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TAB 2

The Six-Minute Family Law Lawyer 2013

Alienation Update: What Are The Courts Doing With These Cases?

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cpd Continuing Professional Development

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It is questionable whether any trial outcome could actually repair these damaged relationships, that is, accomplish what the parents with so much professional assistance have been unable to accomplish. A court order provides a decision. Solutions lie elsewhere. In its search for the order that is in the best interests of these children at this point in time, realistically, the court may only aspire to minimize the ongoing damage to the children. [1]

Parental alienation cases are not going away. Having reared its ugly head for the first time in or around 1985 when the term "parental alienation syndrome" was coined by Dr. Richard Gardiner, sadly, this pathology is here to stay. That being the case, how are our courts dealing with these most extreme of high conflict cases? How are judges handling this behaviour, which some have gone so far as to label as child abuse?[2]

I. Simple Definitions and Concepts To Assist in the Understanding Of The Caselaw

Parental alienation (PA) has been defined as attempts by one parent to undermine the relationship a child has with the other parent. Children are suggestible. Children of

divorce are, perhaps, particularly so. Some of these children will eventually yield to the pressure and relentless programming by an alienating parent toward a targeted parent.

When a child goes further and aligns with the alienating parent, becoming a mouthpiece for, and a player in, the alienator's agenda by behaving in aggressive and hateful ways toward the targeted parent, some would argue that *parental alienation syndrome (PAS)* has developed. As has been seen in the cases, a child with PAS essentially becomes an alienator in their own right, independently creating their own scenarios of how horrible the targeted parent is. These scenarios are extreme, bizarre and bear little resemblance to the truth.[3]

One wonders how much the label really matters, since it is the devastating effect on children that is the issue. Until recently, the narrative seemed to focus on the "*alienator*" and the "*alienatee*", rather than on how the alienating behaviour impacts on best interest. More recently, the court's focus has shifted to how children in these extreme situations are functioning, or not.

In 2007, Dr. Amy J.L. Baker conducted an in-depth study with 40 adults who experienced PAS as children. The results of this study are set out in her book: *Adult Children of Parental Alienation Syndrome: Breaking the Ties that Bind*[4]. Giving expert testimony in an Ontario trial, Dr Baker described seventeen alienating strategies used by the alienating parent to manipulate children. Dr. Baker's opinion is that parental alienation is established if a parent engages in many of these strategies on a consistent basis:

• Badmouthing;
• Limiting contact;
• Interfering with communication;
• Limiting mention and photographs of the targeted parent;
• Withdrawal of love/ expressions of anger;
• Telling the child that the targeted parent does not love him or her;
• Forcing the child to choose;
• Creating the impression that the targeted parent is dangerous;
• Confiding in the child personal adult and litigation information;
• Forcing the child to reject the targeted parent;
• Asking the child to spy on the targeted parent;
• Asking the child to keep secrets from the targeted parent;
• Referring to the targeted parent by their first name;
• Referring to a step-parent as mom or dad and encouraging the child to do the same;
• Withholding medical, social, academic information from the targeted parent and keeping his/her name off the records;
• Changing the child's name to remove association with the targeted parent; and
• Cultivating dependency on self / undermining authority of the targeted parent.[5]

The above behaviours came up time and again, to different extremes, in the alienation case law.

In preparing this paper, I considered every reported case in Ontario mentioning the term "alienation" in the custody context for the period of a little over a year, from September 1, 2012 up to and including October 31, 2013. I also reviewed all appeal court decisions referencing alienation across Canada for the same period. The following is a summary of the courts' most recent responses to alienation. Hopefully, an option or idea from one of these decisions will resonate with counsel working on a similar case right now.

II. Judicial Responses to Alienation

1. Order an Assessment

In many cases, an assessment is either being sought on an interim basis or forms part of the evidence being considered at the final hearing. This tendency toward assessment has its roots in the 2012 decision in *Baillie v Middleton*[6] where Pazaratz J. suggested that an assessment might be warranted where there were allegations of parental alienation or where an inexplicable rift existed between parent and child.

In *Ottewell*[7], the parties had been involved with both an assessor from the Office of the Children's Lawyer ("OCL") and a Parenting Coordinator ("PC") prior to trial. The OCL recommended the mother have sole custody. However, the mother largely ignored the other OCL recommendations, including supporting the father's relationship with the children. The trial judge awarded custody to the father, with the following: admonitions to the mother:

> *In the case at bar, I find that the RM mother has chosen a course of conduct that is injurious to the children's healthy contact with their father. She clearly has no insight into how her conduct is impacting negatively on the children. She has shown no willingness to take responsibility for the conflicts and stress that have dominated this unfortunate situation. She has failed to obtain the kind of counselling recommended by the OCL and urged upon her by her own friend Stacey Landry. She has refused to follow established parenting protocols or cooperate to ensure that access schedules are established which guarantee the maximum contact between the children and each parent. She has used her time and energies to thwart access.*
>
> *Both the CLRA and the DA direct that court only take into account a parent's*

> *past conduct if it is relevant to the person's ability to act as a parent. I find that the past conduct of the mother, which has continued up to the present, must be taken into account.* ***A parent must be prepared to promote the other parent as an important part of the children's lives and refrain from denigrating, minimizing, or alienating that other parent. This, Christine Ottewell has been unwilling or unable to do.*** *I have no confidence that this pattern of conduct will cease.*[8]

This paper is not a debate on the relative strengths and weaknesses of the assessment process. It is axiomatic that an assessment is no guarantee of the correct result. This is particularly true in alienation cases. Even an experienced assessor might not make the "right call" at first instance. In *S. (N.) v. N. (C.)*[9] , the assessor considered the problems not to be purely one-sided, i.e. both parents contributed to the negative dynamic at play. As such, the assessor's initial recommendations did not eradicate father's access. On the update, however, the recommendation was changed. The assessor agreed that it would be appropriate to eliminate the father's access for a period of a year, given his actions.

2. Order Supervised Access on a Permanent Basis

Most family lawyers tell their clients that supervised access is only a temporary solution. In alienation cases, however, courts have held that supervision can and should be permanent where there appears to be no hope the alienating parent will mend his/her ways.

In *Milanizadeh v Zeinali*[10], Marshman J. made a final order for custody to the mother and supervised access to the father. The court left the possibility of unsupervised access open, based on the father's participation in counselling, successful supervised access

visits and an understanding of the children's wishes. The father failed to convince the court to lift the supervision requirement:

> *With respect to alienation, it is apparent that the father has learned nothing in the approximately two years since the trial took place. He continues to raise adult issues with the children during supervised and telephone access. He continues to be of the view that he is the proper parent to have custody of these children. He continues to downplay the mother's role in the children's lives and indeed to this day cannot refer to her as the children's mother.*
>
> *Matters will only get worse if I allow the father to have unsupervised access. Although he may have attended some counselling sessions with Ms. Cowper Smith, there is no report and no suggestion that he has learned how to stop his alienating behaviour. If he sees the children in an unsupervised setting, he will continue to speak to the children about their health and what is wrong with them, and how their mother is failing to take them to the doctor. He will continue to discuss court proceedings with the children. He will be even more likely to attempt to get information from the children to which he is not entitled, placing the children again in the middle of the dispute between their parents. He will continue to speak ill of the mother and refer to her by her first name rather than as the children's mother.*
>
> ***Simply put, the father does not recognize that the rules are there to protect the children and that the alienating behaviour must stop. Alienation is continuing and after two years it is time to make an order for supervised access on a permanent basis.*** *I was provided with a list of conditions which the father had agreed to. Those conditions had not been incorporated into an order. It is time that they be incorporated into an order so that the father will be clearly aware that he is not entitled to question the children about adult issues.*[11]

In *L. (T.L.L.) v. L. (J.J.)*[12], the Manitoba Court of Appeal upheld the variation application ruling requiring the AP mother's access to be permanently supervised. On a first variation application ("variation #1"), both parties sought to vary a joint custody and time sharing order. The father was awarded sole custody. The mother's access was to be supervised, largely to thwart her pattern of making false abuse allegations against the father to various authorities. The availability of unsupervised access was contingent

upon, among other things, the mother's obtaining a psychiatric assessment to rule out mental health issues. After two subsequent hearings, no psychiatric assessment, and continued bad behaviour, the judge on variation #1 made a final order for sole custody to the father and supervised access to the mother. The mother appealed the final order, brought another variation application ("variation #2") which was denied, and her appeal of that decision was denied. Alienators are nothing if not persistent.

