A REMEDY TO FIT THE CRIME: A CALL FOR THE RECOGNITION OF THE UNREASONABLE REJECTION OF A PARENT BY A CHILD AS TORTIOUS CONDUCT

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INTRODUCTION

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

Parental Alienation (PA), insofar as this Article is concerned, will be defined as the unreasonable or irrational rejection of a parent by a child primarily due to the "negative influence of the other parent."[1] The more controversial Parental Alienation Syndrome (PAS) is a form of alienation which Dr. Richard Gardner believed to be legally actionable and a subset of PA in that it described the rejection of a parent irrationally or unreasonably by a child, based upon what Dr. Gardner believed were observable and repeated symptoms of a scientifically provable "syndrome," wherein a describable "pathogenesis" is applicable, and certain behavior "factors" are evident,[2] thereby lending, at least in his estimation,

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[1] Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, 37 FAM. L.Q. 273, 273 (2003); *see also id.* at 280 ("[There are] three essential elements in [PAS's] definition: (1) rejection or denigration of a parent that reaches the level of a campaign (*i.e.*, it is persistent and not merely an occasional episode); (2) the rejection is irrational (*i.e.*, the alienation is not a reasonable response to the alienated parent's behavior); and (3) it is a partial result of the nonalienated parent's influence. If any element is absent, the term PAS is not applicable. Properly understood, a clinician using the term PAS does not automatically assume that the favored parent has influenced a child's alienation from the other parent. Rather, the term PAS is used only when there is evidence for all three elements.").

[2] Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, 29 ACAD. F. 3, 5 (1985), *available at* http://www.fact.on.ca/Info/pas/gardnr85.htm.

credence to PA as a definitional fitting what is properly called a syndrome.[3] Despite the conclusions of several commentators, Gardner did not invent the concept of unreasonable rejection.[4]

The existence of PA cannot be denied by experienced family law practitioners and judges. Controversy exists, however, between supporters and detractors about whether PAS—postulated as a more defined set of conditions—even exists, and the exact terms to be used in describing this phenomenon. Regardless of what the phenomenon is called, the interaction is a very real and devastating problem in child custody cases today. With the advent of a greater diversity of alternative familial arrangements—such as single-parent households, same-sex unions, divorcing couples who have children, and absentee parents—vast numbers of children are being subjected daily to both subtle and overt pressure by parents pitting one caregiver against another for the affections of their children.[5] The existence of PA cannot be denied by experienced family law practitioners and judges. Controversy exists, however, between supporters and detractors about whether PAS—postulated as a more defined set of conditions—even exists, and the exact terms to be used in describing this phenomenon.[6] However, while fights over the very existence of PA and whether to discredit PAS rage within scholarly literature and mental health and women's advocacy circles, thousands of children are being systematically taught to detest one of their parents by the only other person whom the child should trust implicitly—in other words, the favored, usually custodial, parent.[7] This is not to say that a child may not harbor and

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[3] RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME xx–xxii (2d ed. 1998) (stating that PAS should be considered a form of emotional abuse).

[4] *See* William Bernet, *Parental Alienation Disorder and DSM-V*, 36 AM. J. FAM. THERAPY 349, 352 (2008); William Bernet et al., *Parental Alienation, DSM-V, and ICD-11*, 38 AM. J. FAM. THERAPY 76, 86–92 (2010) [hereinafter Bernet et al., *Parental Alienation*]; Richard A. Warshak, *Current Controversies Regarding Parental Alienation Syndrome*, 19 AM. J. FORENSIC PSYCHOL. 29, 30 (2001).

[5] Bernet et al., *supra* note 4, at 130 (estimating that "1%, or about 740,000 children and adolescents in the United States" experience parental alienation, resulting in hundreds of thousands of children and parents being impacted). While on the surface this percentage may seem statistically insignificant and like it does not warrant the proliferation of studies, symposia, and popular culture debates on PA and PAS, the growing number of cases involving parents and children through the courts in this issue justifies increased scrutiny and consideration of potential action. *See Domestic Relations Caseloads on the Rise*, Court Statistics Project, http://www.courtstatistics.org/Domestic-Relations/20121Domestic.aspx (last visited May 1, 2013) (citing an increase of domestic relations court caseload despite general population decrease).

[6] *See generally* Richard Bond, *The Lingering Debate Over the Parental Alienation Syndrome Phenomenon*, 4 J. CHILD CUSTODY 37 (2007) (examining both sides of the controversy).

