A Remedy To Fit the Crime: A Call for the Unreasonable Rejection of a Parent by a Child as Tort

Bruce L. Beverly
If we accept the fundamental premise that each parent has the obligation and the right to raise, know, enjoy, nurture and encourage his or her children, the insidious and often intentional act of subverting the relationship between one parent and a child by the other parent is reprehensible, and due to the nature of the alienation and the complex relationships of the court and the parties, this act often has few consequences.

Parental alienation, insofar as this paper is concerned, will be defined as the unreasonable or irrational rejection of a parent by a child primarily due to the “negative influence of the other parent.” As originally defined by Dr. Richard Gardner, who coined the term in 1985, Parental Alienation (hereafter referred to as PA) was the rejection of a parent by a child, whether reasonable or not. The more controversial PAS, or “Parental Alienation Syndrome,” was the

---

1 Assistant Professor of Law, Lincoln Memorial University Duncan School of Law; Author teaches Family Law and Torts, has been practicing family law for seventeen years and is Board Certified as a Family Law Specialist by the Texas Board of Legal Specialization. The author would like to thank his research assistants Gordon Byars and Patrick Slaughter, Professors David Walker and Professor Jonathan Marcantel, Charleston College of Law, for their unflinching commentary, Prof. Barbara Bavis for her gracious demeanor and citation expertise, as well as Dr. Wayne D. Sneath of Davenport University for his unfailing assistance.

2 Dr. Richard A. Warshak, Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence, 37 FAM. L.Q. 273, 273, 280 (2003) (citing RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME (2d ed. 1998)). Warshak notes that there are:

three essential elements in this definition: (1) rejection or denigration of a parent that reaches the level of campaign (i.e., it is persistent and not merely an occasional episode); (2) the rejection is irrational (i.e., the alienation is not a reasonable response to the alienated parent’s behavior); and (3) it is a partial result of the non-alienated parent’s influence. If any element is absent, the term PAS is not applicable. Properly understood, a clinician using the term PAS does not automatically assume that the favored parent has influenced a child’s alienation from the other parent. Rather, the term PAS is used only when there is evidence for all three elements.

3 Id. at 280.

4 This term can be found in Richard A. Gardner, Recent Trends in Divorce and Custody Litigation, 29 ACAD. F. 3, 5 (1985), available at http://www.fact.on.ca/Info/pas/gardnr85.htm.

4 Id.
form of alienation which Gardner believed to be legally actionable, and was a subset of PA in that it described the rejection of a parent irrationally or unreasonably by a child. While Gardner coined the term “Parental Alienation,” he did not invent the concept of unreasonable rejection, despite the conclusions of several commentators.\(^5\) Regardless of what the phenomenon is called, the interaction is a very real and devastating problem in child custody cases today. With the advent of a greater diversity of alternative familial arrangements, such as more single-parent households, same-sex unions, divorcing couples who have children, and the heart-breaking ramifications of absentee parents, vast numbers of children are being daily subjected to both subtle and overt pressure by parents pitting one caregiver against another for the affections of their children.\(^6\) While controversy exists between supporters and detractors about whether a more defined set of conditions, postulated as “Parental Alienation Syndrome” (PAS), even exists, and over the exact terms to be used in describing this phenomenon,\(^7\) parental alienation will not be denied existence by any experienced family law practitioner or Judge. While fights over the very existence of parental alienation, or whether to discredit PAS completely as garbage science, rage within scholarly literature and mental health and women’s advocacy circles, thousands of children are being systematically taught to detest one of their parents by the only other person whom the child should trust implicitly: the favored, usually custodial, parent.\(^8\) This is not to say

---


\(^6\) William Bernet, et al., *Parental Alienation, DSM-V, and ICD-11*, 38 AM. J. FAM. THERAPY 76, 77 (2010). Bernet estimates “that 1% of children and adolescents in the U.S. experience parental alienation,” resulting in hundreds of thousands of children and parents being impacted. Id. While on the surface this percentage may seem statistically insignificant and not to warrant the proliferation of studies, symposia, and popular culture debates on PA and PAS, the exponentially growing number of cases involving parents and children through the courts in this issue justifies increased scrutiny and the consideration of potential action.


in any way that a child may not harbor and maintain overwhelming fear, animosity or loathing for a truly abusive parent, due to the bad acts of that parent toward the other parent in view of the child, or acts visited upon the children directly by the perpetrator. In those cases, where the reaction of the child, given the circumstances, is completely reasonable, accusing the favored parent of plotting to poison the child against the abuser should never be tolerated, and such instances are not covered. However, in the case where a child suddenly and apparently unreasonably rejects a formerly trusted parent when the only visible change in circumstances is the break-up of the parents’ marriage, a custody battle, a new paramour, or planned geographic relocation, the issue of PAS needs to be given serious scrutiny.

Despite the existing literature and comments on alienation, the phenomenon is much more prevalent than anyone apparently wishes to acknowledge; in almost every case in which the author and other practitioners were involved where there were children, some form of active campaigning by one parent against the other parent was evident. Perceived wrongs committed by one parent in the evolution and final demise of the marriage relationship often took ultimate expression in the undermining, blaming, and sometimes subtle encouragement of children to reject the perceived “wrongful” parent and to circle the embattled “favored parent.” These cases

This article cites numerous studies which speak to the multiple traumatic effects of alienation on children such as being “genuinely reluctant to visit their non-custodial parent” and “extreme alignments with one parent against the other,” and states that these issues can become “more pronounced with older adolescent children.” Id. at 192-93. While the authors acknowledged clearly that there is still significant debate about the differences between a child who could be defined as “estranged” versus alienated from a parent, they do specially cite Kelly & Johnston, infra note 52, at 251, who describe alienated children as likely to display a host of impactful, negative behaviors and emotions such as “hatred, anger, rejection, and/or fear toward a parent” reinforcing the seriousness of PA, even if not clinically defined as a syndrome or disorder. Id. at 194.
were also not without often serious implications for the mental health and well-being of the parents involved.⁹

This paper will not take sides with the numerous papers which attempt to draw the phenomenon of parental alienation as unique to women, for, whatever the beliefs of the different factions, the unjust alienation of a child by a parent is not limited to just women alienating men; it flows as destructively in both directions. To assume that alienation is an all or nothing, one faction against another phenomenon, rejects and otherwise demeans the established facts: that both fathers and mothers may be the subjects of an irrational campaign of rejection by their children due to influence of the other parent (or even due to the outside influence of other aligned adults, e.g.: grandparents). It is important, therefore, to start first with the rights of both parents to know and be a part of their children’s lives, despite the turmoil and difficulties that have arisen between them, through an explication of the historical background of parental rights as set out by the Supreme Court in numerous cases and echoed by many states.

