *cannot* be made on an anticipatory basis; they can only be made after an order has been breached and once the court has been persuaded that no other order will secure the party's compliance.

⁶² *Criminal Code*, RSC 1985, c. C-46

13. Under s. 224, the court may order that one or more parties or a child “attend counselling, specified services or programs,” and allocate the cost among the parties. Reunification programs, such as the Family Forward program offered by Alyson Jones & Associates in West Vancouver, would certainly seem to qualify as a “specified service or program.”⁶³
14. Pursuant to s. 225, the court can make orders restricting or imposing conditions on communication between the parties, including orders as to the timing and manner of communication.
15. Under s. 227(1), the court can require a person to give security to “do or not do anything” in relation to one of the factors set out at s. 222.

Prohibitory Orders. Where the conduct of a party, usually the favoured parent, has become pestilential for the reasons set out at s. 221(1), the court may prohibit the party from “making further applications or continuing a proceeding” without leave.

16. Pursuant to s. 221(2), the court may direct that a prohibitory order remain in effect for a fixed length of time or until the restrained party has complied with an order, and may impose terms and conditions on the granting of leave.
17. Under s. 221(2), the court may also make order:
 - a. for the reimbursement of costs thrown away; or,
 - b. requiring the restrained party to pay up to \$5,000 to the aggrieved party or as a fine.

Children’s Counsel. Although there is some debate over the wisdom and efficacy of appointing counsel for alienated children,⁶⁴ such appointments may nonetheless be made pursuant to s. 203 where the appointment is necessary to protect the child’s interests and “the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child.”

2. Options Available Under the *Divorce Act*

The *Divorce Act* is bereft of enforcement mechanisms, the federal government having prudently chosen to leave the provinces to their own devices in this regard. However, there is some authority to the effect that where corollary relief

⁶³ www.alysonjones.ca/services/family-forward-reunification-therapy/

⁶⁴ See Bala, Fidler, Goldberg and Houston.

is sought under both the federal legislation and the provincial, the final order can only be made under the *Divorce Act*,⁶⁵ and where alienation has arisen following trial, orders under the *Divorce Act* can only be varied by further orders under the *Divorce Act*.

1. Under s. 16(6), the court may impose such “terms, conditions or restrictions” as it thinks fit on orders for custody and orders for access. See s. 17(3) with respect to variation applications.
2. Although we are thoroughly acclimated to the idea that parties’ conduct during their relationship is not relevant in family law proceedings, s. 16(9) allows the court to consider past conduct that “is relevant to the ability of that person to act as a parent of a child.” Alienating behaviours would seem to be highly relevant to determinations of parental capacity. See also s. 17(6) with respect to variation applications.

Counsel should bear in mind that the “maximum contact” principle enunciated at ss. 16(10) and 17(9) is not an absolute. The parenting time to be extended to a parent is that which is “consistent with the best interests of the child.”

3. Options Available Under the Rules of Court and Elsewhere

Provincial Court. The Provincial Court Family Rules are, with the greatest of respect, of limited utility in addressing situations of alienation independent of the *Family Law Act*.⁶⁶ I note, however, that there appears to be no limit to the number of Family Case Conferences which can be set under PCFR 7, and that at these conferences, the court may mediate an issue in dispute, set a date for a further family case conference, give a non-binding opinion, make any order requested in an application or notice of motion, and “make any other order or give any direction that the judge considers appropriate.” Family case conferences may provide an excellent vehicle for the sort of hands-on case management recommended by Sullivan and Kelly and Fidler and Bala.

Although the Provincial Court cannot punish for contempt except contempt *in facie*, all of the enforcement powers provided by the *Family Law Act* are available to it, including the power to make orders for imprisonment, the payment of fines and the payment of costs thrown away.

Supreme Court. The Supreme Court Family Rules, on the other hand, contain a number of potentially useful processes and procedures.

⁶⁵ *Yu v Jordan*, 2012 BCCS 367

⁶⁶ Provincial Court (Family) Rules, BC Reg. 417/98

1. Judicial case conferences are provided for in SCFR 7-1, and a party may request a judicial case conference at any time in a proceeding, “whether or not one or more judicial case conferences have already been held.” Under SCFR 7-1(15), the court may:
 - a. mediate an issue in dispute;
 - b. set a date for a further judicial case conference;
 - c. give a non-binding opinion; and,
 - d. make “any procedural order or give any direction” that the court believes will further the objects of the rules, set out in SCFR 1-3.

