TRENDS IN THE EFFICACY OF PARENTAL ALIENATION ALLEGATIONS IN CHILD CUSTODY CASES AND THEIR IMPLICATIONS FOR TORTIOUS ACTION

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The Parental Alienation Debate and Argument for Tort

Parental alienation is a growing problem faced by the courts -- a problem which deserves a better remedy than currently exists. Parental alienation (PA), insofar as this paper is concerned, is defined as the unreasonable or irrational rejection of a parent by a child primarily due to the “negative influence of the other parent.”¹ In a previous article, this author discussed the balancing interests of the fundamental constitutional protection of the right of a parent to raise a child as s/he sees fit, and the failure of Courts to protect the interests of an unreasonably rejected parent.² To summarize, in those cases where the rejected parent has intentionally injured the child or the primary custodian of the child, then the rejection of the injuring parent by the child is rational and should be supported by the courts. However, in those cases where one parent is unreasonably rejected by a child and where the other parent has subtly or otherwise caused the rejection, then the court must do more to protect the relationship between the child and the wrongfully rejected parent -- and to deter the alienating parent from engaging in the behavior which caused the rift between the child and the rejected parent. Further, where the rejection has been so absolute as to destroy, perhaps for all time, the relationship between the rejected parent and the child, the court must allow the tortious recovery for the devastation caused by what is often calculated and blatant manipulation of the child’s affection.

¹Richard 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.

The most vocal opponents of the concept of parental alienation have gone so far as to wholly reject the phenomenon as “junk science.” While “Parental Alienation Syndrome” (coined by Dr. Richard A. Gardner) as an identifiable mental disorder has been largely panned by the scholarly community, the collection of behaviors independently viewed by various courts in child custody proceedings may be taken into account one at a time when determining the best interests of the child, and in making the determination of who should be the primary caregiver of the child. Most astoundingly, opponents of alienation have indicated their disgust by what they see as a “codification” of parental alienation in the factor which many state legislatures have adopted as merely one of the factors which must be taken into account in making such custody determinations, that being, whether a parent may encourage a relationship with the other parent. This factor exists to allow the Court determinations as to whether the primary parent of a child is exercising the maturity necessary to recognize that both parents, regardless of their personal differences, are important to the development and well-being of a child. While the involvement of both parents is not always possible or desirable, the literature is replete with recommendations that a child is best served when both caring and involved parents are engaged with the upbringing of their children, whether they are living in the same residence as the child or not.

**Current Cases and Qualifications to the Argument for Tort**

The analysis which follows is a review of recent cases which provide examples of parents (and courts) behaving badly and support the argument for tort: first, parents will and do act badly in divorce and child custody situations; second, parents will and do attempt to wrongfully alienate the parties’ child from the other parent; and lastly, that while the courts in these cases invariably recognize the wrongdoing of the alienating parent, they do nothing to compensate the rejected parent for the enormous cost both in fees and emotional turmoil caused by the other parent. These cases fly in the face of those in opposition to the concept of alienation as a legal theory in that several of these courts, after hearing the investigations and conclusions of countless mental health

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5 See e.g., Tenn. Code Ann. § 36-6-106(a)(10)(“Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child”); Cal. Fam. Code § 3040(a)(1) (West,WestlawNext current with urgency legislation through Ch. 202 of 2013 Reg.Sess. and all 2013-2014 1st Ex.Sess. laws)(“In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent”); Iowa Code Ann. § 598.41(1)(c) (West, WestlawNext current with legislation from the 2013 Reg.Sess.)(“The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement”).

professionals and social workers, find that the allegations of physical or sexual abuse are *unfounded* and yet do nothing to deter the continued behavior of the parent found to have begun or perpetuated these false allegations except change the custody of the child from the offending parent to the rejected parent. Additionally, we must observe that several of these cases have been declared unreported by the courts which have considered them. The issues which this paper discusses are of such vital importance and the scholarly debate so divisive that these cases are important to the dialogue, yet remain unreported. The precedential nature of these cases and the issues with which the courts wrestle cannot be denied, but the very act of rendering these cases unavailable as precedent does a disservice to the debate, to parents, and to counsel who seek family court guidance all over our country, especially in the possible pursuit of tortious action.