The second section of the paper will discuss the origin and current state of parental alienation as a “syndrome,” as well as describe research around the causes, effects, and remedies available for dealing with PAS in the context of custody evaluations and litigation. This section will further respond to some commentators who have attempted to eliminate the phenomenon of

---

⁹ See Warshak, supra note 2, at 273; see also Kendra Randall Jolivet, *The Psychological Impact of Divorce on Children: What Is a Family Lawyer to Do?*, 25 Am. J. Fam. L. 175, 178 (2012); Deidre Conway Rand & Randy Rand, *Factors Affecting Reconciliation Between the Child and Target Parent, in The International Handbook of Parental Alienation Syndrome: Conceptual, Clinical and Legal Considerations* 163, 165 (Richard A. Gardner, S. Richard Sauber & Demosthenes Lorandos, eds. 2006); Despines Vassiliou & Glen Cartwright, *The Lost Parent’s Perspective on Parental Alienation Syndrome*, 29 Am. J. Fam. Therapy 181, 185, 188 (2001). In his article, Warshak describes the “hundreds of pleas [he has received] from alienated parents being shut out of their children’s lives” and cites an increasing number of studies looking at suicide rates in alienated parents as well as other general detrimental impacts. Warshak, supra note 2, at 277.
parental alienation from our lexicon by stating that the evidence of alienation should never be discussed as it does not pass evidentiary muster, or that alienation is a normal reaction by children to the stresses of growing up, and therefore, should be allowed to simply work itself out.

Lastly, this paper will suggest that, in those cases where there has been a complete, unreasonable and total break-down of respect and affection by a formerly loving child for a parent, that, instead of just throwing in the towel and waiting for the situation to naturally work itself out given time,¹⁰ the courts should recognize a tortuous cause of action for intentional alienation of the affections of a child when the relationship between the child and the rejected parent is irreparably harmed through the intentional act of the favored parent or that parent’s conscious indifference to the harm caused by his actions. The threat of tortious action serves as a deterrent for future activity and as a punishment for the harm caused both to the child and to the rejected parent.

Acknowledgement of the Rights of a Parent

Constitutional Support

While widely known and frequently discussed, the historical underpinnings of the rights of parents with regard to their families is critical to the discussion of the institution of a specific tort for parental alienation. The Supreme Court of the United States, in the seminal case of Meyer v. Nebraska, 262 U.S. 390 (1923), established precedent in this arena. Authoring the opinion, ¹⁰ See Joan S. Meier, A Historical Perspective on Parental Alienation Syndrome and Parental Alienation, 6 J. CHILD CUSTODY 232, 249 (2009), available at http://www.dvleap.org/LinkClick.aspx?fileticket=dUauj0V-0Fs%3D&tabid=181.
Justice McReynolds first articulated the right of parents under the liberty interest of the 14th Amendment of the U.S. Constitution which states that “[w]ithout doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children.”  

Further, Justice McReynolds stated, that “[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life.”

What is made clear by these statements is that a right exists within the parental sphere of influence over a child to control and raise that child as the parent sees fit, with which right, the state’s interest in the protection and raising of healthy children should coexist. *Pierce v. Society of Sisters* further solidified the nature of parental autonomy, that is, the right and freedom of parents to raise their children without interference, thereby expanding the notion of the liberty interest within substantive due process to include the relationship between parents and their children.

Even more recently, the Supreme Court has again reaffirmed the fundamental right of parents to direct the rearing of their children couched in terms of the liberty interest involved.

Significantly, no distinctions were made as to whether fathers or mothers enjoyed greater rights to have a relationship with their child, but rather expressed the right of *all* parents to raise and train their children.

If we accept as a society that there is a fundamental right springing from the nature of the parent-child relationship, then we must also direct attention toward the idea that, beyond the best interests of the child (which is the threshold burden in all child-related cases), we must also give

---

12 Id.
13 Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).
deference to the rights of the parent. It is clear through the myriad child support laws and regulations in this country, that we take seriously the obligations of parents to financially support dependent children. However, any discussion of obligation to children must be collateral to protection of the rights of a parent to be involved in the raising of her children. What has been lost in the legislative and judicial effort to protect and provide for children is the belief that the right to parent should also be protected against interference and intrusion from third parties. While one might argue that the state has no obligation to protect an individual from the encroachment upon his civil rights by third parties, where the state engages the parties to the point of developing a “special relationship” with the family, the state has an obligation to act reasonably. There should be no doubt that the state, within the context of a child custody case, so fully involves itself in the lives of the parties as to establish this “special relationship”; the court routinely orders “home studies,” psychological evaluations, attendance at parenting classes, mediation (often more than once), temporary hearings, motion hearings, and myriad other tests to determine the fitness parents have to control and maintain possession of their children. Therefore, in those cases where the rights of the parents have been unreasonably interfered with by the other parent, the court has a duty to act to remedy the situation.

**Public Policy Support**

In addition to the constitutional basis for parental rights, numerous states have supported through statutes the fundamental notion that parents have not only the obligation, but the right to have stable and meaningful contact and control with their children, thus securing a special place

---

15 *See* Gonzales v. Castlerock, 545 U.S. 748, 768-69 (2005).
for the rights of parents to parent as they see fit. Among the most important of these discuss the obligation of the state to encourage ongoing engagement of both parents with the child after divorce, unless there is some potential imminent harm to the child. Other statutes reflect a growing consensus on the need for clear and consistent policy on the best interests of children specifically, and the family unit as whole, even in the context of divorce and custody.

Also, significant discussions about parental rights and alienation related to broader public policy goals are contributing to the statutory declarations. Parental alienation and PAS have gained greater traction as issues of public awareness and advocacy in recent years. For example, in 2011, Toronto, Canada, served as host to the first international conference on PAS featuring over 20 experts on the subject as well as hundreds of mental health professionals and family law attorneys. By way of advocacy, Parental Alienation and PAS have also become center points of awareness campaigns sponsored by governors and state legislators. Former Iowa Governor Tom Vilsack declared a Parental Alienation Awareness Day in 2006, and through 2008, over 16

---

17 See, e.g., N.H. REV. STAT. ANN. § 461-A:2 (2011) (“Because children do best when both parents have a stable and meaningful involvement in their lives, it is the policy of this state, unless it is clearly shown that in a particular case it is detrimental to the child, to . . . [s]upport frequent and continuing contact between the child and both parents . . . [and e]ncourage parents to share in the rights and responsibilities of raising their children after the parents have separated or divorced.”).
18 See, e.g., VT. STAT. ANN., tit. 15, § 650 (2011) (“The legislature finds and declares as public policy that after parents have separated or dissolved their civil marriage it is in the best interests of their minor children to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical harm or significant emotional harm to the child or parent is likely to result from such contact.”).
19 See, e.g., W. VA. CODE § 48-9-101 (2011) (“The Legislature finds and declares that it is the public policy of this state to assure that the best interest of children is the court’s primary concern in allotting custodial and decision-making responsibilities between parents who do not live together. In furtherance of this policy, the Legislature declares that a child’s best interest will be served by assuring that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children, to educate parents on their rights and responsibilities and the effect their separation may have on children, to encourage mediation of disputes, and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or divorced.”).
governors supported the designation of April 25 as Parental Alienation Awareness Day during National Child Abuse Prevention month.²¹