The court may also seize itself of all applications in the proceeding.

2. Under SCFR 9-5, the court may make an order that a person submit to a psychiatric examination “if the physical or mental condition of a person is in issue.”
3. The court’s general injunctive powers are set out at SCFR 12-4. A party may apply for a pre-trial injunction whether or not pled, and for a post-trial injunction to prevent the continuation of a “wrongful act” established in the judgment.
4. The court may appoint its own expert at any stage of the proceeding pursuant to SCFR 13-5, specify the questions the expert is to address and allocate the costs of the expert’s services among the parties.
5. The court’s powers to punish for contempt are partially codified by SCFR 21-7. In addition to the court’s powers to jail or impose a fine and its inherent jurisdiction to impose other remedies as appropriate, the court may require a contemnor to post security for his or her good behaviour.
6. The court may award costs and special costs against a party under SCFR 16-1. Costs may be awarded for all or part of a proceeding, and in respect of anything that “is done or omitted improperly or unnecessarily.” The court may order that a party post security for costs under SCFR 22-1(6).

Other Legislation. Under s. 18 of the *Supreme Court Act*, the court may prohibit a person from commencing proceedings without leave of the court, where that person has “habitually, persistently and without reasonable grounds, instituted

vexatious legal proceedings in the Supreme Court or in the Provincial Court,"⁶⁷ a remedy similar to that available under s. 211(1) of the *Family Law Act*, albeit one likely more difficult to obtain.⁶⁸

Injunctions are available under s. 39(1) of the *Law and Equity Act* as well as SCFR 12-4, and may be made "in all cases in which it appears to the court to be just or convenient that the order should be made."⁶⁹ Injunctions may be granted "unconditionally or on terms and conditions the court thinks just."

Although proceedings under the *Offence Act* are unavailable as a result of s. 232 of the *Family Law Act*,⁷⁰ s. 127 of the *Criminal Code* makes the breach of a court order, other than an order for the payment of money, a hybrid offence. In theory breach of any order made under the *Family Law Act* or the *Divorce Act* could be the subject of criminal charges, however I rather think that Crown counsel would decline to use the criminal courts as a vehicle for the enforcement of civil entitlements, particularly when specific remedies are provided for that purpose in the civil courts.⁷¹

4. Options Exercised in British Columbia

Allegations of alienation were substantiated in 27 of the 115 British Columbia decisions I reviewed, including cases in which the children were found to be both alienated *and* estranged from the rejected parent, and the court found there to be a risk of alienation in a further six cases. The following table lists the orders made in judgments yielding final orders (19 cases) or varying final orders (9 cases) in these circumstances.

**Orders Made in British Columbia Cases in which Alienation,
Alienation and Estrangement or Risk of Alienation Have Been Established**

	Final Orders	Variation of Final Orders
Primary Residence		
Primary residence to favoured parent	5	1
Primary residence to rejected parent	1	4
Guardianship		
Joint guardianship	8	5
Sole guardianship to favoured parent	3	
Sole guardianship to rejected parent	2	

⁶⁷ *Supreme Court Act*, RSBC 1996, c. 443

⁶⁸ *S. v S.*, (1998) 43 RFL (4th) 373 (BCCA), *The Law Society of B.C. v Dempsey*, 2005 BCSC 1277

⁶⁹ *Law and Equity Act*, RSBC 1996, c. 253

⁷⁰ *Offence Act*, RSBC 1996, c. 338

⁷¹ I suspect that this line of thinking may explain why s. 188 of the *Family Law Act* provides that protection orders may not be enforced by any means under the act or under the *Offence Act*.

