

Best Interests of the Parent?

Moving Beyond Controversy & Refocusing on the Children in
Parental Alienation

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Table of Contents

1. Introduction.....	3
2. Parental alienation in high conflict divorces.....	4
<i>a. Defining the legal concept</i>	<i>4</i>
<i>b. Remedies for parental alienation</i>	<i>6</i>
3. Canadian legislation does not address parental alienation directly	9
4. Retaliatory parental alienation claims and family violence.....	11
5. Parental alienation is a necessary legal tool.....	14
6. Moving away from controversy and single cause theory	16
<i>a. Refocusing on the best interests of the child</i>	<i>19</i>
7. Conclusion	23

1. Introduction

An overwhelming majority of parental alienation literature right now focuses on controversy. There are problems surrounding whether lawyers and courts are exaggerating alienating behaviours, organizations calling for the ban of parental alienation claims because they can be used as a sword against survivors of family violence, and parties searching for a single cause or one alienating behaviour to explain why a child rejects a parent unfairly.

Parental alienation is a difficult and relatively new area of family law in Canada; the first claims appeared in courts only thirty years ago. And while Parliament has never addressed the legal elements of a parental alienation claim directly, these claims are being made more and more across the country each year, putting lawyers and courts at the forefront of a developing area of the law. The best interests of the child, however, has been lost in the noise.

In this paper, I will argue that although the *Divorce Act* states the best interests of the child should be the *only* consideration for courts making parenting or contact orders in the context of divorce, this consideration appears as an afterthought in parental alienation research and legal practice. Courts, lawyers, and researchers can do more to promote positive outcomes for families in parental alienation cases by moving beyond the polarization and controversy, rejecting single cause theory and blame games, and refocusing on the best interests of the child factors.

This paper is divided into five sections: Part 2 will define parental alienation and provide a brief history of the legal concept in Canada. Part 3 will discuss Parliament's response to parental alienation, and consider what guidance is provided by section 16 of the *Divorce Act* (and what guidance is not). In Part 4, this paper will detail the controversy surrounding parental alienation claims, specifically calls to action from feminist organizations to ban parental

alienation from Canadian courts because of its intersection with allegations of family violence. Part 5 will advocate that despite these calls, parental alienation claims offer a necessary last resort for suffering families. Finally, Part 6 will discuss how researchers, courts, and lawyers can move beyond the polarization and controversy characterizing parental alienation claims and refocus on the best interests of the child.

2. Parental alienation in high conflict divorces¹

a. Defining the legal concept

The reality of high conflict divorces is elevated stress levels for parties.² Emotions are high, as spouses face tough decisions and navigate difficult new terrain. It is inevitable that those experiencing divorce who are also parents may become frustrated with their former spouse. The stress of divorce is compounded by re-arranging parenting plans and negotiating decision-making responsibility within the context of new routines and living situations. But does one parent's negative attitudes towards their former spouse inevitably get passed along to their child?³ When does this behaviour rise to the level of alienation?

Parental alienation is a child's denial of one parent (the rejected parent) due to the negative influence of the other parent (the preferred parent). Researchers and Canadian courts offer a slew of definitions for parental alienation, but common among them is that the rejected parent is unjustifiably shunned by their child. Importantly, this distinguishes parental alienation

¹ For the purposes of this paper, I will focus on parental alienation in high conflict divorces, as governed by the federal *Divorce Act*. Parental alienation claims raised in parenting matters for unmarried couples fall under provincial legislation, including the *Family Law Act* in Ontario; *Divorce Act*, RSC 1985, c 3; *Family Law Act*, RSO 1990, c F 3.

² Frank Trovato, "A Longitudinal Analysis of Divorce and Suicide in Canada" (1987) 49:1 JMF 193.

³ For consistency, I will refer to a singular child in parental alienation claims following divorce instead of multiple children although, of course, more than one child can be alienated by their parent.

from justified estrangement, which is when a child turns away from a parent because of that parent's negative behaviours including family violence or child abuse.⁴ Judges making findings of parental alienation in Canadian cases will often state directly that the rejected parent is capable of being a good and supportive caregiver to the child.⁵

The invention of parental alienation is credited to American child psychiatrist, Dr. Richard Gardner in the 1980s. Gardner provided eight criteria for making a finding of “parental alienation syndrome”.⁶ Long before Gardner, however, in 1949, an Austrian psychoanalyst named Wilhelm Reich identified that divorcing parents exhibit alienating behaviours, noting that divorce proceedings can aggravate personality differences between parents.⁷

As a legal concept, parental alienation has only existed for thirty years.⁸ The first use of the term “alienation” in Canadian courts was in 1989, but there were references in prior decisions to behaviour where one parent influences a child to reject the other parent.