3. Early Intervention

It is hard to argue with the maxim that early intervention is a good thing. In the alienation case law, early intervention usually means one or more of the following: intervention at the early stages of the dispute; intervention before the problem has had time to become "true" alienation; or intervention in the early years of a child's development.

a) Early in the Process

On an interim motion in *Thom v Thom*[13], for example, the "custody evaluation report"[14] found considerable evidence of the mother engaging in behaviour of concern, including:

> *...enticing, overpowering and encouraging the children to pursue her agenda thereby undermining the father. Suggesting these are merely the wishes of the children is untrue and ignores the accommodation and compromise needed during the transitional period and after a separation. To do otherwise is contrary to the best interests of the children.*[15]

Likewise, the father was found to be "*confrontational, rigid and less than imaginative in handling the challenges his son and this mother have presented. His former, and perhaps current, quantity of communication to this mother is harassment."*[16] In order to prevent the parties from engaging in more extreme and alienating behaviour with respect to their children, an order was made upholding the daughter's alternate week schedule and "placing" the son with the father. No interim custody order was made.

b) Early in the Development of Alienating Behaviour

The court will order a temporary change in a parent's access pending trial, for example, in the hopes that such an order will prevent the child from being manipulated by that parent:

> *The issue of alienation will be a central issue at the trial of this matter. The father denies some of the facts that lead the clinical investigator to this conclusion. Certain other facts are admitted but the interpretation offered by the applicant is different than that of the clinical investigator.*
>
> *Having regard to the concerns raised in the report and the other evidence contained in the record, I am of the view that a change in the existing access order must be made pending the trial of this matter.* ***The child, Clinton, should not be exposed to potentially alienating behaviours. I am of the view that the evidence presented does give rise to the urgent need to disturb the existing status quo in the best interests of the child. Unchecked alienating behaviour, even if the applicant does not see it as such, poses a significant risk to the child, Clinton.***
>
> *I find that it is in the best interests of the child that the access by the applicant be varied pending trial in a manner that reduces the risk that Clinton will be exposed to alienating behaviour.*[17]

Early intervention designed to prevent the development of alienation also found favour with the Quebec Court of Appeal in *Droit de la Famille -131637*[18]. The case was an appeal of a trial judge's decision to depart from the custody and access assessor's recommendations of sole custody to mother. The trial judge had awarded joint custody and a week about schedule. In denying the appeal, the court upheld the trial judge's decision, finding it to be in the children's best interest to protect them and to prevent what had been described as a "loyalty conflict" from progressing to full blown alienation. Giroux J.C.A. had the following comments for the Court:

> *En l'espèce, Mme H... suggère un délai avant l'exercice de la garde partagée, malgré le fait qu'elle ait clairement identifié les difficultés des enfants, les lacunes des parents dans l'exercice de leurs droits parentaux, leur manquement tel que le manque de responsabilisation du père face aux besoins des enfants, les propos de la mère tenus auprès de ces derniers, lesquels nourrissent inconsciemment le conflit de loyauté.*
>
> *Avec respect pour l'opinion de Mme H..., c'est dès maintenant qu'il faut réagir.* ***Ce qui aujourd'hui est identifié comme un conflit de loyauté pourrait devenir une forme d'aliénation parentale, situation fortement déplorable qui nécessiterait un remède plus drastique qui a souvent peu de chances de réussite.***
>
> *Le père reconnaît les capacités parentales de la mère et reconnaît qu'elle a été, jusqu'à maintenant, une figure parentale dominante pour les enfants. De plus, le Tribunal ne peut mettre de côté la volonté de ce dernier de prendre sa place et de vouloir s'investir auprès de leurs enfants.*
>
> *Cependant, le Tribunal retient la suggestion de Mme H... selon laquelle une thérapie familiale doit être instaurée, préalablement à l'exercice de la garde partagée et les parents ont démontré, séance tenante, une ouverture pour ce faire.*[19]

c) Early in the Child's Life

Where a child was only two and a half years old, the court decided to intervene on an interim basis in the hopes that the situation would improve before trial. In *Rodriguez v*

Guignard[20] the father and paternal grandmother's denigration of the mother in front of the child was of concern. Price J. held that, if permitted to continue, the denigration *"would be increasingly detrimental to Ysabella's regard for her mother, both as a role model and a source of security."*[21] The court departed from the parenting status quo and granted sole custody and primary residence to the mother, over the objections of the father. The court was quite clear that the parties' actions in the intervening period would be carefully scrutinized at trial:

> *The best way for Mr. Rodriguez to show love and respect for Ysabella is for him to show respect for Ysabella's mother. Neither he nor Ms. Gutierrez have yet demonstrated an ability to do so. The interim custody and access arrangement that results from the present Order will be reviewed at trial, if the case proceeds to trial or in two years. At this time, the quality of communication between the parties, as well as the degree to which Ms. Guignard has facilitated contact between Mr. Rodriguez and his mother and Ysabella, will be considered.*[22]

4. Change Custody on a Temporary Basis

They say short term pain allows for long term gain…..but can it prevent long term pain? Swift, deliberate and, somewhat, harsh intervention at the start can sometimes change the course of a case otherwise destined to be an alienation battle.

In a number of cases, the courts have made temporary orders for sole custody to the targeted parent and limited the alienating parent's contact with the child(ren) to supervised access only. Provision is made in such orders to permit the parties to return to court to either finalize the initial order or, in a few happy cases, to vary the temporary order to acknowledge the alienating parent's improved behaviour.

Pursuant to a temporary order in the *Shalma*[23] case, for example, the Court granted the targeted mother sole custody and the alienating father limited supervised access. By the time of the trial 15 months later, significant progress had been made. The parties agreed that the mother should retain custody and that the father's access to their now 9 ½ year old son could be unsupervised, increased substantially and include overnights.