[7] Janet R. Johnston et al., *Is It Alienating Parenting, Role Reversal or Child Abuse? A Study of Children's Rejection of a Parent in Child Custody Disputes*, 5 J. EMOTIONAL

maintain overwhelming fear, animosity, or loathing for a truly abusive parent due to the bad acts of that parent toward the other parent in view of the child or for acts directly committed upon a child by the perpetrator. In these cases of abuse, where the reaction of the child is completely *reasonable*, accusing the favored parent of plotting to poison the child against the abuser should never be tolerated. The issue of PA needs to be given serious scrutiny, however, where a child suddenly and apparently *unreasonably* rejects a formerly trusted parent, and when the only visible change in circumstances is the break-up of the parents' marriage, a custody battle, a new paramour, or a new planned geographic location.

Despite current existing literature and comments on PA, the phenomenon is much more prevalent than anyone apparently wishes to acknowledge. In almost every case where the author and other practitioners were involved with children, some form of active campaigning by one parent against the other parent was evident.[8] Perceived wrongs committed by one parent in the evolution and final demise of the marriage relationship often took ultimate expression in the undermining, blaming, and sometimes subtle encouragement of children to reject the perceived "wrongful" parent and to circle the embattled "favored parent." Often, these cases are not without serious implications for the mental health and well-being of the parents involved.[9]

ABUSE 191, 192–94 (2005) (citing numerous studies which speak to the multiple traumatic effects of alienation on children such as being "'genuinely reluctant to visit' their non-custodial parent" and "'extreme alignments' with one parent against the other," and stating that these issues can become "more pronounced with older adolescent children" (quoting JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 146 (1980), and Janet R. Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation and Children of Divorce*, 31 J. AM. ACAD. PSYCHIATRY L. 158, 164 (2003))). While Professor Johnston and her co-authors acknowledged clearly that there is still significant debate about the differences between a child who could be defined as estranged versus alienated from a parent, they do specifically cite an article that Professor Johnston co-authored with Dr. Kelly that describes alienated children as likely to display a host of impactful, negative behaviors and emotions such as "hatred, anger, rejection, and/or fear toward a parent," reinforcing the seriousness of PA, even if not clinically defined as a syndrome or disorder. Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 251 (2001).

[8] The author's own experience as a family law practitioner for seventeen years provides the basis for the statement.

[9] *See* Warshak, *supra* note 1, at 273; Deidre Conway Rand & Randy Rand, *Factors Affecting Reconciliation Between the Child and Target Parent*, *in* THE INT'L HANDBOOKOF PARENTAL ALIENATION SYNDROME: CONCEPTUAL, CLINICAL AND LEGAL CONSIDERATIONS 163, 165 (Richard A. Gardner et al. eds., 2006); Kendra Randall Jolivet, *The Psychological Impact of Divorce on Children: What Is a Family Lawyer to Do?*, 25 AM. J. FAM. L. 175, 178 (2012); Despina Vassiliou & Glen F. Cartwright, *The Lost Parents' Perspective on Parental Alienation Syndrome*, 29 AM. J. FAM. THERAPY 181, 185, 188 (2001). In his article, Dr. Warshak describes the "hundreds of pleas [he has received

This Article does not side with any of the numerous papers attempting to classify the phenomenon of PA as unique to women. The unjust alienation of a child by a parent is not limited to just women alienating men; it flows as destructively in both directions.[10] To assume that alienation is an all-or-nothing phenomenon rejects, and otherwise demeans, how both fathers *and* mothers may be the victims of an irrational campaign of rejection by their children due to the other parent's influence (or even due to the outside influence of other aligned adults such as grandparents). It is important, therefore, to start first with the rights of *both* parents to know and to be a part of their children's lives through an explication of the historical background of parental rights as set out by the Supreme Court and echoed by many states.

The second section of this Article discusses the origin and current state of PA as a "syndrome,"[11] and describes the causes, effects, and remedies for dealing with PAS in the context of custody evaluations and litigation. This section also responds to some commentators who have attempted to eliminate recognition of the existence of PA by stating that the evidence of alienation should never be discussed because it does not pass evidentiary muster, or that alienation is a normal reaction by children to the stresses of growing up.

Finally, this Article suggests that in those cases where there has been a complete, unreasonable PA,[12] the courts should recognize a tortious cause of action for intentional alienation. Unreasonable PA occurs when the relationship between the child and the rejected parent is irreparably harmed through an intentional act by the favored parent or through a parent's conscious indifference to the harm caused by their actions. The threat of tortious action serves as a deterrent for future activity and as punishment for the harm caused to both the child and the rejected parent.

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from alienated] parents . . . being shut out of their children's lives" and cites an increasing number of studies looking at suicide rates among alienated parents as well as other general detrimental impacts. Warshak, *supra* note 1, at 277 n.15.