Since parental alienation claims first appeared in Canadian courts, their incidence has increased dramatically. A study done at Osgoode Hall Law School in 2022 showed that while there were only 167 cases involving parental alienation between 2003 and 2007, there were 567

⁴ I will use the term “family violence” in this paper to include a broad range of abusive behaviour within families, including intimate partner violence and child abuse; Government of Canada, “Family Violence: Relevance in family law” (2018) *Department of Justice Canada*, online: <<https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/sept01.html>>; Nicholas Bala, Suzanne Hunt & Carolyn McCarney, “Parental Alienation: Canadian Court Cases 1989-2008” (2010) 48:1 *Fam Ct Rev* 164 at 167 [Bala Canadian Court Cases]; Zechariah Martin, “Remedies for Parental Alienation in Canadian Family Law” (2023) 42:1 *Can Fam Law Q* 85 at 86 [Martin Remedies].

⁵ Richard Warshak, “Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence” (2003) 37:2 *Fam LQ* 273 at 287.

⁶ Gardner's eight symptoms are: “The denigration campaign against the nonpreferred parent; weak, poor or unrealistic rationalizations for nonpreferred parent; lack of ambivalence towards the nonpreferred parent; the independent-thinker phenomenon (child claims that their resistance derives from their own thinking); child alignments with preferred parent during conflict or disagreements; absence of guilty over cruelty to, and/or exploitation of the nonpreferred parent; borrowed scenarios (child tells preferred parent's story about the non-preferred parent); spread of animosity to the extended family and/or friends of the nonpreferred parent”; Telma Moreira Marques, I Narcisco, LC Ferreira, “Empirical research on parental alienation: A descriptive literature review” (2020) 119 *Children and Youth Services Review* 1 at 1.

⁷ Wilhelm Reich, *Character Analysis*, 3rd ed (New York: Orgone Institute Press, 1949) at 265.

⁸ Bala Canadian Court Cases, *supra* note 4 at 165.

between 2018 and 2022. This research was done by counting the cases on CanLII in which parental alienation was claimed.⁹ The author suggested that the increase in parental alienation claims could be due a several factors including, an increase in alienating behaviour between parents; a greater awareness of the court as a legal recourse for desperate rejected parents; more parents divorcing in general; or a greater involvement by mothers and fathers post-divorce.¹⁰

Whatever the reason for the increase in parental alienation claims, this uptick has been accompanied by publicity and controversy. In 2008, well-known actor Alec Baldwin claimed to have been alienated by his former spouse and spoke out about parental alienation during a very public book tour for his novel *A Promise to Ourselves: A Journey Through Fatherhood and Divorce*.¹¹ Baldwin's statements incited discussion among "men's rights" groups, which crossed the border into Canada. Parental alienation became so prevalent in the public discourse during the early 2000s that the Toronto Star characterized it as a "plague".¹²

b. Remedies for parental alienation

When a finding of parental alienation is made, the court may order several remedies. The most common is an order for a reversal in the parenting arrangements. One study found that a reversal of the parenting arrangement was ordered in 52 out of 106 (49%) cases where parental

⁹ Martin Remedies, *supra* note 4 at 86.

¹⁰ Bala Canadian Court Cases, *supra* note 4 at 165.

¹¹ Baldwin took issue with the court process and the lawyers involved in his matter. He said that courts try to delay conflict resolution in parental alienation claims because it "lines their pockets with a lot of money". He also took aim at the concept of parental alienation itself but took an opposite position to present day critics. Baldwin called parental alienation cases "civil proceedings that mete out criminal punishment" and claimed that 80% of divorces involve alienating behaviour; Alec Baldwin & Mark Tabb, *A Promise to Ourselves: A Journey Through Fatherhood and Divorce*, 1st ed (New York: St Martin's Press, 2008); WWMFWBOY, "Parental Alienation Syndrom [SIC] – Alec Baldwin on CNN" (2009) *YouTube* online: <<https://www.youtube.com/watch?v=u38LzIYp78k>>.

¹² Susan Pigg, "How to deal with 'toxic' parents" (2009) *Toronto Star* online: <https://www.thestar.com/life/health-wellness/how-to-deal-with-toxic-parents/article_832f9fe3-efe4-5cde-b6bf-1dd04534e7ef.html>.

alienation was found.¹³ A reversal of the parenting arrangement includes altering parenting time, decision-making responsibility, primary residence, and contact. A judge will make a parenting order changing one or many elements of the present arrangement depending on what they consider to be in the best interests of the child.

In extreme situations, the preferred parent and primary caregiver will lose their parenting time and sole decision-making responsibility over the child, and it will be transferred to the rejected parent. These orders often also restrict the preferred parent from being in contact with the child for a specified period.¹⁴ The rationale is that this will give the child time to heal their relationship with the rejected parent before reintegrating the other parent back into their life.

A reversal in parenting arrangements is a difficult outcome for all involved, both parents and the child. An alienated child may feel fearful of the rejected parent, and while they are getting to know the rejected parent again, their preferred parent is removed from their life. Many critics of parental alienation express concerns over the potential traumatic long term effects of reversals in parenting arrangements on the health and well-being of the child.¹⁵

Judges do not order reversals of the parenting arrangement lightly. Many written decisions show judges grappling with the toll this dramatic change may take on the child, in the short and longer term. However, courts see fit to provide this remedy because of the view that it is in the long term best interests of the child to have a relationship with both parents.¹⁶ If one parent is alienating the child, the hope is that with some time and space, and an opportunity to

¹³ Much of the research refers to this remedy as a “reversal of custody”, using the old language from before the March 2021 amendments to the *Divorce Act*, or the American terminology; Bala Canadian Court Cases, *supra* note 4 at 172.