Other times, the final result is not so cheery. *F.(A.) v W. (J.)*[24] is one such case. Presently under appeal, the decision in *F.(A.) v W. (J.)* contains a number of creative approaches to the alienation challenge that will be referenced in this paper. For present purposes, however, it is the 6 month review in the case that is of interest. Following a lengthy trial, and after hearing a great deal of evidence that might indicate otherwise, Harper J. remained hopeful that the children could have a positive relationship with both of their parents. Harper J. made a "multi-directional order that included positive duties on both parents to promote the other parent to the children"[25]. The findings against the alienating mother were harsh:

> *In my June 27, 2011 reasons for judgment, I made certain findings of fact that were to form the baseline from which to measure gains for this review. At the core, I found that the mother had distorted the children's reality to such a degree that they feared and disrespected their father for no valid reason. In para. 147 of that judgment, I stated the following:*
>
> *From her proclamation to J. shortly after separation, that "the children don't want to see you and they are better off without you" until her testimony in this court room, A. has actively set about to excise J. out of the children's life. The children started out a few weeks after separation protesting that they did not want to go with their father. They all transformed into children who feared and professed to have an intense dislike of their father. I find that transformation of the children was primarily caused by A.'s role in helping to create a distorted reality of their father within the children.*

> *One of my most significant concerns about the mother's behaviour was the lengths to which she appeared to be willing to go in order to transfer her own feelings about J.W. onto the children's feelings about J.W. As I stated at para. 146:*
>
> *The mother's own testimony is very instructive of her intentions relative to obeying the court ordered terms of access. She stated that she "has been to hell and back trying to get someone to listen to the children's feelings and to validate those feelings about their father." Incredibly, in response to counsel in cross-examination when asked whether she would comply with a judge's order, were the judge to find her in contempt and order fines per each future missed access, A. responded, "if I had to go into further debt in order to get my children's feelings heard and validated I will."*[26]

Despite her bad behaviour, and due in large part to the close attachment the children had to her, the mother was granted interim custody of the children, but under the supervision of the Children's Aid Society ("CAS") with very specific terms.[27] The father was granted increasing access to the children. The mother was found to be in contempt of prior custody and access orders, and put on 6 months' probation. At the end of this 6 month period of transition, the interim order would be reviewed in January 2012.

The review was delayed and did not take place, in January as planned. Hearings were held over the fall and winter of 2012 and in the spring of 2013. The judgement was released in June 2013 removing custody of the three children from the mother and granted sole custody to the father. The mother's only access to the children was to be supervised by CAS and occur only when she joined the children's therapy sessions. If the mother ever sought unsupervised access, she would have to bring a Motion to Change and be able to demonstrate that she was *"able to both act and articulate to the children in a manner that promotes the ability of the children to have a loving relationship with both of their parents."*[28]

5. If it Walks Like a Duck...

The result of a finding of alienation is often a punitive order. A parent can lose custody of, and sometimes even access rights to, a child following a determination of alienation. As such, the courts and experts are careful to consider whether the circumstances in a particular child are "pure" (i.e. caused by only are parent) or "mixed" alienation. Mixed alienation cases are really the court's way of recognising that it often, but not always, takes two to tango.

In *Fielding*[29], the parties had three children: Katie (age 17) and twins Sean and Natalie (age 15). The mother claimed that the father had alienated Katie and Sean from her, that his favouritism of Katie caused problems between the sisters and that the father had abandoned Natalie. The mother sought sole custody of all three children with no access by the father to any of them until recommended by a family therapist. The father argued that the mother's behaviour and lack of insight were responsible for her relationship problems with Katie and Sean. He agreed his relationship with Natalie needed work. The father sought sole custody of Katie and Sean and joint legal custody of Natalie with primary residence to the mother.

Following evidence from the parties, Dr Sutton (who conducted an assessment), various witnesses and professionals, as well as an expert on alienation, Makinnon J. found that

both parents had engaged in alienating behaviour. Both parents had an active part to play in the family's current predicament:

> *My finding is that this is not a case of pure alienation. To the contrary,* ***I accept Dr. Sutton's opinion that it is a mixed pathology case where alienating conduct by both parents has been at play; and where there are also other complicated contributing factors.*** *The mother submits that both parties are normative parents and that, without this acceptance and acknowledgement, the family will remain fragmented. I disagree. The Fieldings' parenting is not normative. Significantly, the mother's own parenting style and current inability to see or accept her contributions to her relationship problems with Katie and Sean, contra-indicate the change in their custody that she seeks. Residential custody of these children could not confidently be transferred to her. The case law does not include examples of court ordered changes in custody in mixed cases such as this where the shortcomings of the parent seeking custody are a significant contributing factor to the dilemma.*
>
> *The respondent's own need to stand up to the applicant, and to be seen by the children as doing so, plays out negatively in his parenting and decision-making. He has involved Sean and Katie in the parental conflict and has permitted and supported their rejecting behaviours towards their mother. This has not been in their best interests. Although he articulates an understanding of the dynamic between himself and Natalie and a desire to repair it, to date he has been unable to accomplish this.* [30]

MacKinnon J. recognized that there was no *"single cause or simple solution for the Fielding family dysfunction"*.[31] Her Honour made a nine page order addressing as many aspects of custody and access as could possibly be included. The father was awarded sole custody of Katie and Sean. The mother was awarded sole custody of Natalie. The parties were required to participate in a variety of therapeutic interventions in different configurations to rebuild relationships. Four months after the decision, one wonders how this family is doing.

Similar findings on the parties' respective contributions to the problem are made in the *Veneman, Giroux, S (N)* and *Tran* [32]cases. In *Tran*, for example, the parties had two children, but the case focused on 12 year old Madelyn and whether or not the mother had alienated her from the father. The OCL assessor and the therapist working with Madelyn and her father gave extensive evidence. In the decision, Stevenson J. observed:

> *It is not inconceivable for Madelyn to place blame on Mr. Tran. Given her young age she most likely perceives him as the parent leaving the relationship (he had left the relationship on a number of occasions but had always come back); being responsible for the sale of the matrimonial home and the move; and more importantly, the loss of the family unit. Added to this are the past arguments and physical altercations that she witnessed, the ongoing conflict between the parties and Ms. Chen's constant upset and anger.* ***As Ms. Parker testified, Madelyn is placed in the unenviable position of not wanting to upset or disappoint either parent and her only way of coping, although it is not the way of most children, is to cut off contact with one parent.*** *Ms. Parker testified, as did both Mr. Tran and Ms. Chen, that Madelyn is very stubborn and was never able to cope well with change.*
>
> *Although Madelyn is clearly estranged from her father, I cannot fully attribute the blame for the estrangement to either party, although I accept Ms. Parker's evidence that Ms. Chen continues to be so upset and angry herself that she has not been able to help Madelyn separate her distress from Madelyn's own distress. Ms. Parker testified, as did Ms. Weisdorf, that* ***Madelyn is very much aware of how upset and distressed her mother is and Ms. Chen needs to take the initiative by supporting Madelyn's relationship with Mr. Tran, by telling Madelyn it is okay to have a relationship with her father and by telling her that Mr. Tran is a good person. Additionally, she needs to tell Madelyn that Madelyn's treatment of her father is unacceptable.*** [33]

Stevenson J. awarded sole custody to the mother and alternate weekend access for the daughter with the father. The order is multi-directional and a combination of a number

of the approaches set out in this paper to address alienation and overcome the estrangement problem.

6: **Keep the Courts Involved**

In recent cases, the courts have made every effort to be actively involved in an (alleged) alienation case from the outset. This involvement can take a number of forms, as is seen in the cases: strict case management by the same judge[34]; interim orders to either reverse the status quo or to motivate the alienator to correct his/her ways[35]; fixing dates for an automatic review[36]; and dispensing with the material change requirement, on a review or variation.[37]

In *Tran*[38], for example, the mother was granted sole custody following a trial. Due to what the court described as the mother's "troubling behaviour", however, her custody was made conditional on following the children's therapist's recommendations, participating in family therapy and seeking counseling for herself.