[10] Richard A. Gardner, *Denial of the Parental Alienation Syndrome Also Harms Women*, 30 AM. J. FAM. THERAPY 191, 198 (2002). Dr. Gardner concludes that "the ratio is now 50/50, with fathers being as likely as mothers to indoctrinate children into PAS." *Id*.

[11] This Article will not address whether PA is properly classified as a mental illness or syndrome. That debate is best left to other disciplines. This Article will focus instead on how courts should intervene to protect the fundamental rights of children and parents.

[12] *See* Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 249 (2009) (discussing the conflation of children responding to real abuse to those subject to "unreasonable PA," or hostility fanned by one parent against the other).

I. ACKNOWLEDGEMENT OF THE RIGHTS OF A PARENT

The rights of a parent are derived, and gain support, from several sources. Chief among those sources are: (A) the Constitution, and (B) public policy.

A. Constitutional Support

Understanding the historical underpinnings of the rights of parents is critical to the discussion of a specific tort for PA. In the seminal case of *Meyer v. Nebraska*,[13] Justice McReynolds first articulated the right of parents under the liberty interest of the Fourteenth Amendment, stating that "[w]ithout doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children."[14] Justice McReynolds further stated that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."[15] What is made clear by these statements is that, within the parental sphere of influence over a child, a right exists to control and raise that child as the parent sees fit. This parental sphere of influence should coexist with the state's interest in protecting and raising healthy children.

Pierce v. Society of Sisters[16] further solidified the nature of parental autonomy by including the notion of the liberty interest within substantive due process.[17] Recently, the Supreme Court reaffirmed the fundamental right of parents to direct the rearing of their children in terms of the liberty interest involved.[18] Although no distinctions were made as to whether fathers or mothers enjoyed greater rights to have a relationship with their child, the Court expressed the fundamental right of *all* parents to raise and train their children.[19]

If we accept that there *is* a fundamental right springing from the nature of the parent-child relationship, then we must also direct attention toward the idea that the rights of the parent should be given great deference. While no parental right is absolute, however fundamental, the underlying support for right of an involved parent to at least know their child cannot be disputed, given the overwhelming precedent. It is clear through the myriad of child support laws and regulations in the U.S. that the *obligation* of parents to financially support dependent children is taken seriously. However, any discussion of obligations to children must be

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[13] 262 U.S. 390 (1923).

[14] *Id.* at 399.

[15] *Id.* at 399–400.

[16] 268 U.S. 510 (1925).

[17] *See id.* at 535 ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

[18] Troxel v. Granville, 530 U.S. 57, 66–67 (2000).

[19] *Id.* at 65–67.

coupled with protecting the rights of a parent involved in raising their children. What has been lost in the legislative and judicial efforts to protect and provide for children is the belief that the right of a parent should also be protected against interference and intrusion from third parties. While one might argue that the State has no obligation to protect an individual from the encroachment upon their civil rights by third parties,[20] the State has an obligation to act reasonably where the State engages the parties to the point of developing a "special relationship" with the family.[21] Within the context of a child custody case, the State often does involve itself in the lives of the parties by establishing this special relationship and ordering "home studies" (also known as "social study"),[22] psychological evaluations, attendance at parenting classes, mediation (often more than once),[23] temporary hearings, motion hearings, and myriad other tests to determine the fitness of the parents to control and maintain custody of their children. Therefore,

[20] Castlerock v. Gonzalez, 545 U.S. 748, 768–69 (2005) ("[T]he benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause.").

[21] DeShaney v. Winnebago, 489 U.S. 189, 201–03 (1989).

[22] TEX. FAM. CODE ANN. § 107.051 (2008) (stating that "[t]he court may order the preparation of a [home study] into the circumstances and condition of: (1) a child who is the subject of a suit or a party to a suit; and (2) the home of any person requesting conservatorship of, possession of, or access to a child.").

> **Social Studies** are court ordered when Judges would like additional information about parents, their parenting styles, living conditions, employment and educational backgrounds and your relationship status. These studies are conducted by Social Workers who have experience and expertise with working with families and children. Custody evaluations are usually conducted in the home and involved completion of extensive questionnaires about your background, your children and others living in your home. During the process you will be asked to give the names and contact information of individuals who know you and your children. These individuals should be professionals including teachers, physicians, psychologist, therapist, child caregivers and others who know you and your children. Relatives may also be contacted to provide additional information. All of this information, along with the Social Workers evaluation and recommendations will be placed in a report that will be submitted to the judge. This information along with other information presented to the judge during the custody hearing will the basis for the court's custody decision.