¹⁴ Bala Canadian Court Cases, *ibid* at 171.

¹⁵ Joan B Kelly and Janet R Johnston, “The Alienated Child: A Reformulation of Parental Alienation Syndrome” (2001) 39:1 Fam Court Rev 249.

¹⁶ More on this later.

rebuild the relationship with the rejected parent, the child will come to have two healthy relationships with their parents in the future.

This remedy reflects a ‘short term pain, long term gain’ mentality that, while exceptionally difficult for parents and children, seems to provide better outcomes in the longer term regarding the best interests of the child. Researchers studying the effects of parental alienation argue that if a child remains with the preferred parent who continues alienating them, they are more likely to develop behavioural issues and have difficulty sustaining their own relationships when they are older.¹⁷ However, given that the first parental alienation claim in Canada was only in 1989, the long term effects of this remedy will not fully be known or understood until these children are adults.

An order reversing the parenting arrangements also reflects the time-sensitive nature of parental alienation. Early responses are desirable as a child’s rejection of the alienated parent will likely worsen over time. When courts can intervene quickly there is a greater chance that the child’s relationship with the rejected parent will recover.¹⁸

A 2017 decision from the Ontario Superior Court of Justice explained the time sensitive nature of parental alienation claims, writing: “If the alienating parent continues to have unfettered access to the children, there is little doubt that the poisoning of the children’s minds will continue. At some point, the restoration of a relationship with the other parent becomes much more difficult, if not impossible”.¹⁹ Courts anticipate a point of ‘no return’, after which all existing remedies would be insufficient to mend the broken parent-child relationship.

¹⁷ Naomi Ben-Ami & Amy JL Baker, “The Long-Term Correlates of Childhood Exposure to Parental Alienation on Adult Self-Sufficiency and Well-Being” (2012) 40:2 AM J Fam Ther 169 at 173.

¹⁸ Barbara J Fidler & Nicholas Bala, “Concepts, Controversies and Conundrums of “Alienation”: Lessons Learned in a Decade and Reflections on Challenges Ahead” (2020) 58:2 Fam Court Rev 576 at 583; Martin Remedies, *supra* note 4 at 94 [Fidler & Bala Conundrums].

¹⁹ *Hazelton v Forchuk*, 2017 ONSC 2282 at para 75.

To that end, sometimes a child's hatred of the rejected parent is so entrenched that the court will decline to provide a remedy even though parental alienation has been found. This is called the 'do nothing' approach. The court will 'do nothing' when it is too damaging to the child's well-being to be forced to spend time with the rejected parent.

In these instances, the parenting arrangement is left alone, and the rejected parent can only hope that, given time, they may be able to rebuild their relationship with the child. As the Ontario Superior Court of Justice wrote in 2016, "the wishes of an alienated child may be warped and misconceived, but they are nonetheless real".²⁰ Courts are less likely to order that an older child should be subject to a reversal of the parenting arrangements, and more likely to weigh an older child's wishes heavily if they express not wanting to know the rejected parent.

3. Canadian legislation does not address parental alienation directly

There are increasing calls for legislative direction around parental alienation, but Parliament has never addressed this area of family law.²¹ There are no references in the *Divorce Act* to parental alienation beyond the "best interests of the child" clauses in section 16. Section 16(1) provides that the best interests of the child shall be the *only* consideration used by courts when making parenting or contact orders.²² The factors laid out to help courts determine what outcome in the best interests of the child include each parent's "willingness to support the development and maintenance of the child's relationship" with the other parent, and the preferences of the child, duly considering their age and maturity.²³

²⁰ *L (N) v M (RR)*, 2016 ONSC 809 at para 140.

²¹ All parenting arrangements for divorcing parents in Canada are governed by the *Divorce Act*, but the *Act* does not mention parental alienation; *Divorce Act*, RSC 1985, c 3.

²² *Divorce Act*, *ibid* at s16(1).

²³ *Divorce Act*, *ibid* at s16(3)(c).

Prior to March 2021 amendments of the *Divorce Act*, a “maximum contact principle” appeared frequently in the parental alienation case law and literature.²⁴ This principle stated that the court “shall give effect” to the notion that a child “should have as much contact with each spouse as is consistent with the best interests of the child...”.²⁵ Lawyers and courts had interpreted this incorrectly to create a presumption of shared parenting arrangements and equal parenting time.

However, the Supreme Court of Canada clarified in 2022 that this interpretation was incorrect after Parliament removed the principle.²⁶ Justice Karakatsanis, writing for the Court, directed parties instead to section 16(1): the parenting time consistent with best interests of the child factor.²⁷ This factor reads the same as the maximum contact principle but should be understood as only one of many factors to be considered in making parenting and contact orders.