**Orders Made in British Columbia Cases in which Alienation,
Alienation and Estrangement or Risk of Alienation Have Been Established**

	Final Orders	Variation of Final Orders
Parental Responsibilities		
Shared parental responsibilities without final say	1	
Shared parental responsibilities with final say to favoured parent	2	
Shared parental responsibilities with final say to rejected parent	1	
All parental responsibilities to favoured parent		
All parental responsibilities to rejected parent	3	1
Custody		
Joint custody	2	2
Sole custody to favoured parent	6	
Sole custody to rejected parent	6	2
Parenting Time		
Equal parenting time	3	
Parenting time to favoured parent	1	5
Parenting time to rejected parent	3	3
Parenting time to favoured parent at discretion of counsellor		
Parenting time to rejected parent at discretion of counsellor	3	
Supervised time to favoured parent at discretion of counsellor	2	
Supervised time to rejected parent at discretion of counsellor		
Counselling		
Counselling for family	3	
Counselling for favoured parent	2	
Counselling for favoured parent and children	2	
Counselling for rejected parent		
Counselling for rejected parent and children	1	
Reunification		
Participation in reunification counselling	2	
Participation in reunification program		2
Protection Orders		
Against favoured parent restricting communication with children	2	
Against rejected parent restricting communication with children		
Against favoured parent restricting attendance at school or home	2	
Against rejected parent restricting attendance at school or home		
Conduct Orders		
Against both restricting communication with children	5	1
Against favoured parent restricting communication with children	2	
Against rejected parent restricting communication with children	1	
Against both restricting communication with each other	4	2
Against favoured parent restricting communication with rejected parent	1	
Against rejected parent restricting communication with favoured parent		
Against favoured parent restricting consumption of intoxicants	1	
Against rejected parent restricting consumption of intoxicants	1	

**Orders Made in British Columbia Cases in which Alienation,
Alienation and Estrangement or Risk of Alienation Have Been Established**

	Final Orders	Variation of Final Orders
Financial Penalties		
Favoured parent to post security for compliance	1	1
Rejected parent to post security for compliance		
Costs to favoured parent	1	
Costs to rejected parent	2	3
Miscellaneous Orders		
Favoured parent held in contempt of court	2	
Rejected parent held in contempt of court		
Appointment of parenting coordinator	4	2
Peace officer enforcement	2	2
Judge seized of matter	4	3

These cases demonstrate a significant differential in the approach taken to the making of final orders and to their variation where allegations of alienation have been established. It may be that final orders reflect an optimism for the future whereas the orders made upon their variation reflect a cynicism engendered by failure:

- a) the variation orders made in the cases I reviewed are far more limited in scope and creativity than the final orders;
- b) no variation orders included orders for the counselling of one or more of the parents or the children;
- c) families were required to participate in reunification *counselling* in two final orders but required to participate in a reunification *program* in two variation orders; and,
- d) rejected parents were more likely to be awarded the primary residence of their children in variation orders than in final orders.

Curiously, explicitly punitive orders, such as orders for costs, security and peace officer enforcement, were infrequently made and were not significantly more commonly made at the hearing of variation applications than at trial, and the only findings of contempt were made at trial.

Also curious is the distribution between orders made and orders not made. The bulk of final and variation orders made in the 28 cases digested in the table above concerned children's primary residence and the allocation of parenting time and responsibility for decision-making (75 orders):

- a) orders for counselling were only made eight times, 12 times if orders for attendance at reunification counselling and programs are included;
- b) orders restricting parents' communication with the children were made nine times;
- c) the court seized itself of the case at hand only seven times;
- d) parenting coordinators were appointed six times;
- e) costs orders were made six times; and,
- f) orders for security for costs were made just twice.

The relative newness of the *Family Law Act*, which didn't come fully into force until 18 March 2013, may explain both the scarcity of some of these interventions and the court's preponderant reliance on more traditional tools. The remedies available under the former *Family Relations Act* were far more limited than the panoply provided by the *Family Law Act*, and important tools such as costs and contempt were unavailable to the Provincial Court. It may be the case that the court will adopt a more inventive approach to alienation cases as bench and bar become increasingly familiar with the *Family Law Act* and the extraordinary range of remedies it offers.

C. Therapeutic Options

Parental alienation is a psychosocial problem that, like all such problems, cannot be "cured" by court order. Barring those cases in which a rejected parent is prepared to walk away or the negative views of an older child are immovably entrenched, something beyond orders about primary residence and parenting time is necessary. The present options appear to be limited to some form of therapeutic intervention, and range from the usual sort of one-on-one counselling most people have experienced to full-blown targeted residential reunification programs.

Therapeutic interventions are most likely to be successful when all family members are involved and when they are supported by a legal framework that requires the involvement of the favoured parent and minimizes the possibility of his or her interference with the process; Sullivan and Kelly write that "therapeutic interventions must be backed by court authority."