Mark E. Hickey, *Social Studies*, TEXAS LCSW, http://texaslcsw.com/social-studies/ (last visited May 5, 2013).

[23] *See, e.g.*, KNOX CNTY. CIR. CT., DIV. 4, 6TH JUD. DIST. R. 26(B); *see also* Note, Carrie-Anne Tondo et al., *Mediation Trends*, 39 FAM. CT. REV. 431, 431 (2001) (arguing how "a change in custody standards played a vital role in the consequences of mediation").

in those cases where the rights of the parent have been unreasonably interfered with by the other parent, the court has a duty to act to remedy the situation.

B. Public Policy Support

In addition to the constitutional basis for parental rights, numerous states have supported, through statutes, the fundamental notion that parents not only have the obligation, but also the right, to have stable and meaningful contact with, and control of, their children. This secures a special place for the right of the parent to parent as they see fit. One of the most important of these statutes discusses the obligation of the State to encourage ongoing engagement of both parents with the child after divorce,[24] unless there is some potential imminent harm to the child.[25]

Other statutes reflect a growing consensus about the need for clear and consistent policy regarding the best interests of children and the family unit as a whole, even in the context of divorce and custody.[26] Also, significant discussions about parental rights and alienation related to broader public policy goals contribute to the statutory declarations. PA and PAS have gained greater traction as issues of public awareness and advocacy in recent years. For example, in 2009, Toronto, Canada hosted the first international conference on PAS, which featured eighteen experts on the subject and was attended by roughly 200 parents, lawyers,

[24] *See, e.g.*, N.H. REV. STAT. ANN. § 461-A:2 (Supp. 2011) ("Because children do best when both parents have a stable and meaningful involvement in their lives, it is the policy of this state, unless it is clearly shown that in a particular case it is detrimental to the child, to . . . [s]upport frequent and continuing contact between each child and both parents . . . [and e]ncourage parents to share in the rights and responsibilities of raising their children after the parents have separated or divorced.").

[25] *See, e.g.*, VT. STAT. ANN. tit. 15, § 650 (2002) ("The legislature finds and declares as public policy that after parents have separated or dissolved their [civil] marriage it is in the best interests of their minor children to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical harm or significant emotional harm to the child or parent is likely to result from such contact.").

[26] *See, e.g.*, W. VA. CODE ANN. § 48-9-101 (LexisNexis 2009) ("The Legislature finds and declares that it is the public policy of this State to assure that the best interest of children is the court's primary concern in allocating custodial and decision-making responsibilities between parents who do not live together. In furtherance of this policy, the Legislature declares that a child's best interest will be served by assuring that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children, to educate parents on their rights and responsibilities and the effect their separation may have on children, to encourage mediation of disputes and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or divorced.").

and psychologists.[27] By way of advocacy, PA and PAS have also become the focal point of awareness campaigns sponsored by governors and state legislators. Former Iowa Governor Tom Vilsack declared a Parental Alienation Awareness Day in 2006,[28] and by 2008, over sixteen governors had supported the designation of April 25th as Parental Alienation Awareness Day during National Child Abuse Prevention Month.[29]

II. MODERN THEORY OF PARENTAL ALIENATION

A. Current Opinions on Parental Alienation as a Legitimate Phenomenon

When researching PA, one is struck by the extreme polarization of the various factions involved in the discussion of the phenomenon. One camp, advocating for victims of physical and emotional abuse, has urged for the complete eradication of the PA concept on several grounds.[30] Among these is the apparent belief that PA is almost always raised as a defense by men against allegedly abused women; it is seen as a way of deflecting blame from the man for his own behavior back upon the woman, and it is proffered as the reason that the children reject the abusive father.[31] What is most disturbing about these arguments is the almost universal and broadly sweeping assumption that claims of parental abuse are mostly used by abusive fathers to further denigrate mothers and that denying a mother's parent-child relationship "would seem to be the epitome of destructive 'parental alienation.'"[32] This denies the opposite and tragic effects that can be imposed upon the alienated parent, who, if Professor Meier's assumptions were considered completely accurate, in most cases, would be the father. Finally, in at least one commentary, Professor Meier's solution is to do nothing because children are resilient and therefore the situation will resolve itself.[33] However, if a child in an *intact* family displays the "type of denigration, hatred, and fear characteristic of

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[27] *See Speaker Profiles*, CANADIAN SYMPOSIUM FOR PARENTAL ALIENATION SYNDROME, http://cspas.ca/press_toronto.shtml (last visited Feb. 4, 2013); Kathryn Blaze Carlson, *Custody Judges Rule on Vengeance*, NAT'L POST, Mar. 28, 2009, at A1.