Despite the 2021 amendments, the essence of the maximum contact principle remains in parental alienation jurisprudence and research. Courts state repeatedly that children have better outcomes after a divorce if they have a close relationship with both parents.²⁸ This includes better physical health, better performance in school, and more pro-social behaviour.²⁹ Exceptions are made for when contact with a parent exposes the child to high levels of stress or conflict, but judges push generally for the child to be in contact and have a relationship with both parents. The

²⁴ *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, RSC 2019, c 16, amending *Divorce Act*, RSC 1985, c 3.

²⁵ *Divorce Act*, *supra* note 21 at s16(10).

²⁶ *Barendregt v Grebliunas*, 2022 SCC 22 at 153 [*Barendregt*]; Jared Davies, “Clarifying the removal of the ‘maximum contact’ principle” (2022) *Davies Family Law* online: <<https://www.daviesfamilylaw.com/post/clarifying-the-removal-of-the-maximum-contact-principle-ottawa-family-lawyer-pembroke-family-lawyer>>.

²⁷ *Barendregt*, *ibid*.

²⁸ Fidler & Bala Conundrums, *supra* note 18 at 580; Bala Canadian Court Cases, at 164; Linda C Neilson, “Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?” (2018) *JOURNAL* 1 at 5 [Neilson Empirical Analysis].

²⁹ Christine Giancarlo & Kara Rottmann, “Kids Come Last: The Effect of Family Law Involvement in Parental Alienation” (2015) 1:9 *Int J Interdisciplinary Soc Sci* of 27 at 27 [Giancarlo Kids Come Last].

justification for orders reversing parenting arrangements comes from this research on positive outcomes for children.

While the *Divorce* Act alludes to a maximum contact principle (or factor), and other parental alienation adjacent concepts, Parliament has never legislated directly about parental alienation. This is likely because research into parental alienation and the law in this area is far from settled, and it can be dangerous to develop policies based on contentious research.³⁰

There is a great deal of controversy surrounding the concept of parental alienation and its legitimacy. In recent years, feminist organizations have argued loudly that parental alienation claims are being used as a legal defense to allegations of family violence. There has been a polarizing response to these calls, however, including critics who point to “weak evidence” and questionable methodology” in some foundational research.³¹ At this point, Parliament could not legislate about parental alienation without backlash.³²

4. Retaliatory parental alienation claims and family violence

The controversy today surrounding parental alienation is seemingly at a fever pitch. The loudest critiques are coming from feminist organizations who argue that parental alienation claims are being used as a weapon against mothers who have experienced family violence and intimate partner violence. The concern is that perpetrators are claiming parental alienation in

³⁰ Jennifer J Harman & Demosthenes Lorandos, “Allegations of Family Violence in Court: How Parental Alienation Affects Judicial Outcomes” (2021) 27:2 APA 184 at 203 [Harman & Lorandos].

³¹ NAWL cites Meier et al. frequently despite their research being based on United States case law; National Association of Women and the Law (NAWL), “Addressing Intimate Partner Violence and Parental Alienation Accusations” (2022) 1 [NAWL Addressing Intimate Partner Violence]; National Association of Women and the Law (NAWL), “NAWL continues advocating against parental alienation accusations against victims of family violence” (2024) *NAWL* online: <<https://nawl.ca/nawl-continues-advocacy-against-parental-alienation-accusations/>>; Harman & Lorandos, *ibid* at 205.

³² Harman & Lorandos, *ibid* at 206.

response to mothers' claims of abuse, which can result ultimately in a reversal of the parenting arrangement.

A representative from WomenatthecentrE stated recently that “by design, parental alienation accusations are a tactic to silence survivors, a way for the abuser to shift the narrative, shift the focus away from their violence”.³³ These concerns are echoed by the National Association of Women and the Law (NAWL), among many others.

Suzanne Zaccour, a representative from NAWL called the concept of parental alienation “pseudoscience” because it cannot be distinguished from justified estrangement and thus can be used to ‘punish’ a survivor for speaking up against her perpetrator.³⁴ Zaccour says that this “parental alienation problem” exists as “reciprocal allegations”, with parental alienation always being claimed in retaliation against allegations of family violence.³⁵ In early 2024, NAWL launched a petition calling on Parliament to ban parental alienation claims in Canadian courts, and over 250 organizations have signed on to date.³⁶

While it is true that more parental alienation claims are made by fathers against mothers, this reflects the fact that mothers are more often the primary caregivers a child following divorce.³⁷ According to Statistics Canada, 70% of divorced families in Canada report that their child's primary caregiver is the mother.³⁸ This aligns with findings that 69% of parental

³³ Alexandra Mae Jones, “Ban ‘parental alienation’ arguments in family law cases, feminist coalition urges federal government” (2024) *CTV News* online: <<https://www.ctvnews.ca/canada/ban-parental-alienation-arguments-in-family-law-cases-feminist-coalition-urges-federal-government-1.6738592>> [CTV News].

³⁴ CTV News, *ibid*.

³⁵ NAWL Addressing Intimate Partner Violence, *supra* note 31 at 3.

³⁶ National Association of Women and the Law (NAWL), “250+ Feminist Organizations Call for Legal Reform to Ban Parental Alienation Accusations” (2024) *NAWL* online: <<https://nawl.ca/pa-letter/>>.