**History of the Modern Theory of Parental Alienation**

**Current Opinions on Parental Alienation as a Legitimate Phenomenon**

When researching parental alienation, one is struck by the extreme polarization of the various factions involved in the discussion of the phenomenon. One camp, advocating for victims of physical and emotional abuse, has urged the complete eradication of the term parental alienation, based upon several grounds. Among these are the apparent belief that parental alienation is almost always raised as a defense by abusive men against women who claim that they have been abused, as a way of deflecting blame from the man for his own behavior and back upon the woman for the reason that the children reject the abusive father.²² What is most disturbing about these works is the almost universal and broadly sweeping assumption that claims of parental abuse are mostly used by abusing fathers to further denigrate mothers and that denying a mother's parent-relationship “would seem to be the epitome of destructive ‘parental alienation.’”²³ This denies the opposite and tragic effects that can be imposed upon the alienated parent, which, if his assumptions were to be considered as completely accurate, in most cases would be the father. Finally, in at least one commentary, Meier’s solution is to do nothing, for

---


²² See Meier, *supra* note 10, at 234.

²³ *Id.*
the reason that children are resilient, and the situation will work itself out. However, if a child in an intact family displayed the “type of denigration, hatred, and fear characteristic of irrational alienation . . . [it would be] considered a symptom worthy of treatment.” Surely, therefore, shouldn’t children who develop issues of extreme and unreasonable rejection of a parent after a divorce or separation be afforded the same benefit from an experienced and logical therapeutic intervention?

Dr. Gardner, in his initial works on parental alienation, placed the burden for the lion’s share of alienating behaviors on mothers, to the point that he used the term “woman scorned” to describe what he believed was a proper motivational analogy. This author in no way accords the same amount of weight to Gardner’s observations; in fact, in a recent paper by Warshak on a program dealing with alienation, the numbers which he saw were almost equal, with numbers of rejected fathers only slightly higher than mothers who were being rejected by their children. These results better mirror the true situation faced in these cases, but the reality is still accurate that, in most family cases, despite most jurisdictions doing away with the presumption that children should always be with their mothers, and the trend toward a gender neutral application of custody laws, mothers are still disproportionately more likely to obtain custody of children.

While outside of the immediate focus of this paper, we may speculate that many factors are present in the current modern family which could account for this disparity. Among these are the reality that many men work and women take care of children, either because a man can still

---

24 Id. at 250.
25 Warshak, supra note 2, at 277.
make more money than a woman for the same work, or because of the traditional notions which still exist for the “roles” of each parent, that is that men work to support the family and women tend children and the household. Additional reasons may involve absentee fathers who traditionally relegate the entire duty of birthing, raising and supporting children to mothers, outdated views of many older sitting judges that women should still be presumptively preferred as primary caregivers despite law to the contrary, and sociologists who appear to expound a new desire of women to stay at home with their children. Whatever the cause, when we see the numbers by which women outstrip men as primary caregivers, it only follows that there would be more women apparently influencing children against fathers. This by no means supports the idea that the causation of the unreasonable alienation of one parent by a child is restricted to women, or that alienation is a female malady; fathers in similar circumstances are just as likely to attempt to alienate mothers from children and for many of the same reasons. In one Australian study, “an analysis of unreported judgments . . . over a five-year period reported approximately equal numbers of male and female alienators.” Further, Dr. Warshak himself indicates that “[he] has been involved in several cases in which alienated mothers accused their ex-husbands of turning the children against them.”

Custodial Realities and the Effects of The Uninvolved Father

28 Richard A. Warshak, supra note 2, at 292 n. 62 (citing Sandra Berns, Parents Behaving Badly: Parental Alienation Syndrome in the Family Court: Magic Bullet or Poisoned Chalice, 15 AUSTRALIAN FAM. L. 191 (2001)).
29 Id. In fact, as Dr. Warshak notes: [t]here are two established foundations and one being formed that deal with some aspect of pathological alienation, and all three were founded by alienated mothers. Many of the women involved in such organizations, and those who participate in online discussion groups, view PAS as a lifeline offering understanding and hope for their own distressing situations. Id.
However, if this argument must turn on gender lines, the effects of the *uninvolved* father upon children have been studied, and therefore should also be considered seriously in the debate about Parental Alienation as a legitimate phenomenon to expand the understanding of the issue. The uninvolved father in this discussion will be defined as one who does not have regular or frequent contact with the child, is not living with the child in the same household, and who may or may not pay support. The payment of support is usually through the primary parent and does not necessarily effect the child directly, except insofar as the child is made aware of the failure of support, either by order of a court that has officially restrained the father from being in the vicinity of the child, movement of the child from her primary customary residence to a distant place where the father cannot be involved regularly, or simply apathy in that the father does not want the responsibility for the child. It is clear from the voluminous research that daughters, for instance, that have a regular father figure with whom they are connected, “have significantly fewer suicide attempts and fewer instances of body dissatisfaction, depression, low self-esteem, substance use, and unhealthy weight.”


An analysis of child abuse cases in a nationally representative sample of 42 counties found that children from single-parent families are more likely to be victims of physical and sexual abuse than children who live with both biological parents. Compared to their peers living with both parents, children in single parent homes had:

- a 77% greater risk of being physically abused
- an 87% greater risk of being harmed by physical neglect
- a 165% greater risk of experiencing notable physical neglect
- a 74% greater risk of suffering from emotional neglect
- an 80% greater risk of suffering serious injury as a result of abuse
- overall, a 120% greater risk of being endangered by some type of child abuse.