Again, in those circumstances where one parent has wrongfully, illegally or intentionally harmed a child or the other parent, and the child of the parties’ has rejected the abusive parent, the reaction of the child may be reasonable and the concept of alienation as it is discussed in this paper is inapplicable; in that case the abused child and parent should be protected by whatever means are at the disposal of the courts. However, where there are provable attempts by one parent (or even other family members, friends or third parties) to dissolve the bonds of love and affection between one parent and a child of that parent for their own ends, then the courts should apply every means to protect the child and the rejected parent, including where appropriate the imposition of a tortious recovery for both the child and the rejected parent.

It should also be reiterated that this paper is not concerned with the various shades of grey within the mental health profession regarding whether parental alienation exists as a “syndrome” or mental health diagnosis, whether there exists empirical data to legitimize the idea of parental alienation as a singular and identifiable “disorder,” or whether the courts should reject outright any of the real science based upon legitimate studies which indicate that “Parental Alienation Syndrome” is “junk science.” To delve into this debate misses the point; the actions of a parent which have the effect of destroying the relationship between a child and the other parent, however we label those actions, should always be taken into account when making the determination of primary residential conservator of the child. As family courts universally have been tasked with making determinations as to the best interests of children, a court would fail in that mandate if the actions of one parent to interfere with the Constitutionally fundamental right of a parent to raise their child as they see fit, were not taken into account in making these most important of familial

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determinations. As with all such factors, parental alienation should not be completely dispositive of the issue of child custody, but should be taken into account with all of the other factors, many of which have been codified to large degree, in making the determination of with whom a child should live, and any restrictions to that arrangement a court should deem appropriate to the healthy sharing of rights, duties and responsibilities between parents. Therefore, to this discussion, the following definition of parental alienation will be helpful: Parental alienation may be present where a person, parent or other otherwise, engages in some activity or inactivity, whether intentional or not, which has the effect of negatively affecting the relationship between an appropriate, loving and involved parent and a child of that parent. These active or passive actions, and the resulting rejection of the formerly loved parent by the child may be taken into account by the Court as a factor, but not necessarily a determinative factor, in making the decision of which parent should be responsible for the primary care, control and possession of a minor child. The cases which follow clearly echo the belief of most practitioners and judges that alienation, as actions which should be considered among the litany of factors, must be considered in making determination of custody. The implications of the cases point to the ongoing justification for tortious action around alienation, and further reveal an ongoing reluctance of the courts and the system both to recognize future harm and to fully compensate an alienated parent for the wrongful behavior of the other parent.

In Dobies v. Brefka, 921 N.Y.S.2d 349 (N.Y. App. Div. 2011), the father of two children brought an action against the mother of their children to modify the prior orders which gave the mother the primary custody of the children. The parties had a history of “acrimonious relations . . . resulting in more than a decade of litigation.” The parties entered into an agreed order in 1999 wherein the mother had sole custody of the children and father had visitation. In 2004 the father filed an action to find mother in violation of the custody order, and motion seeking the primary custody of the children, where the father alleged that the mother had “engaged in an intentional campaign of parental alienation against him.” In November of 2004, the New York Supreme Court, Appellate Division, found the mother in violation of the orders, but maintained the mother as the sole custodian of the children and increased the father’s parenting time. The Court indicated “grave concerns” with the mother’s activities and stated that the Court would reconsider the decision not to change custody if the mother continued to interfere with the father’s