³⁷ Research to date has only considered heterosexual couples, with a mother alienating the child's relationship with a father, or a father alienating the child's relationship with a mother. Future research should consider parental alienation claims arising in other family makeups to reflect the diversity of families in Canada today.

³⁸ Maria Sinha, “Parenting and child support after separation or divorce” (2014) *Statistics Canada* online: <<https://publications.gc.ca/site/eng/458859/publication.html>>; referenced in Neilson Empirical Analysis, *supra* note 28 at 10.

alienation claims are made by fathers against mothers. Parental alienation claims are almost always made by the non-primary parent, who is more likely to be the father.

Research done in the United States by Joan Meier and her colleagues showed that mothers are more likely to lose “custody” when they are found to be alienating.³⁹ Similar research done by scholar Linda Neilson in Canada, showed that 41.5% of parental alienation claims also involve allegations of violence. Further, Neilson’s research found that while in 47.4% of the cases in which the mother was found to be alienating the children were removed from her care, this only happened 35.8% of the time when the father was found to be alienating.⁴⁰

Some have raised concerns about the quality of Meier’s and Neilson’s research methods, but their findings have nonetheless provided the foundation for many of the feminist critiques of parental alienation and calls to action, including those from NAWL.⁴¹ The critiques also challenge the legitimacy of parental alienation claims on the ground that it is difficult to differentiate between instances of alienation and justified estrangement. Further, they fear that having survivors defend against parental alienation claims might create a chilling effect among those wanting to speak out.

It is certainly possible that following allegations of abuse, a perpetrator could retaliate with a claim of parental alienation. If this parental alienation claim were to be successful, it could appear to discredit the allegations, and could also ‘punish’ the survivor in the sense that the most common remedy in situations of parental alienation, as discussed, is a reversal of the parenting arrangements. The survivor could lose their parenting time, decision-making responsibility, or

³⁹ Using the American language for parenting time, decision-making responsibility, and contact.

⁴⁰ Neilson Empirical Analysis, *supra* note 28 at 11.

⁴¹ Harman & Lorandos, *supra* note 30 at 203.

contact with the child. This would be a terrible outcome. However, this sequence of events likely does not reflect the reality of parental alienation claims in Canada.

5. Parental alienation is a necessary legal tool

There is a difference between acknowledging and taking care to consider the gendered dimensions at play in parental alienation claims as well as the risk that parental alienation claims are being used to silence survivors, and agreeing that these risks justify banning parental alienation claims altogether. Two things can be true at once: that some survivors of family violence are facing retaliatory parental alienation claims, and that the legal concept of parental alienation provides useful and necessary legal recourse for unfairly rejected parents, especially where their claim is a last ditch effort to re-establish contact with a child.

In 2021, American scholars Jennifer Harman and Demosthenes Lorandos published a rebuttal to Meier et al. in which they replicated Meier et al.'s findings to a different conclusion and identified 30 conceptual and methodological flaws in the original study.⁴² Harman and Lorandos found that parents who were found to be alienating were equally likely to “lose custody” regardless of their gender. Further, they highlighted that courts refrain from reversing the parenting arrangement in situations where family violence is likely present. Harman and Demosthenes raised many questions about the research methods used by Meier and her colleagues, and ultimately deemed their conclusions “untrustworthy”.

Parental alienation is difficult concept, and the stakes are high when an order reversing parenting arrangements is possible. However, the answer is not throwing the baby (parental alienation as a legal concept) out with the bathwater (the risks). At the very least, taking drastic

⁴² Harman & Lorandos, *supra* note 30 at 185.

action and banning parental alienation claims in Canadian courts today, would be premature given the polarized arguments and contradictory research.

This should not discount the reality that likely family violence and parental alienation co-exist in some cases, but a nuanced issue like parental alienation calls for a more complicated and considered response. Parental alienation, like family violence, is a form of manipulation which is dangerous for the child and needs to be protected against. As Canadian scholars Dr. Barbara Fidler and Professor Nicholas Bala write, it is not ethical to discount one form of violence to support another, and research has not decidedly found that parental alienation is “junk science”, despite what some critics are saying.⁴³

Further, some researchers providing data on the coincidence of family violence and parental alienation ignore the reality that more severe abuse cases are being dealt with through alternate legal channels. Family court in Canada does not have the evidentiary process required to adjudicate on the merit of some family violence claims. As such, many cases where family violence is present do not appear in the parental alienation jurisprudence. This means that when researchers tally the cases where a reversal of parenting arrangement remedy is ordered despite allegations of family violence, these are being misinterpreted. Family violence cases have been removed from the pool of those available.

In addition, most scholars in Canada and the United States do not agree with NAWL’s assertion that parental alienation was created as justification for rejection claims of family violence.⁴⁴ Many point to case law which illustrates the opposite: judges taking accusations of

⁴³ Maebyn Frey, “Parental Alienation: The Junk Science Perverting Custody Decisions” (2023) *Medium* online: <<https://medium.com/fourth-wave/parental-alienation-the-junk-science-perverting-custody-decisions-2572eb9d9975>> [Frey Junk Science].