> *Ms. Chen shall have sole custody of the children Madelyn Tran, born March 21, 2001, and Ethan Jacob Tran, born December 13, 2006. She shall consult with Mr. Tran on all major decisions involving the children including health and education.* ***As a term and condition of Ms. Chen having sole custody of the children****, she shall follow psychotherapist Ms. Carol Jane Parker's ongoing recommendations, including participating in counselling with Ms. Parker, Mr. Tran and the children and in the "Overcoming Barriers" program in Vermont along with Mr. Tran and the children or any other program recommended by Ms. Parker or any professional retained to assist in the repair of the relationship between Mr. Tran and Madelyn.* ***As an additional term and condition of Ms. Chen having custody of the children****, she shall continue with her personal counselling to control her anger and emotional outbursts towards Mr. Tran and to learn to co-parent effectively.*[39]

Stevenson J. remained seized of the matter and ordered the parties to return to court on a case conference three months later to provide an update:

> *The Court shall remain seized of this matter and the parties shall attend before me at a case conference on a date to be scheduled prior to the end of September 2013, to provide an update as to the progress of the re-unification counselling between Mr. Tran and Madelyn with Ms. Parker (which counselling includes Ethan and Ms. Chen as determined by Ms. Parker) and an update on the "Overcoming Barriers" camp or any other program recommended by Ms. Parker or any professional retained to assist in the repair of the relationship between Mr. Tran and Madelyn.*[40]

Lastly, the father was permitted to return the custody matter without the requirement of a material change:

> *If there is any breach by Ms. Chen of these terms and conditions of her having sole custody, there shall be* ***no requirement that Mr. Tran prove a material change in circumstances with respect to a change in custody*** *and he shall be entitled to bring the matter immediately back to this Court to seek any appropriate remedy.*[41]

A similar approach was taken in *Chin Pang*[42] where, instead of dispensing with the material change threshold, the court simply held that the wife's continued breaches of the order constituted a material change. In custody matters, a simple material change is not sufficient: the material change has to be one which has an affect on the children's best interest in a fundamental way. In this case, the wife's breaches of the order undermined the parenting arrangement and revived the conflict between the parties, thereby interfering with the children's healthy relationship with their father.

The court agreed that the mother had undermined the order and affected the child's interests to such a degree as to justify variation of the order to grant the father sole custody. It is noteworthy that the father only sought to change decision-making and not the child's schedule which was left as two weeks on, two weeks off, maybe because he acknowledged a more significant change now having the child. Query whether a change in decision-making only will put a stop to the mother's antics.

7: **"Suggest" Counselling**

Although there remains some debate on the court's authority to order counselling, courts in alienation cases regularly do so without even referencing jurisdiction. Counselling for the parties, children, or any combination thereof, might stem from the court's jurisdiction to *"impose such other terms, conditions and restrictions"* in connection with a custody and access order *"as it thinks fit and just"*[43] or to make any *"additional order as the court considers necessary and proper in the circumstances."*[44] In the alternative, some courts have considered counselling an incident of custody. Whatever the jurisdiction, in alienation cases, counselling is an almost standard component of the order.

In *Milanizadeh*[45], for example, the father was found to be alienating the children from their mother. The order granted the mother custody and the father supervised access, and also required the father to attend counselling and other programs prior to obtaining unsupervised access. The father's later application for unsupervised access was denied. None of the evidence indicated that access should become unsupervised since the father

continued to raise adult issues with children and to downplay the mother's role to the children, constantly claiming that he was proper parent to have custody.

In *Tran*[46], the court ordered a myriad of counselling options, including: Overcoming Barriers Camp, family counselling, psychotherapy and individual counselling. Similarly, in *Fielding,*[47] therapeutic interventions ordered by the court included dyadic therapy for mother and Katie once a week for at least 9 months, individual psychotherapy for Katie, dyadic therapy for father and Natalie once a week for at least 6 months[48], individual psychotherapy for Natalie and individual psychotherapy for Sean.

The courts will often order therapy on an interim motion, so that these efforts can be well underway by the time of the trial. In *Valettas v Chrissanthakopoulos*[49], for example, there were not one but two orders for pre-trial counselling. In her report, the OCL assessor recommended that the father *"participate in therapeutic access visits with the children"* which would occur *"with a professional experienced with reintegration counseling"* occurring weekly at minimum.[50] Mossip J., seized of the matter, ordered that the parties cooperate with all aspects of the chosen therapist's reintegration program. Nine months later, the mother withdrew from therapy claiming the therapist has lost objectivity. The father had still not seen the children and brought a motion for sanctions against the mother in accordance with Rules 1(8) and 14(23) of the *Family Law Rules.* As a remedy under Rule 14, Lemon J. ordered an immediate resumption of the court ordered reunification therapy sessions.

An order that is becoming more prevalent in alienation cases is the requirement that the family, or certain members thereof, participate in a residential workshop. These workshops are designed to assist families, in particular the children and the targeted parent, in repairing relationships ruptured by alienation. Examples include Family Bridges, a program developed by Dr. Richard Warshak, or Overcoming Barriers, which was designed by Matthew J. Sullivan, Peggie A. Ward, and Robin M. Deutsch. In some cases, the court will order a targeted to participate with the children in a workshop. In others, once the targeted parent is awarded custody, she/he enjoys sole decision-making authority and, therefore, is able to pursue any form of therapeutic intervention considered appropriate, including residential workshops.

In *Tran*[51], the court was prepared to order attendance for the family at "Overcoming Barriers", on the recommendation of the child's therapist. The court went the other way in *S(N) v. N. (C.)*[52]. In that case, the parties had consented to an order for attendance at Family Reflections Reunification Camp ("FRRC") and requiring that the children be in the mother's sole custody for the one week of the program only. The judge and the parties had been under the mistaken impression that FRRC was a one-week program, with follow-up through local counsellors. When the parties learned FRRC was actually a one year process, the father moved to vacate the initial order. The mother sought to uphold the order and to secure further relief including custody of both children with no contact to the father, and an award compelling the father to comply with all entry requirements of the program. The mother claimed that she needed these orders as they were required by FRRC in order to *"ensure that there will be not only attendance and*

success in overcoming alienation from the mother during the program's originally proposed 4 days but that follow-up counselling to that end will succeed over the long haul."[53] The FRRC director was prepared to report to the court on progress but wanted sole authority to guide the therapeutic process and aftercare for the family. The judge denied the mother's request holding that the orders being sought by the mother were an inappropriate delegation of authority:

> *What I am being asked to do, in my view, is to substitute for the court's due process and therapeutic orders, a Program on the basis of no peer-reviewed research as to the success of this Program, and no independent evidence of its efficacy and its quality of accommodation and services. My order following the review will be based on expert and parental evidence of those who know these children best and may very well include a no-contact order for a period of time and temporary custody of the children in a neutral residential setting, depending on the evidence and my findings, followed by a gradual reintroduction of the father into the children's lives. It also may not. But the findings will be to use the best facilities and people we have to deal with this situation following a fair hearing and appraisal of the evidence of all relevant persons. I cannot cede the considerable powers granted this court under the statutes I am dealing with to act in the best interests of the children to a Program the experience and value of which I have no independent evidence.* [54]

Howden J. sympathized with the mother's desperate desire to get counselling in place as soon as possible but was forced to dismiss her motion anyway:

> *I understand completely N.S.'s feeling that trying anything is better than doing nothing. But that is not the issue. As a judicial officer with duties toward the welfare of these children as well as to the parties, I cannot act in the absence of evidence. This is one of several programs that have come on the scene recently and in each case, the court requires some evidence other than a program's own claims before the court entrusts two children to it for a long term program which will go well beyond the court's own process of review.* [55]

These residential programs are still relatively new, can only serve a limited number of families and are extremely costly. Some Ontario experts have been trained to conduct these workshops, which will make them more available and more cost effective.