9 “The “Parental Alienation Syndrome”, as far as this Court can divine from the case law and the papers submitted, comes into existence when one parent uses his/her influence with his/her child to undermine the relationship between the child and the other parent. It typically arises when the parents are engaged in divorce proceedings or a custody dispute. The fact that a child, and in particular a child of tender years, might be subject to such undue influence and have his or her judgment and perceptions compromised by such conduct is a matter of common understanding and experience.” People v. Loomis, 172 Misc. 2d 265, 267, 658 N.Y.S.2d 787, 788, 1997 N.Y. Slip Op. 97221, 1997 WL 225149 (Co. Ct. 1997).
11 Id.
12 Id.
13 Id.
relationship with the children,\textsuperscript{14} despite the fact that “[p]rotraction or delay in parental alienation cases often serve to reinforce the offending conduct and potentially undermine any remediation that a court could fashion with appropriate therapy, parent coordination, and/or, a change of custody.”\textsuperscript{15} In 2007, the father again alleged violation of the orders, which resulted in an agreed order modifying the father’s parenting time (which order was entered in March 2008), and finally, in September 2008, the father filed a motion in which he once again alleged violation of the orders and sought a change of custody from the mother to him.\textsuperscript{16} In October 2008, some nine years after the initial order, the trial court granted the father’s request for change of custody of the younger male child, but denied the request seeking custody of the older female child (then sixteen) for the reason that her relationship with her father was “irreparable.”\textsuperscript{17} It should be noted that the Court found the mother in violation of the 2004 and 2008 orders of the Court and sentenced her to sixty days in jail for willful violation of those orders.\textsuperscript{18}

On appeal, the New York court demonstrates one of the clearest adoptions of the concept of alienation as a factor which can be found in statutory law dealing with alienation, stating: “While a determination of the children’s best interests must be based on a totality of the circumstances . . . [e]vidence that the custodial parent intentionally interfered with the noncustodial parent's relationship with the [children] is so inconsistent with the best interests of the [children] as to, per se, raise a strong probability that [the offending party] is unfit to act as custodial parent.”\textsuperscript{19} The father was easily able to establish his burden of proof in this case by pointing out numerous incidents where the mother interfered with his visitation: refusing to transfer the son’s suitcase at an exchange and laughing at the father as she walked inside a restaurant with the children;\textsuperscript{20} refusing to let the son participate in visitation because of inclement weather, even though both parties had already driven through the weather to the custody exchange point;\textsuperscript{21} and telling the daughter that she did not have to participate in the spring break visit with her father.\textsuperscript{22}

While the appellate court supported the findings of the trial court that the mother had purposefully embarked on a campaign against the father, the court also reviewed the steps which the trial court took to decide, after the finding of alienation, whether a change of custody was in the children’s best interests.\textsuperscript{23} A brief discussion marks the thought process of the court where it

\textsuperscript{14} Id.
\textsuperscript{15} Lauren R. v. Ted R., No. 203699-02, slip op. at 2 (N.Y. Sup. Ct. 2010).
\textsuperscript{16} Id.
\textsuperscript{17} Dobies, 921 N.Y.S.2d at 351.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 353 (citing Matter of Youngok Lim v. Sangbom Lyi, N.Y.S.2d 617 (N.Y. App. Div. 2002)(internal quotation marks and citations omitted).
\textsuperscript{20} Id. at 352.
\textsuperscript{21} Id. at 352.
\textsuperscript{22} Id. at 352.
\textsuperscript{23} Id. at 353.
considered and discounted the testimony of the psychologist who treated the children from 2003 to 2008. He testified that it would be “devastating” to remove the younger child from the mother’s custody; however, the court made such statements without having consulted a prior psychologist’s report which stated that the mother had alienated the child from his father and because the doctor failed to concentrate on the effect of the alienation on the child in his therapy. However, even after the trial court made the determination that the mother had in fact been on a campaign to destroy the relationship between the children and his father, the appellate court found that other factors supported the change of custody for the younger child, namely the child’s “recent obsessive compulsive tendencies, his falling school grades, his continued bedwetting and that his behavior and reactions are at the level of a four or five year old” and the mother’s denial of any problems with the child. Notably, the family court acknowledged that the father behaved badly on occasion when the father exercised poor judgment by picking up a hitchhiker when his son was in the car, ridiculing the son in front of strangers, engaging in name calling, and using physical discipline, however the court was of the opinion that these parenting deficiencies could be remedied by continued therapy, and that the change of custody of the child was in the best interests of the child. Changing the custodial parent in cases where alienation has been proved is a popular, but controversial, option for a court seeking to remediate the damage incurred by an offending parent, as several recent cases support. However, courts are all over the spectrum when deciding how best to deal with cases of proven alienation, from leaving the child with the adjudicated alienator, to changing the custodial parent.