1. Counselling

The complexity of alienation cases, the different therapeutic objectives appropriate for favoured parents, rejected parents and children, and the high potential for patient-therapist alignment suggest the need for a team approach. In “Therapeutic Work with Alienated Children and Their Families,” Janet Johnston and psychologists Marjorie Gans Walters and Steven Friedlander observe that:⁷²

Alienated children need a family-focused intervention that includes all parties – the child, siblings, both the aligned and rejected parents, and other family members (e.g. stepparents, grandparents) – determined to be contributing to the dynamics.

Fidler and Bala warn, in fact, that “individual therapy for the child ... without the inclusion of other family members is likely to deter the effectiveness of the intervention and may further entrench the alienation.”

Unlike other interventions, the primary object of interventions based on a family systems perspective is not the reunification of the child with the rejected parent, although reunification may happen, but to:

... transform the child’s distorted, rigidly held ... views of one parent as “all bad” and the other as “all good” into more realistic and measured ones, rooted in the child’s actual experience of both parents. ... the goal is to restore appropriate coparental and parent-child roles within the family.

This approach recognizes that the damaged parent-child relationship is not a monodimensional problem with a single cause, but a complex problem with multiple contributing environmental and psychological factors that are influenced by the child’s distorted perceptions and recollections of each parent. The cause of the damage to the parent-child relationship, in other words, is not wholly reducible to the favoured parent’s alienating behaviours.

Further, making restoration of the damaged parent-child relationship the primary object of counselling interventions risks placing the child’s best interests in the back seat. Bala, Fidler, Goldberg and Houston argue that “the goal of intervention should be the promotion of a child’s wellbeing, and therefore best interests, and not simply to advance the ‘rights’ of a rejected parent.”

Sullivan and Kelly outline a collaborative team approach to counselling in “Legal and Psychological Management of Cases with an Alienated Child,” in which the

⁷² *Supra*, fn 42

therapists providing treatment are assisted by professionals in purely supporting roles. Team members may include:

- a) a judge involved in a case management function who provides prompt access to decision-making;
- b) a parenting coordinator who manages the team and may be responsible for providing prompt conflict resolution;
- c) a child therapist who sees the child individually but may provide coparenting counselling with the parents;
- d) the parents' therapists; and,
- e) the parents' lawyers, who support the counselling process and prevent the case from returning to court.

Johnston, Gans Walters and Friedlander recommend that the roles of all professionals involved in an intervention, their ability to communicate with one another, the existence, and limits, of any decision-making authority and the limits of confidentiality within the process be carefully described in a court order. The order thus provides "an overarching, coordinated, rule-governed process for managing the ongoing family conflict and for implementing the therapeutic intervention."

Nonetheless, judges can and do order that the child alone, or the child and a parent, attend counselling, sometimes for the explicit purpose of restoring the broken parent-child relationship. The functions of counselling in such cases have, for better or for worse, included:

- a) for the rejected parent and children, facilitating healthy communication and recommending adjustments to parenting time;⁷³
- b) for the children, addressing the effect the favoured parent's behaviour had on the child's relationship with the rejected parent;⁷⁴
- c) for the favoured parent, assisting him in coming to terms with the end of the relationship;⁷⁵

⁷³ *D.G.S. v J.D.S.*, 2014 BCSC 2183

⁷⁴ *L.A.I. v K.B.Z.*, 2014 BCSC 652

⁷⁵ *I.S. v D.S.*, 2010 BCSC 306

- d) for the favoured parent, addressing his anger management issues and difficulty putting the needs of the children before his own;⁷⁶ and,
- e) for the children, dealing with the effects of their alienation.⁷⁷

2. Reunification Programs

Psychologist Randy Rand began to develop a specialized program aimed at reuniting recovered missing children with their parents in 1991. His program, *Family Bridges: A Workshop for Troubled and Alienated Parent-Child Relationships*, which I believe was the first of its kind, was eventually extended to serve alienated children who hadn't been abducted and whose parents were separating. Since that time, but particularly in the last decade, reunification and reintegration programs of various sorts have popped up across Canada and the United States.