8. Make a Finding of Contempt

Some parents resort to the bringing of a contempt motion as an attempt to address alienating behaviour. There is a three pronged test for contempt:

(i) the relevant order must be clear and unambiguous;
(ii) the fact of the order's existence must have been within the party's knowledge at the time of the breach; and
(iii) the party intentionally did or failed to do something in contravention of the order. This does not imply direct intention to disobey a court order. Wilful disregard is sufficient.

Proving contempt in an alienation case is complicated, and, hence, it is not a remedy that is often sought. It is difficult to prove beyond a reasonable doubt that the refusal of a child to see a parent is a result of the alienating parent's actions such that if grounds contempt. Hence, the focus has primarily been on the overt breach of actual orders, such as orders for access, in order to find contempt. It is unclear whether behaving in such a way as to manipulate children and poison them against a parent qualifies as contempt. The argument has succeeded in Manitoba but, to date, has failed in Ontario. [56]

When bringing a motion for contempt, counsel for the targeted parent must carefully consider the penalties. In some cases, the available penalties may "prove" the alienator "right" in the eyes of the alienated child, and make matters worse.

Some judges suspend contempt sentence until a review some months later. This type of order is meant to give the alienating parent time and an incentive to mend his/her ways. Unfortunately, as was seen in *F.(A.) v W.(J.)*[57], it is rare for a leopard to change its spots.

9. Make a "No Contact" Order

Consistent with the social science research confirming that a period spent completely apart from the alienator's toxic influence can be of benefit to children, the courts have been making no contact orders to address parental alienation.

In *S.(N.) v N.(C.)*[58] , the court was willing to consider making a no contact order but only on a motion and with proper evidence. Sending the alienator to jail, for example, will not likely do a great deal to mend the alienated child's relationship with the targeted parent. However, in certain cases, the change of custody order following a contempt finding has had a positive impact. In *Fielding*[59], an order was made preventing the mother from having any contact with Katie outside of therapy. Similarly, in *Vucenovic*[60], the court found that it would be in the child's best interests to be in the father's sole custody, with an order for no access to the mother pending further court order.

In *Vucenovic*, the parties initially enjoyed joint custody with primary residence to the mother and alternate weekend access to the father. On a contested motion, following the mother's frequent access denial, the order was varied and custody granted to the father. The mother's access was to be supervised at first, gradually increasing to a shared and unsupervised arrangement. Emilee ran away from the father's home to reside with the

mother, and refused to see the father. The court found that it was in Emilee's best interests to be placed in the sole custody of the father with no access to the mother:

> *It is clear that after considering all of the factors, it would be in the child's best interests to be placed in the custody of her father.* ***With respect to access, it most unfortunately is clear that it would not be in her best interests to have access with her mother as it would undermine the stability of her placement with her father and inevitably lead to a complete rupture in her relationship with her father as it has several times in the past, including most recently in the summer of 2012.***
>
> *While Ms. Rieschi claims to support Emilee's relationship with her father, it is clear that she does not really want Mr. Vucenovic to have access to Emilee because otherwise, she would not keep focusing on allegations that he always "lays his hands on her [Emilee]." She cannot on the one hand profess a wish for Emilee to have regular access with her father while on the other complain at length about Mr. Vucenovic's deficiencies as a person and parent, including having him charged on the eve of this trial on spurious allegations of harassment, and expect to be believed.*
>
> *Furthermore, it would not even be enough to have supervised visits with counselling as that was already tried and proved an insufficient safeguard. Ms. Rieschi would first have to demonstrate through individual treatment that she has changed...*
>
> ***Emilee cannot be further subjected to the back and forth changes of custody, to the hysterical access exchanges, to this battle any further. She deserves stability, permanence and emotional security and she is most likely to achieve that in the care of her father with no access to her mother***. [61]

10. Involve the Children's Aid Society

Involving the CAS is a controversial option and the subject of some debate. It is also the subject of an appeal, so we will have to wait and see how the appeal court weighs in on the subject.[62] On one side of the issue are those who believe that the court should be able to resort to whatever means are necessary to remedy alienation in the best interests of children. On the other side are those who suggest that the court has exceeded its

jurisdiction by making orders in private disputes that were never sought by the parties and/or which actively involve child protection authorities.

The "for" camp rely on the assertion that alienation is abuse and, as such, engages the CAS mandate. This notion forms the basis for Harper J.'s decision in *F. (A.) v. W.(J.)*. The matter was a review of a prior custody order, where the children were found to be in need of protection in accordance with s. 37(2) of the *Child and Family Services Act (CFSA)*. [63] Resort could not be had to the remedies available under the *CFSA*, however, because no application for protection had been brought and, even if it had the trial took place in a jurisdiction without a Family Division of the Superior Court. Harper J. was critical of the CAS who never "connected the dots" in the case by conducting a complete review of the family's file in order to determine the root of the problem. Had this been done, His Honour remarks, the CAS would have brought the case to court pursuant to the *CFSA* for a finding that the children were in need of protection.

The court was extremely concerned about the children's distorted reality regarding their father, found to be caused by the extremely negative conduct of the mother and her family over a lengthy period. The alienation had gotten to the point where the children were in hysterics at the mere thought of having to see their father. Following the initial hearing, the three children were placed in the alienating mother's care and custody, but under CAS supervision with very specific terms. The CAS supervision was said to be granted under section 34 of *Children's Law Reform Act* [64]. Section 34 permits the court to *"give such directions as it consider appropriate for the supervision of the custody or access by a person, a children's aid society or other body"* as well as the court's inherent

parens patriae jurisdiction to act in the best interests of the children and for their protection. Other aspects of the order included counselling for the children and the parents, and reports from the latter's therapists being filed in the court.

On the review, Harper J. considered whether the goals and expectations of the initial order had been met and set himself the task of determining whether or not the children remained "*in need of protection*". If the children were found to be in need of protection, the court had to consider what order would be in their best interests. The frustration of being limited in the types of orders that could be made on the review, as on the initial application, was evident.

It was clear at the review that the mother had made no progress. If anything, the alienation had become more extreme. The mother paid lip service to the benefits of the children's time with their father, but "*never gave the children permission to love and respect him.*"[65]. Harper J. observed:

> *Based on all of the evidence discussed above,* ***I find that all three of these children continue to suffer severe emotional abuse and that abuse is caused by their mother. She is not able to disengage her extreme anger and disdain for the father and as a result, has led the children to have severe anxiety about anything to do with their father.*** *This anxiety has manifested itself in the children expressing a desire to hurt themselves. At times, A.F. whips them up into such an emotional swirl that they become hysterical. They have been taught that it is okay to disrespect their father and that anyone who supports him is frightening.* ***They show a complete disregard for the impact of their conduct on their father, and a shocking lack of empathy.*** *They have exhibited cruel and disrespectful conduct to his wife S.W., who they had previously grown to love and respect. In many ways, their most disturbing behaviour has been the abuse they have foisted on the dog Bella, a pet they were previously affectionate with and loved. I find that A.F.'s emotional abuse of the children has caused this behaviour. The status quo is frightening and dangerous for the children, and it cannot continue.* [66]

The children were removed from the mother's custody, with Harper J. Finding it was "*the worst case of emotional abuse*"[67] ever seen. The father was awarded sole custody and the mother's access to the children was limited to access during the therapy sessions only, to be facilitated and supervised by CAS. The mother's access had the potential of being increased over time, based upon the positive recommendations of the therapist. The mother would have to bring a Motion to Change to modify the access terms, but Harper J. made it very clear that no change would be forthcoming unless and until the mother could "*demonstrate that she is able to both act and articulate to the children in a manner that promotes the ability of the children to have a loving relationship with both of their parents."*[68]

S. (N.) v. N. (C.) is another case where the court has resort to the CAS.[69] A Newmarket case, it avoids Harper J.'s jurisdiction conundrum by being a Family Court Site with jurisdiction under the *Child and Family Services Act.* In 2008, following a number of skirmishes, court appearances and CAS reports, Wildman J. made an initial order of custody to the mother, a period of no access to the father and monitoring by CAS. Time went on, an assessment was underway, and the father began to exercise regular and unsupervised access. One of the children ran away in response to the mother's discipline, and moved in with the father. The father and his sister then orchestrated having the mother charged criminally with the sexual assault of that child. Care and control of the children was switched to the father, with a no contact order against the mother. By the time of the trial, the 14 year old son was undergoing individual therapy

but having no contact with his mother. The 12 year old daughter was having limited contact with the mother, through re-unification counselling.