“higher academic success,””31 “exhibit less anxiety and withdrawn behaviors,””32 and they “wait longer to initiate sex and have lower rates of teen pregnancy.””33 The intangible benefits, while variable, are very real. The societal cost to take care of potentially tragic consequences created by the lack of a father’s involvement is potentially enormous, and for this reason, the current administration is spending money to reengage fathers in the parenting process.34

Attempts to Discredit Gardner

A constant source of conflict has arisen in the literature over the initial theories propounded by Dr. Gardner and their foundational accuracy to the legitimacy of the current PAS debate and action, insofar as he developed the idea of PAS as a response to a marked increase of abuse allegations which he observed in his private practice, and specifically allegations of sexual abuse by one parent (overwhelmingly the mother) against the other parent (overwhelmingly the father).35 The phenomenon of PAS manifested itself, according to Gardner, as an offensive tactic by one parent against the other, usually within the framework of “the scorned woman,” hence gaining the unfortunate label by some authors as the “Medea Syndrome.”36 The fact that Gardner

31 Meeker, supra note 29, at 23 (citing Rebekah Levine Coley, Children’s Socialization Experiences and Functioning in Single-Mother Households: The Importance of Fathers and Other Men, 69 CHILD DEV. 219 (1998)).
33 Id. at 24 (citing Lee Smith, The New Welfare of Illegitimacy, FORTUNE, Apr. 1994, at 81-94).
35 See Richard Gardner, Recommendations for Dealing with Parents Who Induce a Parental Alienation Syndrome in Their Children, 28 J. DIVORCE & REMARRIAGE 1 (Jan. 1998); see also Meier, supra note 21 (summarizing Gardner’s belief that PAS could be used as an offensive tool in this way); Richard A. Warshak, Current Controversies Regarding Parental Alienation Syndrome, 19 American Journal of Forensic Psychology 29 (2001), available at http://www.fact.on.ca/Info/pas/warsha01.htm (“As is true of most, if not all, newly proposed syndromes, Gardner based his identification and description of PAS on his clinical experience.”).
36 See JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1996). Wallerstein and Blakeslee are referring to the main character of Euripides’ Medea, who was the lover of the mythical Jason (of Argonaut fame). Jason left Medea for Glauce, the daughter of King
raises the issue that many of these abuse and sexual abuse allegations were made after the breakdown of the relation between the parties is particularly enlightening, and is a fact that does not receive much attention in the popular literature which has excoriated Gardner and his opinions as “pseudo-science.”

Therefore, despite the numerous debates on PAS as a legitimate phenomenon from definitional and historical perspectives, as well as from gender-equity points of view, some of the most important current backlash against PAS stems from the belief by some that PAS, when posited as a legal theory in, for example, a case for custody, is often used exclusively as an offensive weapon by an abuser to demonize the abused parent in order to gain an unfair or unwarranted advantage in the case, or to deflect abusive and extreme bad behavior by one party by shining a spotlight on the other. Further, it is stated that an abusive father in a divorce case may try to deflect the original causation of a child’s fear of the father and desire not to visit him as merely the mother “alienating” the child from the father, thereby deflecting true inquiry from the abuser to the mother, who is immediately placed in a defensive posture. Therefore, according to this literature, the entire concept of unreasonable rejection should be completely dismissed, as its use “unintentionally assists in obscuring genuine abuse and reinforces courts’ dismissals of mothers seeking to protect their children and themselves.”

---


39 *Id.* at 224.
ridicule and rejection by the other parent; the automatic assumption that alienation is only a tool of the abuser oppositely denigrates the right of the rejected parent to know and raise her child without interference. However, where the child has been the subject of abuse, or has witnessed abuse at the hands of an abusive parent of either gender, this would be an example of a reasonable reaction by a child to the harm inflicted by one of the parents, and as such, any attempt to deflect that activity should surely be attacked on the grounds that the claim of alienation in that instance is baseless and frivolous. However, where such a reaction exists that is neither rational nor reasonable, e.g., where the child one day has a loving and respectful relationship with the parent, and only days after learning of a break-up or divorce, the child demonstrates intense loathing for the once loved parent and there is no logical or rational reason for the new change of opinion, the Court and the mental health professionals involved must be allowed to ask questions regarding the change of heart of the child, and the Court must consider the possibility that one parent is committing an act of alienation in order to place an unreasonable fear or hatred between the child and the other parent, in order to hurt the rejected parent for hurting the alienating parent.

**Current Court Approaches to the Issue of Parental Alienation**

Despite the arguments for and against the existence of parental alienation as a syndrome, beyond the philosophical, emotional, tactical and rational basis for the diagnosis, is the fact that parents and children are forced to practically deal with the legal ramifications of lawsuits which harbor the malicious truth that parental alienation does exist, and on a very large scale. With respect to the mental health professionals who have spent a great deal of time identifying,
researching and legitimizing the unreasonable rejection of one parent by another caused by the bias of the other parent, the psychological toll of cases like this is only part of the puzzle, the other being the legal reaction to these instances, which in too many cases is wholly inadequate to address the various problems. This section of the paper will look at the general current responses to unreasonable rejection as well as the sanctions, mollifications, and resignations of the family court system to this problem.

Despite criticism that the standard is variable, subjective and not easily reduced to precedentially clear understanding, the primary objective of family courts when dealing with a child is to act in that child’s “best interests.”\textsuperscript{40} The best interests of a child may override the expectations, rights and duties of parents, when that child’s emotional and physical development is at risk.\textsuperscript{41} The reason for this is presumably clear insofar as the child is unable to protect or defend against the machinations of the adults who run her world, and so, in the interest to protect the powerless, the law places the needs and desires of a parent beneath that of a child. While the “best interests” standard for child well-being appears to be a sacrosanct overriding principle, the desires of the parents \textit{must} always be regarded in the determination, for the weight vested by the law in the rights of parents to raise their children as they see fit.\textsuperscript{42} When the child has suffered a harm at the hands of one of the persons who are most directly responsible for his well-being, a

\textsuperscript{40}HOMER H. CLARK, JR., \textsc{The Law of Domestic Relations in the United States} § 19.2, at 788 (2d ed. 1987). Clark notes that:

[n]early all judicial discussion of custody begins with the statement that custody must be so awarded as to promote the child’s best interests…A little reflection is enough to reveal, however, that this is not a legal principle in the usual sense but merely a statement that when the child’s welfare seems to conflict with the claims of one or both parents, the child’s welfare must prevail.

\textit{Id.}

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.} at 789 (“When [the parent’s desires in a child custody case] are heard, they must be given some weight, not merely because they are related to the child’s welfare, but because we recognize that a parent’s interest in the training, upbringing and companionship of his child has an independent importance in our society which must be respected.”).
parent, that parent should be held to a level of accountability which is higher than the general
duty which all persons have to treat one another with reasonable care. The parent lies in a special
relationship with her child, and owes that child a duty to protect the child from harm.\footnote{DAN B. DOBBS, \textit{THE LAW OF TORTS} 884 (2000).} Therefore, just as a parent has been traditionally able to sue for the loss of a consortium of a child,\footnote{\textit{Id.} at 842.} and so too may the child now be able to sue in a respectable minority of jurisdiction for the loss of consortium of a parent,\footnote{\textit{Id.} at 842 n.3 (“Children’s claims for loss of parental consortium began to be recognized in 1980 with the decision in \textit{Ferriter v. Daniel O’Connell’s Sons, Inc.}, 381 Mass. 507, 413 N.E.2d 690, 11 A.L.R.4th 518 (1980). Other courts gradually accepted the claim throughout the 1980s and 1990s. At this writing, about 16 courts have done so.”)} so too should the parent responsible for destroying the relationship between child and other parent, be amenable to suit by the rejected parent for the resultant alienation.