In his 2010 article, "Family Bridges: Using Insights from Social Sciences to Reconnect Parents and Alienated Children," Warshak described the goals of Family Bridges as including:

- a) facilitating and strengthening children's ability to maintain healthy relationships with both parents;
- b) helping children avoid being caught in the middle of their parents' conflict;
- c) strengthening children's critical thinking skills;
- d) helping children maintain balanced views of each parent;
- e) strengthening the family members' ability to communicate with one another and manage conflicts; and,
- f) helping family members develop compassionate views of each other's actions.

Warshak, who became involved with the program in 2005 after witnessing its success with "a severely alienated and violent adolescent," says that the program has dealt with more than 130 children in 70 families. At present, the Family Bridges workshop is offered to one family at a time, and is usually held at "vacation resort facilities" around the United States.⁷⁸

⁷⁶ *Bains v Bains*, 2009 BCSC 1666

⁷⁷ *Ibid.*

⁷⁸ www.warshak.com/services/family-bridges.html

Other well-known American programs include the Overcoming Barriers Family Camp and New Ways for Families. The Overcoming Barriers Family Camp was first piloted in 2008 and today operates as a multi-family five-day overnight camp at different sites in the United States, run by Matthew Sullivan and psychologists Peggie Ward and Robin Deutsch.⁷⁹ New Ways for Families, created by lawyer and social worker Bill Eddy, is a multi-modal short-term structured parenting skills method to reduce the impact of conflict on the children in potentially high-conflict divorce and separation cases which includes a component where alienation is a concern.⁸⁰ Programs with similar purposes have been established in Canada, including two in British Columbia and one in Alberta.

Unfortunately, little third-party research is available on the outcomes for children and families who have used these programs, although many programs have evaluated their own success. Warshak, for example, says that of the 23 children in 12 families he was involved with, 22 had “restored a positive relationship with the rejected parent,” although four of the 22 “regressed after the court renewed their contact with the favoured parent.” On the other hand, Sullivan, Ward and Deutsch looked at five families who graduated their camp in 2008 and reported that:⁸¹

Of the five families, one is enjoying a joint access and responsibility co-parenting plan; in a second family, the children are enjoying visiting their father on full alternate weekends ... and in a third family, the mother is still estranged from the children and has given up pursuing access. A fourth family is now engaged in litigation, and the child is visiting the estranged father with some resistance. The fifth family is having mixed results. The custodial mother is seeing the children in family therapy and weekly for dinner, but the children are reportedly continuing to resist.

Picking a reunification program is a rather challenging exercise as a result.⁸²

Counsel and the court should be concerned about conflicts of interest when a parenting assessor acting under s. 211 of the *Family Law Act* makes a positive finding of alienation and recommends his or her own program as a solution. It is also prudent to be wary of success rates that are too good to be true; in such cases, enquiries must be made to determine how the program defines “success”

⁷⁹ overcomingbarriers.org

⁸⁰ www.newways4families.com

⁸¹ M.J. Sullivan, P.A. Ward and R.M. Deutsch, “Overcoming Barriers Family Camp: A Program for High-Conflict Divorced Families where a Child Is Resisting Contact with a Parent” (2010) 48:1 Family Court Review 116

⁸² Frankly, the results reported by Sullivan, Ward and Deutsch more closely align with the sort of success rate I expect such programs to have given the difficult nature of alienation cases.

and whether the success rate was determined in-house or by an objective evaluator. Other factors to consider include whether:

- a) the program is intended to achieve specific outcomes and is based on a hypothesis that can be empirically tested;
- b) the principals of the program are able to produce research supporting their hypothesis and program design;
- c) the principals of the program are engaged in its ongoing evaluation;
- d) the evaluation of the program includes a long-term follow-up component;
- e) the principals of the program are able to report the program's success rate;
- f) the principals of the program have significant experience in providing services for families and children;
- g) the principals of the program are professionally recognized and respected by their peers;
- h) the principles of the program and all therapeutic staff are licensed and insured members of their applicable provincial regulatory body;
- i) the program intake process includes screening for family violence, substance abuse and significant mental illness;
- j) the program's treatment regime differentiates between alienation and justified estrangement; and,
- k) the program includes an aftercare component.