What is most disturbing about this opinion is that the court dismisses the destroyed relationship between the older child and the father “irreparable.” The only further mention of the relationship between the daughter and the father is couched in terms of the cessation of child support, a very unusual step wherein a New York court may suspend child support payments.

24 Id. at 354.
25 Id. at 353.
26 Id. at 352.
27 See, e.g., Grigsby v. Grigsby, 39 So.3d 453(Fla. Dist. Ct. App. 2010)(findings support trial courts characterization of mother’s conduct as “the worst case of parental alienation that [the court] had ever seen and therefore no trial court abuse of discretion awarding father sole parental responsibility for children); In re Marriage of Hatton, 160 P.3d 326 (Colo. App. 2007)(after evaluation concluding that mother represented a “real and immediate risk” to the children due to the enmeshment of the children with the mother in her battle against father, father is designated primary residential parent of children); Griffin v. Moore-James, 104 A.D. 3d 685 (N.Y. App. Div. 2013)(“the Family Court's determination that there had been a change of circumstances sufficient to warrant a change of custody based on the mother's interference with the father's visitation rights is supported by a sound and substantial basis in the record”); Tori v. Tori, 103 A.D. 3d 654 (N.Y. App. Div. 2013)(findings support trial court’s findings that mother continually interfered with father’s visitation time so as to disrupt relationship between father and child).; 28 See Rebecca E. Hatch, Proof of Parental Alienation in Action for Modification of Custody of Child, 127 Am. Jur. Proof of Facts 3d 237 (Originally published in 2012); Margaret Michelle McKelvey, Parental Alienation in Ontario: What Is Parental Alienation, and What Should Be Done About It?, at p. 38 (2011), Proquest, UMI Dissertations Publishing. MR766766.
29 Dobies, at 351.
“where it can be established by the noncustodial parent that the custodial parent has unjustifiably frustrated the noncustodial parent’s right of reasonable access,” 30 despite the “firmly established principles [wherein] parents have a statutory duty to continually support their children until they reach 21 years of age.” 31 The appellate court supports the decision of the trial in suspending the child support for both children based upon the mother’s conduct in deliberately frustrating the father’s relationship with the children, until such time as the mother may demonstrate “good faith efforts to actively encourage and restore the father’s relationship with the children.” 32

No other opinions within the research conducted for this paper demonstrated the sweeping embrace for the harm associated with alienation as do the opinions of the New York courts; however, what is markedly lacking in the opinions is any discussion of, or contemplation of, payment for the future expenses which would be related to the multiple court cases which the father funded, the continued and extensive therapy which will take place with the children and the parents, and the anticipated involvement of the court in the future. While one may subscribe to the American rule in the payment of fees, where each party pays its own costs, what is completely absent from this discussion is the idea that change of custody is not where this case should end. There is no indication in this case that the father’s physical discipline of the children (which is still accepted as corporal punishment in many states in this country, whether rightfully or not), rose to the level of reportable and legitimate abuse, or that the father was just a vexatious litigant who outspent and outlasted the mother in this case. While the father certainly was forced to file numerous motions in order to correct what he deemed wrongful conduct on the part of the mother, the mother was allowed by the Court and through agreed orders of the parties to mend and modify the nature of her relationship with the father and the children, which the mother chose consciously not to do. While the court does not mention the cost, how can this not be a legitimate area of discussion? How many litigants could afford the multiple motions which the father was required to file, the discovery, therapy, psychologist reports, and multiple trials of this matter? Further, who can put a price on the loss of relationship between father and daughter in which the court found that the mother deliberately interfered? While some experts have apparently convinced courts that “parental alienation syndrome” is a “disorder affecting the children of a contentious divorce,” 33 there must be a simultaneous acceptance and understanding for the intangible losses, both past and future, which occur to the rejected parent. While many states have statutory enactments which allow courts to make attorney fee determinations in marital dissolution cases where misconduct has taken place, 34 and wrongfully accused parents may recover in tort for

32 Id. at 355.
defamation, very few have contemplated a separate and independent tort for parental alienation, as should have been allowed and levied in this case, and for which it is high time.