Most family courts currently have typically three different reactions in a suit where the court believes, by experience, evidence, evaluation, interview or a combination of these factors, that a child is unreasonably rejecting one parent. This is usually the “visiting parent,” and such rejection has been caused, consciously or unconsciously, by the activities of the other parent who is often, but not always, the “custodial parent.”

In the first attempt, the court may order a parent not to “disparage” the other parent within the hearing of the child, or allow any other person to do so to the child or within the child’s hearing.\footnote{E.g., First Amended McLennan County Standing Order Regarding Children, Property and Conduct of the Parties at § 1.6 (McLennan County Dist. Court May 19, 2008), \textit{available at} http://www.co.mclennan.tx.us/distclerk/Standing_Order.pdf (“The District Courts of McLennan County have adopted this order because the parties and their children should be protected and their property preserved while the lawsuit is pending before the Court. THEREFORE, IT IS ORDERED:...Both parties are ORDERED to refrain from doing the following acts concerning any children who are subjects of this case:...(1.6) Making disparaging remarks during visits”)} This is usually done in a standing court order or temporary orders, when it
becomes clear that one or both parents may be saying inappropriate things to a child about the other parent, usually as a result of hurt feelings and most often in the early months of an initial suit, when tensions are highest. While these orders are admirable in that they seek to limit behaviors by parents that could and do injure relationships between them and their children, the efficacy and enforceability of these types of orders is highly questionable. In the throes of emotional and financial turmoil, orders like these do little to actually curb the insistence of one party to undermine the confidence and opinion of a child in the targeted parent. More often, when a child hears disparaging comments from a trusted source like a parent, she takes the statements as true, and thusly begins to align herself with the alienating parent, who often presents himself as the party unworthy of the injuries to which he is being subjected. As has been said about criminal laws meant to curb the activities of law breakers and scofflaws, laws only affect those who follow the law.47 In the face of the passions of family law, and the feelings of the allegedly wronged parent to voice her hurt and anguish, regardless of the harm to the child who may be hearing such epithets, parties feel that it is their right, and that the orders of a dispassionate tribunal do not apply to them.48

47 As Plato noted, “[g]ood people do not need laws to tell them to act responsibly, while bad people will find a way around the laws.” Plato is quoted in P.J. PARSONS, ETHICS IN PUBLIC RELATIONS: A GUIDE TO BEST PRACTICE 67 (2004).

48 See Jeffrey Shulman, What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child, 53 Vill. L. Rev. 173, 174-176 (2008). Shulman explores how one parent’s denigration of the other parent’s religious beliefs is yet another way in which one parent can disparage the other. He argues that, in light of the possible severe ramifications of the violation of court orders enjoining such disparagement, courts have a duty to not to allow such religious intolerance to be taught to the children, regardless of any perceived right to instruct the children in moral or religious matters as freedom of speech and religion. Id.
This conveniently leads into the next problem with such court directives: the vague quality of the meaning of “disparagement.” In defense, many courts have tried to define what specifically a parent may or may not say about another parent, attempting to more narrowly tailor the orders to the circumstances of each individual case. This is done with the idea that, in order to be able to actually bring the enforcement powers of the court to bear with regard to injunction against disparagement, the court must define such orders with particularity, so as to place the parent on notice as to exactly which behaviors will not be tolerated. Without such particularity, the order or injunction loses its teeth, and the ability of the court to enforce the order through real consequences by contempt is tremendously curtailed. However, even with situational definitions and orders, what directive could possibly cover all of the circumstances under which one parent may undermine, denigrate, or attack another parent?

Also complicating the definition of disparagement, as has been pointed out in the psychological literature, is that the process of alienation may be overt, as through direct statements (whether true or false) about the rejected parent’s fidelity or truthfulness, or may be subtle and sometimes unconscious clues given by one parent to the child. These unconscious references may, for example, take the form of insistence that the child call the alienating parent every hour when with the visiting parent, in order to tell the custodial parent how the visitation is going, or making an emotional scene decrying leaving the child with the visiting parent in front of the child at every custody exchange, instead of encouraging the visitation between the child

49 See, e.g., Ex parte Slavin, 412 S.W.2d 43, 44 (Tex. 1967) (quoting Plummer v. Superior Court of San Francisco, 124 P.2d 5, 8 (Cal. 1942)) (finding that where an injunction is vague and subject to multiple interpretations, the respondent may not be held in contempt of order, because “[t]he rights of the parties under a mandatory judgment whereby they may be subjected to punishment as contemnors for a violation of its provisions, should not rest upon implication or conjecture, but the language declaring such rights or imposing burdens should be clear, specific and unequivocal so that the parties may not be misled thereby”).
and the other parent. It is also probable that every parent of a child who is later estranged from the other parent has occasionally made conscious, inappropriate comments in front of a child. However, it is the continuous and deep-seated distaste of one party for another that is more likely to develop the kinds of behaviors which characterize the unjust rejection of a parent by a child. As the behaviors by the parents may be any combination of subtle and/or overt actions, it is impossible for a court to anticipate all of the particular ways parents may undermine each other, and subsequently place these mannerisms into an order. Thusly, the injunctions against disparagement are ineffectual concerning alienation, and exist primarily to make the parties feel that the court has acknowledged and is watching these behaviors, while having no real method of enforcement.

The second and far less common method to deal judicially with the concept of unjust rejection is the threat of custody change or actual change in residential custody of the child from the alienating parent to the unjustly rejected parent. The actual change of custody of a child who is highly aligned with one parent by delivering the child to the maligned parent, carries with it entirely novel problems, both psychologically and legally.

First, it must be accepted that changing the actual physical custody of the child from one parent to the other in an alienation context can carry very harmful results for the child. While children are acknowledged as being highly adaptable, there are several experts who suggest high degrees of caution when dealing with the potentially harmful psychological impact upon children who are so closely aligned with one parent, when those children are moved to the custody of the

---

50 Two separate and comparatively mild examples of behavior by parents in actual cases handled by the author wherein the activities of one parent influenced and changed, for the worse, the attitudes of children toward a formerly loved parent.
rejected parent. This may be seen by the child as a punishment of the aligned parent, or the child, or both, thereby subjecting the rejected parent to even more hatred and rejection. Further, the child tends to act out the patterned rejection by acting openly hostile towards the rejected parent when in that parent’s home, hindering the ability of the rejected parent to rebuild a relationship with the unreasonably alienated child.