In addition, the presence of one or more of the following warning signs should probably discourage further consideration of a particular program:

- a) a principal of the program is not a member of a regulatory body;
- b) a principal of the program holds one or more advanced degrees from online or private universities;
- c) a principal of the program is not recognized by, respected by or widely known among his or her peers;
- d) the reported success rate of the program sounds too good to be true;

- e) the program intake lacks a screening process and will accept all comers; and,
- f) the principals of the program will not discuss their hypothesis, their methodology or the research supporting their approach.

VI. Conclusion

Alienation cases are enormously challenging for both bench and bar, not least because allegations of alienation tend to be raised in high-conflict disputes, which are astonishingly unpleasant to begin with, but because of the extraordinary and inflammatory claims they provoke. It is easy to lose one's objectivity in the midst of hostilities of this nature and overlook alternative explanations, less accusatory reasons for the child's behaviour and the fact that, the parents' wounded pride aside, it is ultimately the child we must be concerned about. Alienation cases are too often couched in the language of the rights, entitlements and privileges of parents rather than the rights, entitlements and interests of children.

The best interests of children must be the lodestone used to measure our response in alienation cases, whether we are serving as counsel for the favoured parent, as counsel for the rejected parent or as judge. As Bala, Fidler, Goldberg and Houston put it, "the goal of intervention should be the promotion of a child's wellbeing, and therefore best interests, and not simply to advance the 'rights' of a rejected parent." The five simple principles articulated by Jaffe, Ashbourne and Mamo flow nicely from this proposition. Our response to allegations of alienation should strive to:

- a) protect the child and the primary parent from abuse and family violence;
- b) protect the child from ongoing parental conflict and litigation;
- c) protect the stability and security of the child's relationship with the primary parent and respect the right of the primary parent to direct his or her life;
- d) respect the right of the child to have a meaningful relationship with each parent; and,
- e) promote the benefits of the child having a positive relationship with a co-parenting team of parents.

It is important, I think, to note that none of these guiding principles concern the rights, entitlements and privileges of parents.

I do have tremendous sympathy for parents who have lost a relationship with a child. However, as I wrote earlier, the moral blameworthiness of a favoured parent's conduct is always subordinate to the child's wellbeing and is irrelevant to determining the course of action that is in the child's best interests.

We must remain alive to the astonishing psychological intricacies and nuances attendant upon alienation cases and struggle against the tendency that such cases have to resolve into an all-or-nothing, black-and-white proposition. Reality is so much more complex, and we do a disservice to our clients' children if we pretend otherwise. Darnall's obsessive alienators certainly do exist, but they are, in a way, monstrous caricatures that obscure the thorny subtleties of the vitiated parent-child relationship.

Where a case involves allegations of alienation, those allegations must be responded to as quickly as possible with the early assessment recommended by Fidler, Bala and Saini. This assessment may well be determinative of the course the case will take by: distinguishing between a child's non-pathological resistance to visiting a parent, situations of realistic estrangement and situations of parental alienation; preventing further maltreatment of the child, if alienation is indeed a factor; steering the family toward the intervention best suited to the circumstances and to the child; and, ensuring that the child has the best possible chance of a healthy childhood, protected from the damaging effects of parental conflict.

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M.J. Sullivan, P.A. Ward and R.M. Deutsch, "Overcoming Barriers Family Camp: A Program for High-Conflict Divorced Families where a Child Is Resisting Contact with a Parent" (2010) 48:1 Family Court Review 116

Wallerstein and Kelly

J.S. Wallerstein and J.B. Kelly, *Surviving The Breakup: How Children And Parents Cope With Divorce* (New York, NY: Basic Books, 1996)

Warshak

R.A. Warshak, "Current Controversies Regarding Parental Alienation Syndrome" (2001) 19:3 American Journal of Forensic Psychology 29

R.A. Warshak, "Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children" (2010) 48:1 Family Court Review 48

Appendix B: Summary of British Columbia Case Law Review

Survey of British Columbia judgments retrieved from CanLII on 16 June 2015 through a search for the most recent cases using variants of the term "alienate" in the document text, excluding: appeals, whether to the Court of Appeal or the Supreme Court; child welfare matters; costs applications; and, all cases other than family law cases. Oldest judgment retrieved was dated 28 April 2008.