Finally, it should be noted that, despite the finding by the trial court that the mother in the Dobies case intentionally and deliberately violated the 2004 and 2008 orders of the court, and that such violations of the order supported the change of custody of the younger child, the appellate court rejected that part of the order which ordered the mother to jail for willful violation of the order. This ordered the mother to “facilitate and encourage parenting time-visitations between [son] and father,” but did not specifically prohibit the mother from picking up her son early from a bowling alley, or ripping a camera from father’s hand which he used to take a picture of his daughter participating in the Mass, and thereafter claiming to a nun that the father was harassing the mother. Therefore, apart from the suspension of child support and the change of custody of their troubled son, mother avoided any specific punishment for her clear violation of the order.

While it may be that New York appears to have the most sweeping pronouncements on the legal effect of concerted parental alienation on a custody case, the enforcement of those pronouncements appears to be another matter. In the case of Lauren R. v. Ted R., 911 N.Y.S.2d 693, 2010 N.Y Slip Op. 50931(U), a deeply disturbing and unreported trial level decision decided on May 25, 2010, the father moved to have mother held in contempt for mother’s willful and deliberate interference with father’s right to frequent and regular visitation with the children, and for alienating the children from father due to numerous acts of disparagement of the father to the

1-354); Me. Rev. Stat. tit. 19-A § 951(A) (West, WestlawNext current with emergency legislation through Chapter 427 of the 2013 First Regular Session and Chapter 433 of the First Special Session of the 126th Legislature).

Ginyard v. Ginyard, No. C-09-138184-IT, 2011 WL 3794216 (Md. Cir. Ct. 2011); Robert Franklin, Maryland Dad Gets $825K Judgment for Ex-Wife’s False Allegations, http://www.fathersandfamilies.org/2011/07/20/md-dad-gets-852k-judgment-for-ex-wifes-false-allegations/ (last visited Mar. 19, 2013). While one may argue that the tort of defamation is a perfectly suitable vehicle for tortious recovery where there have been false allegations of physical or sexual abuse made by one parent against another, defamation requires a false statement of fact be made by one person about another person to a third party which has the effect of harming one’s reputation, and statements of opinion are generally not actionable. Further, the statement must generally be made with other than “good faith”, that is, the person making the statement must be meaning it to be harmful. Where defamation would fail in this instance, is where a parent might claim that “they were just trying to protect their child,” regardless of any other motivation which may actually be the case. Given the general belief that a “protective parent” is blameless, and several other legal arguments which belabor the point, defamation as a vehicle for tort in the case of alienation is woefully inadequate. The same could be said for the criminal offense of interference with child custody; what if the rejecting parent by word or deed turns the child against the visiting parent, but makes the child available for every instance of visitation? Without 24 hour camera surveillance, how could one prove that the offending parent was causing any interference with the custody rights of the visiting parent? A tort embracing all of the activities of the custodial parent; name calling, rejection of visitation, allegations of abuse, denigration, and violence which has the effect of harming the relationship should be considered.

See also, Grigsby, supra note (Where the trial court characterized the Mother’s actions as the “worst case of parental alienation that [the court] had ever seen”, the appellate court justifies mother’s actions by stating that mother “illegitimately used every tactic available to a parent who is legitimately concerned about the safety of her children in an effort to gain a tactical advantage in this custody case”, but appeals court upholds changing custody of four minor children to father)

Dobies, at 355.