The reality of these situations lies in the fact that the rejected parent, already victimized by the other parent in creating these emotionally destructive actions, is further victimized when custody is changed. The child who had been so aligned with the other parent is now placed with the rejected parent, usually at the lowest point in the relationship between the two. The child, who through the court process often discovers his power to manipulate the system and the parties involved, usually spares no time in making his feelings known either through emotional outbursts, threats or destruction of property. It is not unusual for the rejected parent to regret the decision to push for custody of these children because of the turmoil and upheaval which can and is caused by the addition of children to other families. Further, when the rejected parent “gives up” on the child who is acting out, the child’s worst fears of that parent rejecting the child are realized, as are many of the prophecies of the alienating parent, causing an even deeper rift in the relationship between the parents and child. Many times, there are also reasons that the rejected

51 See Steven Friedlander & Marjorie Gans Walters, When A Child Rejects A Parent: Tailoring the Intervention to Fit the Problem, 48 Fam. Ct. Rev. 98, 103 (2010) (“In non-hybrid cases of alienation, or in hybrid cases in which the alienation is open, direct and conscious and, in either case, when there is a satisfactory rejected parent, a change in physical custody may be considered. However, in the hybrid cases, that is, those involving alienation and enmeshment, or alienation, enmeshment and estrangement, careful attention must be paid to elements of enmeshment in order to insure that the intervention does not create a crisis for the child.”).
53 Kelly & Johnston, supra note 53, at 259 (“When rejected parents feel that they are being abusively treated by an alienated child who is also refusing all efforts to reconnect, they can become highly affronted and offended by the lack of respect and ingratitude afforded them. Hurt and humiliated, some rejected parents react to the child’s
parent might not want a significantly alienated child to enter the household, as in the instance where the rejected parent has a new spouse, or new, very young step-siblings, whose safety cannot be easily assured by the addition of a potentially violent, older, alienated child to the environment. While the rejected parent may indeed be desperate to restart a relationship with the child who was once so loving and respectful, it is not unreasonable for that rejected parent to feel like she cannot compromise the present attempt to move beyond the failed relationship with the alienating parent, and not want the out-of-control child to be a part of that scenario. It is also not uncommon for parents to have to make the agonizing choice between new marriages, new children and older disruptive children, often opting to forego the relationship with the alienated child in favor of the obligations presented by a new family, thereby allowing the alienating parent to once again control the situation through the manipulation of the child, coupled with the need to treat the child as the parent perceives he has been treated.54

The third way the courts deal with rejection is to abrogate their responsibility by effectively doing nothing. Some courts attribute their lack of engagement on the abolished causes of action of alienation of affection, which were developed specifically to remunerate a spouse for interference in a marriage by a third party paramour. Alienation of affection is wholly inapplicable to parental alienation (despite the similar nomenclature) and when relied upon by a court to deny the right of a rejected parent to obtain relief is a clear dereliction.55

54 Id.
55 The courts’ reluctance to consider claims of alienation of affection is partly due to the fact that some states have, by statute, eliminated the tort of alienation of affection. See, e.g., Hyman v. Moldovan, 305 S.E.2d 648 (Ga. App. 1983); Raferty v. Scott, 756 F.2d 335 (4th Cir. 1985). Other courts have concluded that, regardless of the statutory authority, a parent should not be able to recover damages for alienation of a child’s affections. See, e.g., R.J. v. S.L.J., 810 S.W.2d 608 (Mo. Ct. App. 1991); Hester v. Barnett, 723 S.W.2d 544 (Mo. App. 1987); Bock v. Lindquist, 278 N.W.2d 326 (Minn. 1979); Bartanus v. Lis, 480 A.2d 1178 (Pa. Super. Ct. 1984).
Proposal for the Acceptance of a Tort for Parental Alienation

In the initial analysis, we must first determine what rights a parent has to his children. In traditional torts, or rather, modern and generally accepted torts that have to do with the relationship between parents and children, the specific right of a parent is spelled out in detailed elements. Two of these torts are the modern extension of loss of consortium to the parent-child relationship, and interference with child custody.

The concept of consortium is historically entwined with ideas about the ability of one family member to sue another. Traditionally, indeed going back to Roman Law, a cause of action for the loss of services of a man’s wife or slaves due to injury rested entirely with the man, as the man controlled the proprietary interest over his household as the owner and controller of his “servants.” The original common law did not accept the right of either a wife or a child to sue for the wrongful death of a husband and father, for the reason that the wife and child of a man were considered upon marriage to be folded into the legal identity of the man, thereby

56 The field of tort has been said to deal primarily with compensation, with the prophylactic attendant benefits and aims of deterrence and punishment. W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS § 4 (5th ed. 1984). That is to say, society has determined that persons should have access to compensatory remedies for injuries caused by a third party either intentionally or negligently caused. The concept of tort developed with the understanding that money, while a poor substitute for use and enjoyment of one’s legs, or the loss of a spouse’s affections, is the only remedy available to a court which may come close to placing the victim back into the position she was prior to the injury. At one time, the common law did not allow the recovery of money damages for intangible injuries to the plaintiff (such as pain and suffering), due to the very real problem that such emotional injuries were objectively difficult to determine, and suffered a potential for fraudulent claims. However, over the years, common tort law has adopted the idea that recovery for intangible damages is not only allowable, but proper and necessary for the administration of the stated purpose of tort recovery. Modern tort cases often encompass damage claims for pain and suffering, emotional distress, and loss of consortium, with ever new novel theories of recovery gaining traction in the effort to compensate innocent victims of harm. Id.

establishing the fiction that a man could not sue himself.\textsuperscript{58} While the man could sue for the loss of consortium of his wife or child, the same could not be said for the loss of services of the husband and father.

The modern definition of consortium between spouses, while illusive, has come to be defined by the courts to refer to the “total bundle of tangible and intangible relationships between spouses including material and moral support, sexual relations, companionship, and mutual assistance of all kinds.”\textsuperscript{59} It encompasses the entire range of services provided by one spouse for the other, including those of an intangible nature, e.g., emotional as well as financial support. The common law, however, for many years also rejected the idea that a child could sue for loss of consortium of a parent, and the first case establishing the right of a child to sue for the loss of consortium of a parent was only recognized at the highest state court level in the United States in 1980 by the Massachusetts Supreme Court.\textsuperscript{60} Since that time, many more courts, but not all, have accepted the right of a child to sue a third party for compensation for the loss of a parent, under the idea that parental consortium carries with it “such sentimental or intangible benefits as the comfort, guidance, affection and aid of the parent.”\textsuperscript{61} The benefits which extend from a parent to a child not only encompass the obligations of the parent to support the child, but also those intangible benefits from parent to child, and arguably from child to parent, which “simply follow from living together as a family.”\textsuperscript{62}