⁴⁴ Harman & Lorandos, *supra* note 30 at 185.

family violence in parental alienation claims very seriously.⁴⁵ Judges are not simply accepting retaliatory parental alienation claims at face value, they are thoughtfully considering the co-incidence of abuse and parental alienation accusations.

Zaccour writes for NAWL that judges should be trained to “see the difference between a parent who is being protective and a parent who is actively sabotaging the other’s parenting...”⁴⁶ This is true. All researchers on parental alienation, no matter their position on the spectrum of opinions, agree that judges should be trained to understand the intricacies of parental alienation, including how they can intersect with allegations of family violence.

In instances of family violence and parental alienation claims, it is up to the courts to decide on the facts of the specific case what is in the best interests of the child. Abuse and alienation are not mutually exclusive, and parental alienation can be claimed in an attempt at retaliation.⁴⁷ As Fidler and Bala write, “all of these realities can and do exist”.⁴⁸ We should trust judges to make careful, considered decisions, and provide families with orders that support them in their healing processes.

6. Moving away from controversy and single cause theory

Polarization among scholars and lawyers is stalling parental alienation law. The research surrounding parental alienation has focused too greatly on the critiques, and lost touch with the focus of these inquiries: determining the best interests of the child. Researchers and family lawyers should move forward through the controversy and refocus on understanding the best

⁴⁵ Harman & Lorandos, *supra* note 30 at 206.

⁴⁶ NAWL Addressing Intimate Partner Violence, *supra* note 31 at 6.

⁴⁷ Fidler & Bala Conundrums, *supra* note 18 at 591.

⁴⁸ Fidler & Bala Conundrums, *ibid*.

interests of the child analysis in parental alienation claims. Many are suggesting that the way forward is by rejecting single cause theory for parental alienation.

A wider view of parental alienation places it within a larger range of parent-child-contact-problems (PCCP).⁴⁹ This terminology helps recentre the best interests of the child in parental alienation claims and remedies by emphasizing that the problem in these situations is that the child does not have a good relationship with their parent, which militates against their learning to live and do well in the world. Where much of the parental alienation research focuses on the actions of the preferred parent, what they are doing wrong and their alienating behaviour, the switch to consider parental alienation claims within PCCPs encourages refocusing on the best interests of the child.

Further, too much time is being spent identifying which party is to blame, and which of their behaviours is the cause of parental alienation. This is called the single cause model of parental alienation, and it is being questioned by thinkers at the forefront of parental alienation research in Canada.⁵⁰ Many think this inquiry is not a fruitful one and doubt that it is even possible to isolate a single cause of alienation. Single cause theory creates a false dichotomy in which one parent is to blame for parental alienation, and one parent is the victim. It does not reflect the many factors at play in post-divorce familial dynamics.⁵¹

When a child rejects a parent for no ascertainable reason, many things could be contributing and should be considered, including the child's age and temperament, sibling relationships, lack of functional coparenting, and the child's relationship to the rejected parent prior to separation. Courts should also consider "child-focused issues" like "parental warmth,

⁴⁹ Fidler & Bala Conundrums, *supra* note 18 at 591.

⁵⁰ Janet R Johnston & Matthew J Sullivan, "Parental Alienation: In Search of Common Ground For a More Differentiated Theory" (2020) 58:2 Fam Court Rev 270 at 270 [Johnston & Sullivan].

⁵¹ Johnston & Sullivan, *ibid* at 271.

child stability, and parent-child attachments”.⁵² Single cause theory does not account for these factors and attempts to simplify a complex situation.

Conflict can be inevitable for parents navigating a divorce, and separating spouses may develop negative attitudes towards each other.⁵³ It is part of the grieving process for former spouses to review the circumstances of their relationship, and “reach new insights” about how things ended.⁵⁴ When this happens in a vacuum, away from the other party, and is reinforced by friends and family supporting one point of view, parties can become even further estranged from each other.⁵⁵ Children in proximity to this process may begin to “parrot” their parent’s views, and alienation can happen, even unintentionally.⁵⁶

Considering the experience of divorcing families in a more holistic light is key to reaching an outcome that will be in the child’s best interests. Parental alienation falls on a spectrum of mild to severe, and any court-ordered remedy will need to be fact specific in attending to the seriousness of the problem. A finding of parental alienation should never be made lightly, and judges should consider literature about children’s experiences and outcomes following high conflict divorces, and parental alienation. Where possible, court-ordered therapeutic interventions can assist with ensuring positive outcomes for children and parents in the short and long term.⁵⁷

⁵² Neilson Empirical Analysis, *supra* note 28 at 12; Fidler & Bala Conundrums, *supra* note 18 at 579.

⁵³ Johnston & Sullivan, *supra* note 50 at 271.