Id. at 354-55.
children.\(^{38}\) The contempt hearing was conducted on 23 separate days over a period of 10 months.\(^{39}\) According to New York law, the father was required to prove, by *clear and convincing* evidence, that mother violated the court orders in such a way as to have “defeated, impaired, impeded or prejudiced the [father’s] rights, or were calculated to affect those rights.”\(^{40}\) The mother was shown to know what the prior order said, and was even given an opportunity to utilize counseling and parenting coordination during the course of the hearing to remediate the alienating conduct, but these attempts to facilitate the father’s parental access were unsuccessful.\(^{41}\) In what can only be described as an astounding pronouncement, the New York trial court found that the father’s “burden of proof was met so overwhelmingly, as to exceed the burden of proof required...[i]nstead [father proved mother’s violation of the stipulated agreement of the parties] beyond a reasonable doubt.”\(^{42}\) The court stated that the instances of alienation were so numerous that recounting each instance was “as daunting as [the acts of alienation were] indefensible.”\(^{43}\) A few of the acts recounted by the courts were the refusal of the mother to allow father to visit the children for Hanukkah. As a result, the father was relegated to lighting a menorah and opening presents in the back of his car at the foot of mother’s driveway.\(^{44}\) The mother frequently called the father a “deadbeat”, “loser”, “scumbag” and “f-----g asshole” in the presence of the children\(^{45}\) telling the father that “we all hope you die from cancer”\(^{46}\) while holding the children. Mother also insisted that the police arrest the father when he dared drive up the mother’s driveway to keep the children from having to walk down the long driveway with heavy bags in a torrential downpour.\(^{47}\) The final culmination of the mother’s attempt to alienate the father from the children was the mother’s allegation of sexual abuse of one of the children due to the father’s tickling the 13 year old daughter in June of 2008, *after* the trial for contempt had commenced.\(^{48}\) Even though the mother conceded at trial that she knew there was nothing “sexual” involved with the tickling incident, the mother insisted on telling the story to the psychologist at the daughter’s school, and encouraged the daughter to advise the children’s pediatrician that her father had inappropriately touched her.\(^{49}\) The mother also told other professionals and family friends of the abuse, which culminated in a Department of Social Service investigation based upon a report that the father fondled the 13 year old’s breasts on a regular basis, which the teenager “categorically denied” under questioning by


\(^{39}\) *Id.*

\(^{40}\) *Id.* at 3

\(^{41}\) *Id.*

\(^{42}\) *Id.*

\(^{43}\) *Id.* at 6

\(^{44}\) *Id.* at 5

\(^{45}\) *Id.* at 6

\(^{46}\) *Id.*

\(^{47}\) *Id.*

\(^{48}\) *Id.* at 7

\(^{49}\) *Id.*
detectives. The case against the father was closed. Subsequent to the closing of the first allegation, the mother was quick to state to the Child Protective Services social worker that “[father] did it again” claiming that the father “hugged [the daughter] too hard.” The CPS records contain evidence that the mother was repeatedly cautioned by the case worker not to involve the children in her disputes with the father, and all allegations of child abuse or maltreatment of the children by the mother against the father were found to be false and “not made in good faith.”

The court noted that the father had initially not made any pleadings to change custody of the children, but so moved during trial after evidence was evinced of mother’s “pattern of willful and calculated violations of the clear and express dictates of the parties...attempts to undermine the relationship between the children and their father, manipulation of the [father’s] parenting access, utter and unfettered vilification of the father to the children, false reporting of sexual misconduct without any semblance of “good faith”, and [mother’s] imposition upon the children to fear her tirades and punishment if they embrace the relationship they want to have with their father.” The court then states that despite the various theories of alienation which exist, the interference by one parent with the relationship between the child and the other parent has always been considered in the context of determining the ability of one parent to encourage the relationship between the child and the non-custodial parent. However, the court was reluctant to allow the father to move for a hearing on changing custody, given the lack of adequate notice to the mother, but the court did state that a proceeding on change of custody would be set, as the facts in the case indicated that the mother clearly satisfied the New York standard where “parental alienation of a child from the other parent has been determined to be an act inconsistent with the best interest of the child...and that it has been proven [in the underlying contempt proceeding] the strong likelihood of unfitness becomes a factor that must be considered in the change of custody hearing ordered herein.”