Howden J. made a number of insightful observations on the hybrid nature of the conflict between the parties:

> *They have each played a part in where their children are now, not equal but significant: two young kids, having watched their parents insult each other over and over, swear at each other, no doubt push each other around at times; the kids trying to get between them, to somehow make it all stop,* ***never out of the pressure cooker atmosphere that could blow up or dissolve at any time;*** *suffering perceived indignities, figuratively rapped fingers, and (in their view) unfairly withdrawn privileges or repetitive grounding at the hands of one; and being courted and petted and made "safe" by the other who would pray with them for the evil one to somehow receive "help" from the all-powerful long-suffering god who is their father and all that is good. But nevertheless they were pulled by his undertow into one side of a bitter break-up and having their own perceptions warped by the continuing suggestions of their father's idea of all the bad stuff she was allegedly doing.....* [70]

Although the court held that the parties had *"each played a part in damaging the children for years"*, the father's alienating behaviour was held to be the root of the problem. Howden J. then struggled with a problem that exists in many alienation cases: not wanting to 'reward' the alienator with custody. The court was mindful of the fact that removing the son from his father's care might cause further damage by removing him too abruptly from his psychological parent, but was aware keeping him in the father's custody would send the wrong message.

To address this dilemma, Howden J. articulated a preference for placing the son in a neutral setting, with no contact with the father, at least for a period of time. The mother had, in fact, sought the alternative relief of the son's a temporary placement in a foster

home under the supervision of the CAS while reunification counselling continued, so that he could be away from the influence and presence of the father. The mother did not bring the proceeding under the *CFSA*, so the court had no jurisdiction to make the requested section 57 order placing the son in a foster home under the care of the CAS. Howden J. did, however, opine that such a placement might be appropriate on the review if the parties did not make the gains expected.

The final determination of the appropriate custodial arrangement for the son was as follows:

> *...I cannot say that there is a clear case at the present time that A.S.N. would be found a child in need of protection without trying the option of intensifying his counselling while leaving his care with his father for the time being. There is no evidence at the present time that the respondent could possibly keep A.S.N. in her care with his present distorted and persecuted feelings toward her. And it would have a devastating impact on A.S.N. in his present frame of mind, probably damage irreparably any chance for a reunification of the mother with A.S.N. for many years. There is no evidence that anyone else could provide a suitable home for A.S.N. for the short term while his therapy continues.*
>
> *With the Society's consent, I find it necessary that the respondent's care of A.S.N. be subject to the supervision of the Durham Region Children's Aid Society as the Society for the region including A.S.N.'s residence in Pickering with the same caveats as for the supervision of A.V.N.'s custody but much more so in A.S.N.'s case.* ***If there is any ground that the Society may determine in its sole discretion for believing that the respondent is acting in any way other than promoting in a positive light the children's relationship with their mother and by example always referring to her with respect, then it shall be reported to me forthwith by courier to my chambers in Barrie. I take the respondent at his word, until shown otherwise, that he will work toward the goal of a complete reconciliation of the children with their mother and equal time for the children with each parent but I will not presume anything in his favour (or against his continued care of the children) without evidence.*** *There will also be an order for reasonable access by the applicant to A.S.N., effective as soon as but not before Dr. Collins and Dr. Holloway of the Willow Centre see both mother and son are ready for that step.*

> *If the first report to me from the Willow Centre does not show some positive progress toward the reunification goals agreed to by the parties, the court reserves the right to bring this matter forward on seven days notice to both parents and to the Children's Aid Society to receive evidence and hear submissions as to why the present custodial order should continue.* [71]

Should family lawyers now include claims under the *Child and Family Services Act* when dealing with cases of alienation? Should an individual litigant even have resort to that statute? Or do we plead CAS supervision be granted under section 34 of *Children's Law Reform Act?* Do we add requests that the court exercise its *parens patriae* jurisdiction to act in place of a parent for the protection of a child? Query how effective the CAS can be in alienation cases, when that organization and its workers are already more than overloaded with children physically at risk.

11. Do Not Make a Parallel Parenting Order

In a few alienation cases, a party (notably the alienating parent) has tried to convince the courts to make a parallel parenting order. There are two types of such orders: divided parallel parenting and full parallel parenting. The former is an order where the areas of authority are divided, for example one parent has religious decision-making and the other makes educational decisions. The latter is where each parent has the right to make major decisions for the child(ren) in every area when they are in that parent's care.

In H. *(K.) v. R. (T.U.)*[72], the parties had two children, ages 7 and 4. At trial, the father proposed that the court make a parallel-parenting order, such that each parent would

exercise *"full parenting and guardianship rights independently of the other".* The mother would be responsible for making religious and medical decisions, the father would make sports/extracurricular activity decisions and they would jointly make educational decisions. The mother sought an order for sole custody. In considering the appropriate custody order, Sherr J. noted that evidence of alienation could be determinative, citing earlier decisions on parallel parenting

> *If the alienating parent is an otherwise loving, attentive, involved, competent and very important to the child, a parallel parenting arrangement may be considered appropriate as a means of safeguarding the other party's role in the child's life. On the other hand, if the level of alienation is so significant that a parallel parenting order will not be effective in achieving a balance of parental involvement and will be contrary to the child's best interests, a sole custody order may be more appropriate.*
>
> ***...Where both parties have engaged in alienating behaviour, but the evidence indicates that one of them is more likely to foster an ongoing relationship between the child and the other parent, this finding may tip the scale in favour of a sole custody order***. [73]

Sherr J. would not make a parallel parenting order and awarded custody to the mother. While acknowledging certain benefits to the father's proposal, the many factors operating against it took the day, being:

> *a)* ***The father has been a major contributor to the family conflict. When he doesn't get his own way, he can be controlling, demanding and, at times, threatening.***
>
> *b) The father can be unreliable, as evidenced by his frequent cancellation of visits with little notice.*
>
> *c) The mother has been the children's primary caregiver. Aside from her dealings with the father, she has made responsible decisions for the children.*
>
> *d)* ***There is a real possibility of a spillover effect with respect to decision-making -***

that the parties will disagree about whose sphere of decision-making a decision will fall under.

e) It is likely that the parents will have conflict over scheduling activities and appointments, since their communication is so poor. The children would likely be caught in the middle of these conflicts.

f) The geographic distance between the parents is too far to make such an order practical, particularly given their level of conflict. The problems associated with the geographic distance between the parents (such as arranging access exchanges and lateness for visits) have been a major contributor to the conflict.