⁵⁴ Johnston & Sullivan, *ibid.*

⁵⁵ Johnston & Sullivan, *ibid.*

⁵⁶ Johnston & Sullivan, *ibid.*

⁵⁷ The Ontario Superior Court of Justice is grappling with whether reunification therapy for adults can be ordered in cases of parental alienation if the parent does not consent. If reunification therapy is considered a “treatment” under the *Health Care Consent Act*, this would require the consent of parties subject to the order. In 2021, the court wrote that whether therapy is treatment shall be decided on a case-by-case basis following a fact specific inquiry into what the therapy entails; *Health Care Consent Act*, 1996, SO 1996, c 2 at s10(1); *Stavropoulos v. Stavropoulos*, 2021 ONSC 5753 at para 24.

Further, courts should consider research showing that denigrating behaviour does not always rise to the level of parental alienation, and that children who are exposed to a parent's negative attitudes towards the other parent do not necessarily become alienated.⁵⁸ By moving away from the single cause theory, courts can recognize that there is no one factor to blame for alienation. As Fidler and Bala write, denigration is necessary to cause parental alienation but not sufficient.⁵⁹ A multitude or "constellation" of factors are at play.⁶⁰ Parental alienation remedies should reflect that there is no 'one size fits all' solution to such a complex problem. What works for one child and family, may not work for another.

a. Refocusing on the best interests of the child

Lawyers working with families in parental alienation claims can do more to deescalate the situation. The adversarial legal process raises the stakes for parents, who may feel like they are 'on trial' for their behaviour and facing very serious consequences, including a reversal of the parenting arrangement. Even where one parent is more 'at fault' for the parental alienation than the other, both parents can and should work to be a part of the solution. Lawyers have an important role to play in explaining to parents that the goal of parenting and contact orders is to promote the best interests of the child.

Clients should understand that the best interests of the child has been interpreted by courts as meaning that the child should have a healthy and stable relationship with both parents.⁶¹ Parental alienation is a complex issue that requires attention and resources. Lawyers should understand and be able to speak to the reasons why it is beneficial for a child to have a

⁵⁸ Fidler & Bala Conundrums, *supra* note 18 at 581.

⁵⁹ Fidler and Bala Conundrums, *ibid.*

⁶⁰ Fidler and Bala Conundrums, *ibid.*

⁶¹ Fidler & Bala Conundrums, *ibid* at 580.

relationship with both parents post-divorce. Further, lawyers and courts can put pressure on parents who are engaging in alienating behaviour to refocus on the best interests of the child.⁶²

There is some meaningful advice available online for people wondering about parental alienation, but most of it relies on the single cause theory and provides strategies for parents looking to bring parental alienation claims. Feldstein Lawyers, an Ontario firm, encourages clients to keep as much contact with the child as possible and to ensure the interactions are positive.⁶³ Another Ontario firm, Smith Law's, website instructs those looking to bring parental alienation claims to gather as much evidence as possible, including keeping a journal, requesting parenting time from the preferred parent in writing, and refraining from engaging in retaliatory alienating behaviour.⁶⁴

Whatever the advice that can be found online, the reality is that “the law is a blunt social instrument” that cannot alone fix problems of parental alienation for families. Lawyers should work hard to determine how to best use the legal process to get positive outcomes for their clients, but lawyers should also encourage, if not require, parents in high conflict divorces and parental alienation claims to seek support from mental health professionals.⁶⁵ Mental health care is beyond the scope of what a lawyer can provide, and it is needed to navigate emotionally a parental alienation claim.

Lawyers should remember and understand the limits of their role as legal counsel. Many family lawyers working with high conflict parenting cases are now insisting that their clients receive mental health support, including Katherine Cooligan, who has been a prominent family

⁶² Nicholas Bala & Katie Hunter, “Children Resisting Contact & Parental Alienation: Context, Challenges & Recent Ontario Cases” (2016) Queen's Law Research Paper Series 1 at 1.

⁶³ Feldstein Family Law Group, “Parental Alienation” *Feldstein* online: <<https://www.separation.ca/help-center/child-custody/parental-alienation/>>.

⁶⁴ Smith Law, “PARENTAL ALIENATION” *Smith Law* online: <[⁶⁵ *AM v CH*, 2019 ONCA 764; referenced in Fidler & Bala Conundrums, *supra* note 18 at 591.](https://www.smithlaw.ca/parental-alienation-law-ontario/#:~:text=What%20is%20parental%20alienation%3F,may%20engage%20in%20this%20behavior>.”</p>
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lawyer in Ottawa for over 30 years.⁶⁶ Parents and children involved in parental alienation claims alike require mental health support to navigate this very difficult situation.⁶⁷ Fidler and Bala write that “meaningful communication and collaboration” between lawyers and mental health professionals is “essential for effective responses” to parental alienation.⁶⁸

Importantly, those working on parental alienation should engage in dialogue with those who hold opposing views. Parental alienation is a charged family law issue, and some are resorting to *ad hominem* attacks.⁶⁹ Researchers, lawyers, and judges need opportunities to speak to each other and discuss their varying opinions. Fidler and Bala suggest that sharing space at conferences, research colloquiums, and dinner tables will be the key to counteracting the polarization in parental alienation.⁷⁰ While the research remains so polarized, there can be no way forward provided for legislators, and families will continue to suffer due to the uncertainty.