What may be gleaned from this trial level opinion is multifold; first, contra some outspoken opposition that states that allegation of parental alienation is only used by abusive fathers to gain tactical advantage in custody cases, this case clearly demonstrates a situation where the allegations of sexual abuse by the father was used by the mother as a tactical tool, and one which was originally the premise of Dr. Richard Gardner’s first treatment of the idea of “Parental Alienation Syndrome.” When many cases of alleged parental alienation are recounted by opponents of the use of this testimony, it is in such a way as to make the reader believe that an insensitive court gives an abusive parent custody of children, without any evidence or expert witness testimony, based solely upon the slick and deceitful testimony of a convincing abuser. However, this is rarely, if ever, the case. Courts are extremely reluctant, certainly once a custody order is put in place, to disturb that

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50 Id.
51 Id.
52 Id.
53 Id. at 8.
54 Id. at 8
55 Id. at 8
order in the absence of a “substantial and material change of circumstances” which would then render the change of custody “in the child’s best interests.” Courts rarely rely solely on the word of either parent, instead relying upon third party experts trained in making observations and reports such as psychologists, psychiatrists, counselors, social workers, parenting coordinators, access facilitators, and attorneys appointed to represent the best interests of the children. However, often the most telling evidence which is used by a court are the actions of the litigants themselves, e.g., when in the instant case, the court pointed out that when the father was emotionally recounting how he was forced to celebrate Hanukkah with his daughters in the back of his car, the mother “smirked.” As with most cases where custody of children is at issue, this case went on for years, wherein both parties had the opportunity to prove their case and to demonstrate genuine rehabilitation, but even while under an impending contempt finding, the mother refused to allow the father to see his daughters and went so far as to make false allegations of sexual abuse against the father, indicating “utter disregard for the authority of the Court.” There is no discussion in this opinion, however, of the emotional damage which has been visited upon father or children in this matter, or the attendant cost. While the court indicates both that a change of custody hearing will be set, and that the court will take up the matter of father’s $134,352.92 attorney fees at a later hearing, what of the emotional cost to the father? What of the time lost with his daughters, time that this parent will never recover? While we may argue that the father has a fine suit against the mother for defamation for false allegations of sexual abuse of the children, what about those cases where the facts are not as clear and mother and the children are better accusers? Certainly, where real sexual abuse takes place, an abuser should be removed from contact with abused children, but even in the instance where an abuser is found not to have committed the acts for which he was accused, can he ever truly be exonerated? Opponents of parental alienation have frequently referred to an alienating parent as the “protective parent” and have pointed out that no parent should be castigated for trying to protect his/her children, but false allegations of abuse whether intentionally meant to be damaging or not, carry with them a stigma that lingers, whether the alleged perpetrator is ultimately found to be innocent or not, while the “protective parent” was just “doing the right thing.”

As to the potential mental health impacts on falsely accused parents around allegations of sexual abuse, recent studies have begun to examine these effects. Deniz Aslin, in her article, The

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60 Lauren R., supra note 39, at 5.
61 Id. at 8
Psychological Aspects of Coping with Being Accused of Sexual Offences, argues that while it remains statistically uncertain if the actual incidents of sexual abuse in custody cases have increased, or if there is simply a higher level of reporting, it is clear that: “the effects of stigmatization regarding sex abuse and rape crimes have rarely been studied.” To begin to address this gap in research, her study “explores the effects of social stigma by examining coping style, thought suppression, depression and anxiety in those falsely accused of sex crimes compared with those convicted of sex crimes.” While the study is based on a broader population than those falsely, but exclusively, accused in custody cases, Aslin does acknowledge that “false allegations occur most often in conflicting parents in divorce cases. This type of allegation is a conscious manipulation on the part of one parent or caregiver to obtain custody of children from another parent or caregiver, often as a countermeasure to damning allegations.” The implications of the impacts on the mental health of the falsely accused parent are important to the argument for tortious action in such cases.