g) ***The conflict between the parents is far too high to make the father's proposal workable****. If the father is granted decision-making over extracurricular activities, the evidence indicates that this will just create more opportunity for conflict. The parents cannot even coordinate exchange arrangements consistently, let alone adding the burden of the father making arrangements and imposing the obligation upon the mother of getting the children to his chosen activities.*

h) ***The father appeared to be more focused on his rights than on the best interests of the children****. It is interesting to note that the temporary orders provided the father with significant participatory rights with the children and it appears that he has rarely exercised them.* ***It appeared to the court that his request for a parallel-parenting order was more about asserting control and winning (or not letting the mother win) than about his desire to become more involved in decision-making. There is a real risk in this case that a parallel-parenting order will have the adverse effect of escalating the conflict between the parties.*** [74]

Similarly, in *Chin Pang*[75], on a motion to vary a final order, Price J. would not make a parallel parenting order. Such an order would put the children in the middle of conflict every few days. Instead, custody was awarded to the boy's father:

Applying the above considerations, I conclude that a parallel parenting order is not appropriate in the present case. Ms. Chin Pang has played a more significant role in Jude's life only because she has repeatedly impeded Mr. Chin Pang's access to Jude. ***I find that Mr. and Ms. Chin Pang are equally competent and loving parents but that they have not been able to focus jointly on Jude's best interests owing to their inability to manage their conflict effectively. Ms. Chin Pang's continued resistance***

> ***to Mr. Chin Pang's access to Jude offers no realistic prospect at the present time for a parallel custody arrangement to work.*** *While both parties have undoubtedly contributed to their present impasse, I find that Mr. Chin Pang is the more likely to foster an ongoing relationship between Jude and Ms. Chin Pang than Ms. Chin Pang is to foster Jude's relationship with him.*[76]

In *Rodriguez v Guignard*[77], two and a half year old Ysabella's father (Rodriguez) and paternal grandmother (Gutierrez) pitted themselves against her mother (Guignard). The court came to the same conclusion on parallel parenting:

> *I find that in the present case an order for parallel custody would not be in Ysabella's interests. While both Mr. Rodriguez and Ms. Guignard have played important roles in Ysabella's life, and are capable of making decisions that would be in her interests, I am not satisfied that Mr. Rodriguez and his mother are consistently able to place her needs and interests above their own. They have displayed such a negative attitude toward Ms. Guignard that I find that an arrangement for equal parenting time would be likely to marginalize Ms. Guignard's role in Ysabella's life. I do not have similar concerns about a likelihood that Ms. Guignard will marginalize Mr. Rodriguez's and his mother's involvement in Ysabella's life.*[78][79]

The father had brought a motion for interim custody and increased parenting time with Ysabella pending trial. The mother wanted Ysabella's primary residence with her, in order to maintain the stability of the status quo. The court held sole custody to the mother was best until full evidence could be led at trial:

> *Ysabella's best interests will be served by Ms. Guignard having sole custody of her, with Mr. Rodriguez having access to her every Tuesday and Thursday, and on alternate weeks from Thursday to Saturday. This arrangement will maximize Mr. Rodriguez's contact on the two days each week when his employer allows him to telecommute from home. On those days, Ms. Gutierrez will be able to care for Ysabella from 12:30 p.m., if Mr. Rodriguez is not available, until 8:00 p.m., when Ms. Guignard will resume her care. This arrangement will also provide two consecutive overnight access periods on alternate weeks, which will maximize the time each parent spends with Ysabella without tilting the balance toward Mr. Rodriguez and his mother in such a fashion as to compromise Ms. Guignard's role in Ysabella's life.*[80]

12. Meet with the Kids

Whether or not judges should be meeting during the trial with the children who are the subject of custody litigation remains a controversial issue. What seems acceptable however, particularly in alienation cases, is the judge meeting with the children to present his or her reasons.

In *F.(A.) v W.(J.)*[81], Harper J. clearly articulated the reasoning behind his meeting with the children. The encounter is described in the judgment as follows:

> *I gave my June 27, 2011 reasons orally, as in high conflict and chronic emotionally abusive cases, the parties often benefit from reading, seeing, and hearing the judge's reasoning and directions on how the family is to move forward. I also discussed my judgment with the children.* ***Speaking directly with the children about the judgment allows them to get an unfiltered version of what is expected of all of the family members and provides an equal starting point. Giving the judgment orally and discussing it with the children allows for a reset of family dynamics and a refocus on how best to meet the children's needs.***
>
> *After I orally gave my reasons to the parents, I went into a separate room where the children and social workers from the CAS were waiting.* ***I told the children that I was the one who made the decision after an extensive review of all the evidence. I assured them that they were going to stay in the custody of their mother, but that I was putting rules into place that everyone had to follow. I told them that it was my view that the rules were in their best interests and that it was my hope the rules would benefit everyone. I assured the children that my intention was to provide them with the opportunity to be able to love both of their parents without feeling that they had to choose between one parent or the other.*** *I told them that I would bring both of their parents into the room separately to talk about their support for the new set of rules. Each time I talked to the children, either alone or with either of their parents, I returned to the courtroom and summarized what had taken place on the record.*

> *When I came into the room with their mother, the children asked A.F. to get me to change my mind. The mother supported my decision and told them that it was important for them to listen to me. They continued to protest and insisted that they should not have to see their father and questioned when they could finally make their own decision to stop seeing him. I emphasized that although judges consider children's views, judges must make decisions based on a number of other considerations in order to reach a decision that is in the children's best interest.*
>
> *When I entered the room with their father, all three children were seated with their backs to the door, facing the wall and ignoring both their father and me. I firmly told them to turn around and listen to what their father had to say. He told them that he loved them and that he hoped that someday they would be able to, once again, say that they loved him too. The children did not respond or even acknowledge him.*[82]

In *Vucenovic*[83], Pawajee J. did not meet separately with the child, but asked that she be present when the decision was presented:

> *I asked that Emilee be at court to hear the decision out of concern that the decision could not be implemented if she were in Ms. Rieschi's residence. There has been a sad pattern in this case of access exchanges involving great upset at first for Emilee or even sometimes proving impossible, as with the recent attempt at an exchange at a police station July 2012. That pattern was borne out again on September 6, 2012. While Emilee was at first hysterical at the thought of going with her father, she eventually went with him willingly.*
>
> *Emilee cannot be further subjected to the back and forth changes of custody, to the hysterical access exchanges, to this battle any further. She deserves stability, permanence and emotional security and she is most likely to achieve that in the care of her father with no access to her mother.* [84]

13. When All Else Fails.....

In extreme cases, the alienating parent manages to completely exclude the targeted parent from the child's life, despite the best and combined efforts of the courts and mental health professionals. Options at this point are limited.

Counsel used to recommend that the targeted parent write a letter to the child, say goodbye, explain his/her side, to let the child know they will always be loved and that the parent will always be open to having a relationship. The letter was a last ditch effort, more of a way for counsel to try to help the targeted parent feel better about losing a child than any kind of solution. Putting a band-aid on a gaping chest wound. Everyone acknowledged that, if the letter even made it into the child's hands, its content would fall on deaf ears. An alienated child would not likely be open to hearing such statements from the targeted parent. S/he would ignore the content of the letter and move on.

I have learned of a newer approach to the worst of the worst cases. Children who are the focus of high conflict custody litigation will often, as adults, have a need to discover "what really happened". To do so, they will likely have recourse to the court record. Counting on this fact, creative counsel are asking the court to put an alienating parent's actions on the record. By asking the court to make a finding that a parent is an alienator, counsel hope that, if s/he revisits the issue as an adult, the previously alienated child might be able to see what actually took place in a different light.