Ultimately, the focus for professionals working on the parental alienation problem should be to provide positive outcomes for families by supporting the best interest of the child. It seems that this focus has been lost amidst the controversy and “conundrums”.⁷¹ It seems that the literature has lost touch of what is at stake, the well-being of children and families post-divorce, and forgotten that there should be only one consideration in determining parenting and contact orders in situations of parental alienation: the best interests of the child.

⁶⁶ Cooligan is the founding partner at Cooligan Yehia LLP which specializes in high conflict cases. Cooligan told our class this semester that she will not take on a client in a high conflict divorce or separation if they are not already seeking mental health professional services, or willing to start. This parallel support complements the work that falls within the scope of family law and recognizes that lawyers do not have the tools to solve all problems arising from a family breakdown, especially psychological pain and distress; Katherine Cooligan, “Parenting: high conflict” (lecture | delivered at | uOttawa | March 18, 2024).

⁶⁷ Fidler & Bala Conundrums, *supra* note 18 at 583.

⁶⁸ Fidler & Bala Conundrums, *ibid* at 592.

⁶⁹ Frey Junk Science, *supra* note 43.

⁷⁰ Fidler & Bala Conundrums, *supra* note 18 at 592.

⁷¹ Fidler & Bala Conundrums, *ibid*.

In terms of remedies when parental alienation is found, these should be limited to healing the parent-child relationship.⁷² Remedies should never be aimed at punishing a parent. The best interests of the child should be the only consideration for orders to change parenting arrangements. Courts should refrain from reversing the parenting arrangement unless absolutely necessary to promote the best interest of the child.

In 2016, the British Columbia Court of Appeal reminded trial judges in the province of their duty to focus on the best interests of the child factors and instructed them to show restraint in reversing parenting arrangements, calling these orders “draconian”.⁷³ According to the court, any judges or lawyers focusing on the “battle between the parents” are failing to assess the best interests of the child.⁷⁴

Reversing the parenting arrangement to make a rejected parent the primary caregiver should only occur in the most extreme instances of parental alienation, where all other remedies (including doing nothing) would fail to promote the best interests of the child. If a child desperately does not want to associate with the rejected parent, whether this view be legitimate or unfounded, it will hurt them to be forced into a relationship with this parent, and courts should consider the potential traumatic short and long term effects.

Further, courts should show compassion and provide space for children’s voices to be heard in determining what is in their own best interests. Neilson writes that “reliance on [single cause theory should] be replaced by detailed scrutiny of best interests of the child factors...”.⁷⁵ Just as orders should not exist to punish parents, courts would be remiss to punish children with

⁷² Joan S Meier, “Getting Real about Abuse and Alienation: A Critique of Drozd and Olesen’s Decision Tree” (2010) 7:1 J Child Custody 219 at 239; NAWL Addressing Intimate Partner Violence, *supra* note 31 at 9-10.

⁷³ *Williamson v Williamson*, 2016 BCCA 87 at para 46; referenced in Neilson Empirical Analysis, *supra* note 28 at 45.

⁷⁴ Neilson Empirical Analysis, *ibid*.

⁷⁵ Neilson Empirical Analysis, *ibid* at 47.

orders. Children who feel their autonomy is being respected may be able to heal from being alienated more quickly.

While the court process is slow, and court involvement can increase the frequency and intensity of alienation tactics, the legal recourse of parental alienation claims is still a necessary last resort for rejected parents.⁷⁶ The court should be utilized as an intermediary for parties who truly cannot work together to reach an appropriate outcome. Court orders that provide a “detailed” and “unambiguous” parenting plan, such that parents can avoid over-engaging with each other during tense times, can help to put families on a path towards healing from parental alienation.⁷⁷

7. Conclusion

A ‘best interests of the parent’ approach has developed in parental alienation law and research. Parliament has indicated that it is generally in the best interests of the child for a child to have a relationship with both of their parents, apart from instances of family violence or abuse, and to achieve this, parents will have to be civil with each other. Efforts should be directed at deescalating dynamics between parents, instead of searching for a single cause of the alienation, or a party to blame. Children in divorced families are already more at risk for poorer health and well-being, and extended parental alienation claims only further harm their futures.⁷⁸

Years from now, when testimonies of formerly alienated children are available, we should hope that they will show an understanding that all parties worked through a difficult time while keeping an eye to their best interests. This goal is being sabotaged by lawyers, scholars, and

⁷⁶ Giancarlo Kids Come Last, *supra* note 29 at 33.

⁷⁷ Fidler & Bala Conundrums, *supra* note 18 at 589.

⁷⁸ Brooke Moen, “The Effects of Parental Divorce and Separation on Children” (2023) 15:2 Can J Fam & Youth 139 at 139.

parents who are caught up in controversy. The polarization and uncertainty in parental alienation law distracts everyone from engaging fully with the best interests of the child factors, and this needs to stop. Children are resilient, but their resilience has limits.⁷⁹ It is about time that the focus of parental alienation returns to where it should always have been; determining the best interests of the child. These children's sense of safety, control, and future depends upon it.

⁷⁹ Neilson Empirical Analysis, *supra* note 28 at 28.