Year of Decision

Response	Chart	Percentage	Count
2015		16.5%	19
2014		19.1%	22
2013		15.7%	18
2012		10.4%	12
2011		7.0%	8
2010		8.7%	10
2009		13.9%	16
2008		8.7%	10
Total Responses			115

Trial Court

Response	Chart	Percentage	Count
BC Supreme Court		87.8%	101
BC Provincial Court		12.2%	14
Total Responses			115

Nature of Hearing

Response	Chart	Percentage	Count
Interim order		18.3%	21
Final order		47.8%	55
Vary final order		33.0%	38
Enforce final order		0.9%	1
		Total Responses	115

Alleged Alienator

Response	Chart	Percentage	Count
Mother		64.3%	74
Father		20.9%	24
Mother and family		7.8%	9
Father and family		3.5%	4
Both mother and father		3.5%	4
		Total Responses	115

Rejected Parent

Response	Chart	Percentage	Count
Mother		24.3%	28
Father		73.0%	84
Both mother and father		2.6%	3
		Total Responses	115

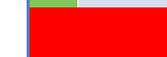
Expert Evidence Tendered?

Response	Chart	Percentage	Count
Yes		56.5%	65
No		43.5%	50
		Total Responses	115

Result of Allegation of Alienation

Response	Chart	Percentage	Count
Estrangement		5.2%	6
Alienation		20.9%	24
Alienation and estrangement		2.6%	3
Risk of alienation		5.2%	6
No evidence		35.7%	41
No finding		30.4%	35
		Total Responses	115

Legal Representation of Parties

Response	Chart	Percentage	Count
Both in person		14.8%	17
Both had counsel		41.7%	48
Father had counsel/mother in person		13.9%	16
Mother had counsel/father in person		28.7%	33
Father had counsel/mother no-show		0.9%	1
		Total Responses	115

Appendix C:
Summary of Orders Made in British Columbia Cases
Where Alienation or Risk of Alienation Is Established

Digest of British Columbia judgments resulting in or varying final orders, excluding appeals, in which allegations of alienation resulted in conclusions that: alienation had occurred; alienation and estrangement had occurred; or, there was a risk of alienation.

2015 *Waugh v Waugh*, 2015 BCSC 688

- primary residence to rejected parent
- parenting time to favoured parent

Mitchell v Mitchell, 2015 BCSC 355

- parents are both guardians
- joint custody
- neither party to have final say on parenting responsibilities
- equal parenting time
- costs to rejected parent

S.M.A. v R.E.W., 2015 BCPC 34

- parents are both guardians
- rejected parent to have all parenting responsibilities
- parenting time to favoured parent

Silverman v Silverman, 2015 BCSC 236

- favoured parent's application to relocate dismissed
- costs to rejected parent

L.D.K. v M.A.K., 2015 BCSC 226

- primary residence to rejected parent
- family to engage in reunification program
- parenting time to favoured parent at discretion of counsellor
- protection order against favoured parent restricting communication with children
- protection order against favoured parent restricting attendance at children's home and school
- peace officer enforcement
- judge seized

2014 *D.G.S. v J.D.S.*, 2014 BCSC 2183

- primary residence to favoured parent
- counselling for rejected parent and children

- parenting time to rejected parent at discretion of counsellor
- conduct order against both restricting communication with children
- judge seized

McDermott v McDermott, 2014 BCSC 1740

- favoured parent to post security for compliance with order for parenting time
- favoured parent to pay rejected parent's costs thrown away of frustrated parenting time

P.K.N. v D.S.N., 2014 BCSC 1156

- primary residence to rejected parent
- rejected parent to have final say on parenting responsibilities
- parenting time to favoured parent
- family to engage in reunification counselling
- counselling for children at discretion of rejected parent

L.A.I. v K.B.Z., 2014 BCSC 652

- parents to share all parental responsibilities
- equal parenting time
- counselling for children at discretion of rejected parent
- conduct order against favoured parent restricting communication with children

J.C.W. v J.K.R.W., 2014 BCSC 488

- primary residence to rejected parent
- sole custody to rejected parent
- family to engage in reunification program
- parenting time to favoured parent at discretion of counsellor
- protection order against favoured parent restricting communication with children
- protection order against favoured parent restricting attendance at children's home and school
- peace officer enforcement
- costs to rejected parent
- judge seized

C.A.J. v N.J., 2014 BCSC 279

- parents are both guardians
- rejected parent to have all parenting responsibilities
- equal parenting time