In a case that emanates from my office, for example, the father purposely and maliciously set about a course of action to terminate the mother's relationship with the children. The father was in breach of a series of orders calling for joint custody and equal residence. As a result, the mother was no longer seeing the children and, essentially had, no relationship with them. Dr. Fidler had been jointly retained to determine the cause of the children's distress and the divisions in the family. Her findings, taken as a whole, were a clear statement that the father was at fault.

The mother appreciated that, at such a late stage in the process, any specific remedy regarding the children was doomed to fail. On the motion she was, therefore, not seeking a change in custody or any other similar relief. Instead, the mother sought a declaration on the record that the father was an alienator, that he had shown a clear pattern of disdain and disregard for the court and the administration of justice, that his actions had "*shattered*" the family and were the direct cause of the mother being cut out of her daughters' lives.

The mother submitted that part of the court's mandate in addressing best interest was to ensure that the children could one day access the truth about the events between their parents. It was important to the mother that the court identify the causes of the current situation on the record, since the court record was the only independent recording of fact. As such, it would one day be an essential part of her daughters' understanding of the events that took place in their lives at a time when they were too young to appreciate the

facts. The case is a poignant statement about the emotional depths to which this mother has fallen. We await the motion judge's decision.

III. Conclusion

Alienation cases are the toughest of the high conflict custody cases. Most of the time, the children's circumstances get worse before they get better if, in fact, they ever improve at all. Alienation cases extract a significant emotional toll on everyone involved: the parties, the children and even the professionals working with the family.

Taking on a case where there is even a suggestion of alienation is not for everyone. It is not for the faint of heart. Alienation cases are best suited to a certain kind of family lawyer. From the case law, it is evident that this lawyer requires intelligence, sensitivity and focus. She must be detail oriented. Each step lays the foundation for what comes next. She must be well-informed about the mental health literature, and prepared to keep up to date on alienation research. New developments in this area could play a role in how the file is managed. No one – lawyer, judge or mental health professional – has yet found a fool proof way to resolve alienation cases and protect these most vulnerable of children. New and creative approaches are helpful and, arguably, even necessary.

Alienation cases require almost daily attention. Whether your client is the alleged alienator or alienatee, she/he will be in need of either constant guidance or continuous

reassurance. The lawyer taking alienation cases must be prepared to be in it for the long haul. These cases take years to "resolve", whatever resolution looks like. Alienation cases take ongoing attention and the active involvement of counsel every step of the way. There is really no period of time when this case will be "quiet". If you fear that you may not have the ability or desire to see the case through, then refer it to someone who does. Or work the case with co-counsel. Two heads and hearts are better than one.

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[1] *Fielding v. Fielding, 2013 CarswellOnt 2619 (S.C.J.) at paragraph 27*
[2] Ibid, paragraph 165
[3] See, for example, the children's behavior in F(A.) v. W. (J.) 2013 Carswell Ont. 9231 (S.C.J.)
[4] 2007 New York: W.W. Norton and Company.
[5] Fielding, supra, paragraph 36.
[6] 2012 CarswellOnt 8014 (S.C.J.) as cited in *Glick v Cale* (2013) CarswellOnt 1409 (S.C.J.)
[7] 2012 CarswellOnt 11748 (S.C.J.)
[8] Ibid, at paragraphs 62-63.
[9] 2013 CarswellOnt 3021 (S.C.J.)
[10] 2013 CarswellOnt 1465 (S.C.J.)
[11] Ibid, paragraphs 9-11.
[12] 2013 CarswellMan 126 (C.A.)
[13] 2013 CarswellOnt 11798 (S.C.J.)
[14] The precise nature of this report is unclear. It appears to be like a custody and access assessment, but that is not evident form the decision.
[15] *Thom*, supra, paragraph 12
[16] Ibid, paragraph 16.
[17] *Clements v Merriam* 2012 CarswellOnt 14316 (C.J.) paragraphs 36-38
[18] CarswellQue 5827 (C.A.)
[19] Ibid, at paragraphs 34-37.
[20] 2013 CarswellOnt 503 (S.C.J.)
[21] Ibid, paragraph 60.
[22] Ibid, paragraph 120.
[23] 2013 CarswellOnt 5554 (S.C.J.)
[24] 2013 CarswellOnt 9231 (S.C.J.)
[25] 2013 CarswellOnt 9231 (S.C.J.) at paragraph 5.
[26] Ibid, paragraphs 3-4.
[27] Ibid.
[28] Ibid., paragraph 144.
[29] Ibid.
[30] Ibid, paragraphs 160-167.

[31] Ibid, paragraph 171.
[32] *Veneman v. Veneman* 2012 CarswellOnt 14478 (S.C.J.), *Giroux v. Giroux* 2013 CarswellOnt 680 (S.C.J.), S*.(N.) v. N.(C.)* 2013 CarswellOnt 400 9 (S.C.J.)
[33] *Tran v. Chen* 2013 CarswellOnt 11094 (S.C.J.) at paragraphs 107-108
[34] *L.(T.L.L.) v. L.(J.J.),* supra
[35] *Shalma*, supra.
[36] *F.(A.) v. W.(J.).,* supra.
[37] *Tran v. Chen*, 2013 CarswellOnt 11094 (S.C.J.)
[38] Ibid.
[39] Ibid, paragraph 177.
[40] Ibid.
[41] Ibid.
[42] *Chin Pang v. Chuh Pang* 2013 CarswellOnt 7824 (S.C.J.)
[43] *Divorce Act* R.S.C. 1985, c. 3 (2nd Supp) as am. Section 16(6)
[44] *Children's Law Reform Act*, R.S.O. 1990 c. C.12, as am. Section 28(1)
[45] 2013 CarswellOnt 1465 (S.C.J.)
[46] Supra.
[47] Supra.
[48] Because the father's relationship with Natalie was 3 months less disturbed than the mother's relationship with Kate?
[49] 2013 CarswellOnt 11106 (S.C.J.)
[50] Ibid.
[51] Supra.
[52] 2013 CarswellOnt 10036 (S.C.J.)
[53] Ibid., paragraph 1
[54] Ibid., paragraph 7
[55] Ibid., paragraph 9
[56] *Gendreau v. Campbell*, 2005 CarswellMan 372 (Q.B.), and: *Reithofer v. Dingley* 2000 CarswellOnt 1087, (S.C.J.).
[57] *F.(A.) v. W. (J.),* Supra.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid, paragraphs 62-66
[62] Harper J.'s decision in *F.(A.) v. W.(J.)* 2013 CarswellOnt 9231 (S.C.J.) is under appeal.
[63] See 2011 CarswellOnt 5622 (S.C.J.)
[64] R.S.O. 1990, c. C. 12
[65] Supra, at paragraph 133.
[66] Supra, paragraph 132
[67] Ibid, at paragraph 136
[68] Ibid, at paragraph 144
[69] An interesting aspect of this case is that the father began his alienating behaviour during the marriage, before the parties had even separated. The early bird catches the worm, I suppose.
[70] Ibid, paragraph 101.
[71] Ibid, paragraph 133-135
[72] 2013 CarswellOnt 10544 (S.C.J.).
[73] Ibid.

[74] Ibid, at paragraph 62.
[75] 2013 CarswellOnt 7824 (S.C.J.)
[76] Ibid, paragraph 138.
[77] [77] 2013 CarswellOnt 503 (S.C.J.) at paragraph 89
[78] Ibid., paragraph 89

[80] Ibid, paragraph 119.
[81] *F.(A.) v. W.(J.),* Supra.
[82] Ibid, paragraph 11-14.
[83] *Vucenovic*, Supra.
[84] Ibid, paragraph 65-66.