\begin{footnotes}
\item\textsuperscript{58} \textit{Id.} at 1328-29.
\item\textsuperscript{59} \textit{Id.} at 1324.
\item\textsuperscript{60} Ferriter v. Daniel O’Connell’s Sons, Inc., 413 N.E.2d 690, 692-96 (Mass. 1980).
\item\textsuperscript{61} Mogill, \textit{supra} note 58, at 1324 (citing Gail v. Clark, 410 N.W.2d 662, 668 (Iowa 1987)).
\item\textsuperscript{62} \textit{Id.} at 1324 (citing \textsc{Homer H. Clark, Jr., The Law of Domestic Relations in the United States} § 11.1 (2d ed. 1987)).
\end{footnotes}
It is not a tremendous leap of logic to hypothesize that the detriments to a child from the permanent loss of either parent due to wrongful death could be completely analogous to the loss of a parent due to alienation. If this premise may be accepted, then we may presume that alienated children have, like children who have suffered loss of consortium, “short-term reactions to familial loss includ[ing] fear for personal survival, separation anxiety, impaired ability to make psychological attachments, problems with control, and regression in developmental stages of growth.” According to Jewett, “[l]ong-term effects [of the loss of a parent by a child] include depression, substance abuse, and suicidal tendencies.” In the most severe alienation cases, the child loses a parent in the same helpless way as does a child who has suffered the death of a parent, as the child is made to think that the rejected parent has abandoned him, that the rejected parent will injure the child in some way, or that the rejected parent had disrespected the favored parent. The loss of the rejected parent in many ways may seem like the literal death of that parent to the child, supported by the actions of the alienating parent.

In one specific case in which the author was involved, the favored parent held a “funeral” for the rejected parent by candlelight upon the parties’ divorce as a means of “closure” for the favored parent and the child (which the custodial parent claimed was recommended by a mental health professional). While the testimony was clear that nothing expressly ‘bad’ was said about the rejected parent, the message was clearer to the child, and the people in the courtroom. The grief and loss felt by the child and the prematurely deceased parent, regardless of the causation of the rejection, is very real and potentially emotionally damaging.

63 Id. at 1325 (citing CLAUDIA L. JEWETT, HELPING CHILDREN COPE WITH SEPARATION AND LOSS 22-49 (1982)).
64 Id.
Despite the fact that some courts have stated that a parent may have a cause of action for loss of consortium (couched in terms of intentional infliction of emotional distress for the intentional and outrageous acts of a rejecting parent to alienate a child from the rejected parent), those courts have still refused to allow an aggrieved parent from moving forward with a tortious claim for harm, in order to “avoid entangling the children in the emotionally destructive process of discovery.”

However, it is a reasonably accepted argument that most commentators would favor a suit by a child against a parent who has been physically or sexually abusive, and in the case where there has been long-term alienation between a child and a parent, the devastation visited upon the relationship may be as destructive. While in no way can sexual abuse of a child and pervasive alienation be analogized in its incredibly destructive nature, we surely would not disallow a tortious suit against an abuser to go forward in the instance of sexual abuse by saying that it will further familial animosity. Nor would we make the child who is the subject of the abuse a witness as it is not in her best interests. Considering these factors we should also not so easily dismiss the right of the parent to seek remuneration against the other parent in cases of alienation.

**Statutory Proscriptions Against Interference with Child Custody**

---

65 Segal v. Lynch, 993 A.2d 1229, 1242 (N.J. Super. Ct. App. Div. 2010) (regarding a case in which a mother had relocated with the children in 2006, established a residence with the children in New Jersey without the father’s knowledge or consent, blocked all forms of communication between the father and the children, and matriculated the children in a local school district under her surname, all in an effort to unlawfully deprive the father of his parental rights for a period of three months, does not constitute a cause of action for damages for intentional infliction of emotion distress as a matter of law).

66 Ann A. Haralambie, *Children’s Domestic Torts Claims*, 45 Washburn L.J. 525, 525-26 (2006) (calling for the allowance of torts for children victims of abuse and neglect against parent perpetrators as this abuse “can actually alter the development of neuronal connections in a child’s brain, which may permanently affect the child’s ongoing development”).
While there is no evidence that laws have yet been enacted to render the specific violation of a parent’s rights in the alienation context “illegal,” there is ample support in the collateral laws on interference with child custody to give us a reference spot from which to build the proposed tortious interference. In recent years, more and more statutes have been enacted which punish, sometimes both criminally and civilly, interference with the custody of the child.67

There has also been much statutory enactment around the issue of parental rights as to visitation and access, making the violation of child support and visitation orders contemptible in every state in the country. The obvious importance of the rights of parents to have meaningful access and possession of their children supports the stated fundamental concept of the rights both of children to be parented, and parents to parent their children, recognizing the obligations and benefits to each.

Given the fact that there exist statutes which appear to control and provide remedies for the parent who has been unreasonably rejected, these statutory enactments prohibiting violation of visitation orders, loss of consortium, or even interference with child custody, do not adequately cover all of the possible situations in which the rejected parent may be wronged. It is entirely plausible for a parent to maintain visitation with a severely hostile child, usually due to the fact that the custodial parent realizes that he may be held in contempt of a visitation order if he does not make the child visit the rejected parent, and so the alienating parent cannot be held responsible for the violation of any orders, and yet still be perpetrating the rejecting behaviors. The child, in the meantime, is miserable, hateful and potentially destructive in the alienated parent’s house, and there does not appear to be violation of any statute upon which a claim may

67 See, e.g., IDAHO CODE ANN. §18-4506 (2011); FLA. STAT. § 787.03 (2004); IND. CODE §35-42-3-4 (2011).
be based, leaving the wronged parent without recourse, all due to the unreasonable alignment of one child against the rejected parent.

In light of the very real consequences in which parents and children may be damaged by the failure of courts to remedy the underlying loss in a case involving parental alienation, courts should extend a tortious claim for parental alienation by a wronged parent, especially in those instances where the relationship between the child and the parent is so severely compromised as to be all but irreparably damaged. Where courts have been reluctant to allow a tort due to the perceived damage that such a lawsuit may cause the children in these situations, or the additional familial strife which may occur as a result of the cause of action, the pain of a legal recovery cannot begin to match the injury to a child or the pain of a rejected parent in not being able to realize the fundamental right to parent a child to majority or to imbue a child with one’s living memory, experience and sense of family. Those courts who dismiss a cause of action based upon some misguided or lazy notion that a legitimate parental alienation claim is precluded by the “alienation of affection” cause of action, which the vast majority of states have abolished, are performing at best a disservice to the wronged parties who bring these cases before the court; at worst these courts are denying voice to a right fundamentally guaranteed by the Constitution, that being the right to raise one’s children. Unlike so many other rights, this right is time sensitive. A child will only be a child for a short period of time, and the non-custodial parent has not only the obligation but the right to have that child in her life; just because a parent cannot live with the other parent does not mean that he divorces the child as well.
In addition to the reasons supporting tort outlined above, other justifications for such action include providing compensation for the victim, supporting deterrence, and insuring punishment of the offender.