- conduct order against both restricting communication between each other
- parenting coordinator

2013 *Rashtian v Baraghoush*, 2013 BCSC 2013

- increased parenting time to rejected parent

M.R.P. v S.R.P., 2013 BCSC 1842

- parents are both guardians
- sole custody to rejected parent
- conduct order against both restricting communication with children
- conduct order against both restricting communication between each other

Silverman v Silverman, 2013 BCSC 601

- parents are both guardians
- increased parenting time to rejected parent
- counselling for family
- conduct order against both restricting communication between each other
- parenting coordinator
- costs to rejected parent

D.A.M. v D.M.T., 2013 BCSC 359

- sole guardianship to favoured parent
- sole custody to favoured parent
- parenting time to rejected parent at discretion of counsellor
- conduct order against rejected parent restricting communication with children

2012 *L.G. v R.G.*, 2012 BCSC 1365

- primary residence to favoured parent
- joint guardianship
- favoured parent to have final say on parenting responsibilities
- joint custody
- conduct order against both restricting communication with children
- conduct order against both restricting communication between each other
- favoured parent in contempt
- favoured parent to post security for compliance with order for parenting time

- parenting coordinator

Hockhold v Gerbrandt, 2012 BCSC 1313

- joint guardianship
- sole custody to favoured parent
- parenting coordinator
- favoured parent's application to relocate dismissed

C.L.H. v R.J.J.S., 2012 BCSC 579

- sole guardianship to favoured parent
- sole custody to favoured parent
- counselling for family
- parenting time to rejected parent at discretion of counsellor
- judge seized

2011 *N.B. v L.M.E.*, 2011 BCPC 284

- sole guardianship to rejected parent
- sole custody to rejected parent
- family to engage in reunification counselling
- counselling for favoured parent

2010 *Lower v Stasiuk*, 2010 BCSC 1081

- primary residence to favoured parent
- joint guardianship
- sole custody to favoured parent
- counselling for children
- conduct order against both restricting communication with children
- conduct order against both restricting communication between each other
- parenting coordinator
- judge seized

I.S. v D.S., 2010 BCSC 306

- joint guardianship
- rejected parent to have final say on parenting responsibilities
- sole custody to rejected parent
- counselling for favoured parent
- conduct order against favoured parent restricting use of intoxicants
- conduct order against both restricting communication with children

- conduct order against both restricting communication between each other
- costs to rejected parent
- judge seized

Paleczny v Paleczny, 2010 BCSC 36

- primary residence to favoured parent
- joint guardianship
- favoured parent to have final say on parenting responsibilities
- sole custody to favoured parent
- counselling for family
- parenting time to rejected parent at discretion of counsellor
- conduct order against both restricting communication with children
- favoured parent's application to relocate dismissed

2009 *Bains v Bains*, 2009 BCSC 1666

- joint guardianship
- rejected parent to have certain parenting responsibilities
- rejected parent to have final say on remaining parenting responsibilities
- sole custody to rejected parent
- counselling for children
- counselling for favoured parent
- supervised parenting time to favoured parent at discretion of counsellor
- conduct order against favoured parent restricting communication with children
- conduct order against favoured parent restricting communication with rejected parent

K.R.M. v G.R.K., 2009 BCPC 391

- parenting time to rejected parent
- peace officer enforcement

Novlesky v Novlesky, 2009 BCSC 1328

- primary residence to favoured parent
- sole guardianship to favoured parent
- sole custody to favoured parent
- parenting time to rejected parent
- favoured parent's application to relocate allowed
- costs to favoured parent

McClaghry v McClaghry, 2009 BCSC 501

- primary residence to favoured parent
- joint guardianship
- joint custody
- parenting time to rejected parent
- parenting coordinator

2008 *M.P. v N.M.*, 2008 BCSC 1501

- sole guardianship to rejected parent
- sole custody to rejected parent
- counselling for family
- supervised parenting time to favoured parent at discretion of counsellor
- conduct order against favoured parent restricting attendance at children's school
- conduct order against both restricting attendance at each other's homes
- peace officer enforcement
- favoured parent in contempt

R.R.W.E.S.-V. v S.E.D.V., 2008 BCSC 1136

- primary residence to rejected parent
- joint guardianship
- joint custody
- parenting time to favoured parent
- judge seized