By design, Aslin employed a self-reporting instrument to two populations. A key factor in her study to determine the impacts of false abuse accusations was to examine how different populations manage or employ coping strategies to deal with them and the resulting mental health implications of these strategies. Aslin describes two major coping strategies to accusations of abuse and/or conviction for abuse: task-focused and emotion-focused coping. Those who use task-focused coping try “to reduce stress by reconceptualising a problem cognitively, by minimizing its effects or by solving it.” Conversely, “emotion-focused coping tries to regulate

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64 Id.
65 Id.
66 Id. at 20, citing (Craig, 2005; Wakefield, 2005; Mikkelsen & Gutheil, 1992)
67 “a total of 60 males volunteered to complete a questionnaire. The questionnaires were given to participants from organizations that support people falsely accused and people who have been found guilty of sexual offending” (p. 26) and adhered to other specific criteria.
For the first group (N=30):
- the allegations were found unproven or proved to be false
- males falsely accused of sex offences
- allegations occurred in professionals against parents or parents against professionals and
- the conflicting parent in divorce cases
- aged over 18
For the second group (N=30):
- found guilty in the criminal justice system
- committed sexual offending such as rape or indecent assault
- male offenders under Community Rehabilitation Order or Parole License
- aged over 18
68 Id. at 23
69 Id.
70 Id. at 30.
the emotional responses to stressors. . . [and] is generally considered less constructive than task-focused coping, because the emphasis is on dealing with the affect rather than trying to solve the problem.”

The findings of her study indicate “that people who have been falsely accused of sex offences scored higher than those convicted of sex offences on the emotion-focused coping subscale” of her instruments and thus also demonstrate “more behavioral problems and experience . . a high level of anxiety and depression” because of the inability to resolve the problem of false accusations of abuse. Increased levels of anxiety for the falsely accused parents become more commonplace in addition to other reported impacts on their mental, financial, and professional well-being, including “the possibility of false imprisonment, unnecessary family disruption, unjustified loss of a job or career, [and] damage to reputation.” These higher levels of anxiety, even in falsely accused individuals who were exonnerated, may also be contributing factors in an increasing number of reports of suicide and depression among the population, although Aslin concedes that this is an important avenue for future research: “very few studies have been conducted, and there has been little theory building. Theories are still needed to explain, for example, why certain falsely accused individuals have developed mental illness or committed suicide, and yet no action has been taken by psychological society.”

Aslin concludes that “an understanding of the consequences of allegations on both falsely accused individuals and convicted sex offenders is important for coping effectively with social stigma and other psychological effects,” particularly to “aid professionals in their interventions with both groups. In particular, it may show how the stigma of being an offender or falsely accused is dealt with.” Social workers, therapists, and others involved in assisting falsely accused individuals in their recovery from anxiety and depression can learn from deeper study in the area.

The two cases examined in this article, and the discussion of the mental and emotional harm suffered by victims of allegations of sexual and physical abuse, reveal several clear and important trends with implications for tortious action. First, alienation - not as a disorder with which the court must make some scientific ruling as to the reasonableness of the science which
imposes the label “syndrome” - but as the individual acts of a parent to drive a wedge between the other parent and the child, is clearly being taken into account as a factor in the general decision to modify custody between residential and visiting caregivers. Second, court decisions as to how best immediately deal with cases where alienation has been proven are at best varied, and at worst a shotgun approach with many courts finding clear evidence of alienation, but leaving children with the offending parent, or completely changing custody of an enmeshed child hoping that it will work out for the best. Lastly, the remediation which these courts demonstrate indicates a thought process marked with a “here and now” mentality, solutions which ultimately solve the problem right now, but fail miserably to give the wronged parent any kind of relief for past denigration and absolutely fail to see that the cost of false allegations of abuse and the emotional battery to which the parents and the children have been subject will increase anxiety, depression and cost many hours of therapy and money in the future. The courts and legislatures need to respond to the damage caused by alienation with clear acceptance of the phenomenon, and a statutory scheme which allows, in addition to attorney fees incurred for the increased costs of litigation, an independent tort for alienation which addresses the loss of dignity, emotional distress, and lost years of fundamentally protected parenting which has been in many cases perpetrated upon the innocent children and parents by the court system.