**Tort as Compensation for the Victim**

A fundamental understanding of tort, as previously described, involves appropriate compensation for wrong doing or injury. In the case of alienation, the wrongdoer who forces the rejected parent to hire private investigators, lawyers, examiners, counselors, evaluators, and visitation supervisors, who must all respond to suits in jurisdictions to which the spouse has secreted the children, should likewise be responsible in tort for the harms caused, and should be ordered to pay compensation for expenses incurred.

If one accepts that alienation also carries with it the potential of psychological injury, then we must also accept that there are other very real costs associated with the remedial nature of the tort. Where a parent refuses to abide with the rejection by that parent of child, the attendant costs to attempt to rebuild a relationship destroyed by alienation can be daunting. Further, without private intervention by mental health professionals trained in the skills of reconciliation between parents and unreasonably estranged children, any future disability of the injured child or parents will likely be carried in no small part by a larger segment of society as a whole such as friends, family, mental health professionals, etc. who engage these parties, but who are clearly not the perpetrators of the act. Therefore, directing the alienating parent to incur costs associated with the injury, both moral and remunerative, satisfies the overarching goal of
providing redress for the recovery of the benefits of parenting and protects society from some of the most obvious costs associated with the tort.

While some detractors will no doubt state that the imposition of a tort for alienation will have the impact of nullifying payments by the rejected parent to the favored parent for child support, the payments are fundamentally different. If the child support obligor parent, however rejected, does not pay, the state may exact harsh punishments upon the non-supporting parent (including incarceration); however, a tortious judgment against the wrongdoer may not be punished by jailable contempt. Further, the courts should not allow a wrongdoer, in this instance a violator of rights deemed fundamental by the highest court in the land, to use the best interests of the child as a shield to limit his liability where he has clearly committed a wrongful act detrimental to the child and the rejected parent.

**Tort as Deterrence**

The threat of a tort used in parental alienation cases may also provide a deterrence to inappropriate behaviors if explained by the court or legal or mental health professionals at the beginning of a case. In most (if not all) cases where there is a child custody dispute, there is a substantial amount of time between the filing of an original petition for custody or modification of custody, and the final disposition of the case. Often, months and years may go by, within which time parties are under temporary orders which dictate where the child will live on a temporary basis and the terms of that visitation, including restrictions which are designed to restrain the parents from disparaging each other, or interfering with visitation. During these
lengthy temporary periods, the parties are watched, sometimes very closely, for signs that they are the “friendly parent,” that is whether one parent could encourage or facilitate a healthy relationship with the other parent. Attorneys, mental health professionals, social workers and the like, frequently advise clients and parties on how to act so as to put on the best face for the Court in the eventual custody trial, and it is in these times when parents shine or fail miserably; for the alienating parent, it can mean the difference between holding onto custody or losing the child. Given the emotional nature of the custody dispute, and the overriding need to “win” at any cost, many parents are unable to restrain their feelings of disdain, disparagement or mistreatment of the other parent; however, if those same parents were threatened with the successful tort suit, it is possible that the tort would act as deterrence to force the rejecting parent to modify his behavior, to encourage a relationship with the unreasonably rejected parent, or at least to remain silent in front of the child instead of being reproachful. Once the tort is established, and the phenomenon of parental alienation is accepted, it may be that only a few cases enforced with judgments will be all that is necessary to control and prevent further cases of alienation from ever happening.

Tort as Punishment

Another fundamental idea of tort is to punish wrongdoers, thereby proving a “strong incentive to prevent the occurrence of the harm.” While alienation may be subtle or overt, the result is the same--the unreasonable rejection of a parent by a child due to the influence of the other parent. Where the parent knows or should know that his or her actions may have the effect of causing feelings of conflict within the child as to the affection of a child for a parent, and that party continues the course of action, that party should be responsible for failure to act as a

reasonable, prudent parent. As pointed out above, most contested child custody, divorce or visitation cases take more than a few months to resolve and within that interim lies an opportunity for both parents to set aside their personal animosity in the best interests of the children. Most states list factors by which the court is to decide who is ultimately awarded the care, control and custody of the minor children. Among these factors is usually the ability of one party to encourage a healthy relationship with the other parent, known as the “friendly parent” provision. During the temporary period between the filing of the suit and the final trial, parents are supposed to be on their best behavior, and it is the job of a good family lawyer to advocate to his client to encourage the relationship with the other party, lest the client’s visitation and access to the child be restricted, or the party lose the ability to have joint or sole control of the child altogether. In the event that the parent is unable to encourage the relationship with the other parent, to get past the hurt feelings she harbors from the break-up of the relationship, to put the child before herself in the blame game which inevitably follows the filing of a suit for custody, then the court should be ready and willing to impose a tort to exact punishment upon the wrongdoer for acts contemplated for no other purpose but the destruction of the relationship between the rejected parent and the child.

Ultimately, it would not be correct to say that the recovery of a tort from an offending parent should be merely a windfall to the rejected parent; any tortious recovery should be used to repair, if at all possible, the relationship between the rejected parent and the child, if not immediately, then after the child has reached majority, when the alienating parent cannot so tightly control the interaction between the child and the rejected parent. The costs of therapy between the child and the unfavored parent should not be borne solely by the rejected parent in
the instances where it can be proven that one parent has caused the unreasonable rejection of the other parent by the child. Fairness dictates that this cost be borne by that party who has visited the harm. Additional costs of parenting coordinators, mediators, and mental health professionals should likewise be paid by the offending parent, and her unwillingness to pay any judgment against her should be used as future evidence of misconduct in any child related matter which is filed before the child becomes emancipated.

Conclusion

The reluctance of courts to provide a tortious remedy for parental alienation is not supported by the recognition of the fundamental rights of parents to be involved in the upbringing of their children. The courts would do well to keep in mind that within the definition of the family comes not only the state’s obligation to do what is in the best interests of the child, but also what is in the best interests of the family and the constituent members of the family. The relationship between children and their parents is beneficial not only to the child at the center of the alienation controversy, but also to each parent, who gains independently from the close and abiding love and affection of a child. Therefore, when the formerly close bond between a child and a parent is irreparably harmed due to the interference of the other parent, the damage can be devastating to both the child and the rejected parent, with ramifications to the child extending into adulthood. The formative years of a child are limited, and each parent has the right to share the wonder of discovery and the journey of exploration with his or her children. Where those years are squandered due to unnecessary alignment, courts should be ready and willing to extract swift and just compensation from the alienating parent, in order to support and further the rights
of all parents to raise their children as they see fit, to deter further parents from espousing such emotional violent and abusive responses to the stresses of divorce, remarriage and custody disputes, and to provide compensation for what proves to be a very expensive road to healing therapy and legal drama for the parent who will not give up on her children, regardless of the actions of the other parent.