[28] Press Release, Parental Alienation Awareness Org., Iowa Governor Thomas J. Vilsack Proclaims April 25th as Parental Alienation Awareness Day (Dec. 28, 2006), *available at* http://www.ereleases.com/pr/iowa-governor-thomas-j-vilsack-proclaims-april-25th-as-parental-alienation-awareness-day-8934.

[29] Glenn Sacks, *6 More States Declare April 25th "Parental Alienation Awareness Day,"* GLENNSACKS (Apr. 25, 2008, 9:16 PM), http://glennsacks.com/blog/?p=2112; *see* Joan Meier, *Parental Alienation Syndrome & Parental Alienation: Research Reviews*, NAT'L. RES. CTR. ON DOMESTIC VIOLENCE, http://www.vawnet.org/sexual-violence/print-document.php?doc_id=1679&find_type=web_desc_AR (last visited Nov. 9, 2012).

[30] *See, e.g.*, Meier, *supra* note 12, at 250.

[31] *See id.* at 234–35.

[32] *Id.* at 234.

[33] *See id.* at 250.

irrational alienation . . . [it would be] considered a symptom worthy of treatment."[34] Should not children who develop issues of extreme and unreasonable rejection of a parent *after* a divorce or separation be afforded the same benefit from an experienced and logical therapeutic intervention?

Dr. Gardner, in his initial works on PA, placed the burden for the lion's share of alienating behaviors on mothers, to the point that he used the term "woman scorned" to describe what he believed was a proper motivational analogy.[35] This author in no way accords the same amount of weight to Dr. Gardner's observations. In a recent Article by Dr. Warshak on a program dealing with PA, the numbers were almost equal, with numbers of rejected fathers only slightly higher than the numbers of rejected mothers.[36] Although these results better reflect the situation, the reality is that, in most family cases, mothers are still disproportionately more likely to obtain custody of children[37] despite the trend toward a gender-neutral application of custody laws in most jurisdictions.

There are many factors present in the contemporary modern family that could account for this disparity.[38] Among these are the reality that more men work and that women take care of children, either because a man can still make more money than a woman for the same work or because of the traditional notions still existing for the roles of each parent (in other words, that men work to support the family and women tend to children and the household). Additional reasons may involve: absentee fathers who traditionally relegate the entire duty of birthing, raising and supporting children to mothers; outdated views of many older sitting judges that women should still be the preferred primary caregivers, despite laws to the contrary; and sociological research suggesting that women desire to stay at home with their children.[39] Whatever the cause, when we see the numbers by which

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[34] Warshak, *supra* note 1, at 277.

[35] RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE SEX ABUSE 86 (1987).

[36] Richard A. Warshak, *Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children*, 48 FAM. CT. REV. 48, 57 n.51, 58 (2010).

[37] U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, at 2 (Dec. 2011), *available at*, http://www.census.gov/prod/2011pubs/p60-240.pdf ("The majority of custodial parents were mothers (82.2 percent), and about 1 in 6 (17.8 percent) were fathers, proportions which were not statistically different from 1994.").

[38] *See* Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 222 (2012) (citing Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. Cal. Rev. L. & Women's Stud. 133, 201–02 (1992) and David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 533 (1984)) (supporting the argument that although divorced parents share legal responsibility for children, "sex-based heuristics survive in the form of a preference for the children's primary caretaker, who most often is the mother").

[39] Eleanor Harding, *Women "Want Rich Husbands, Not Careers": New Survey Claims Drive for Gender Equality is a Myth*, MAIL ONLINE (Jan. 4, 2011, 6:05 AM),

women outstrip men as primary caregivers, it only follows that there would be more women apparently influencing children against fathers. This by no means supports the idea that the *cause* of the unreasonable alienation of one parent by a child is restricted to women or that alienation is a female malady. Fathers in similar circumstances are just as likely to attempt to alienate mothers from children, for many of the same reasons. In one Australian study, "[a]n analysis of unreported judgments . . . over a five-year period reported approximately equal numbers of male and female alienators."[40] Furthermore, Dr. Warshak indicates that "[he] has been involved in several cases in which alienated mothers accused their ex-husbands of turning the children against them."[41]

B. Custodial Realities and the Effects of the Uninvolved Father

If this argument must turn on gender lines, however, then the effects of the *uninvolved* father upon children should also be considered in the debate about PA. In this Article, the uninvolved father will be defined as one who does not have regular or frequent contact with the child, is not living with the child in the same household, and who may or may not pay support. The payment of support is usually through the primary parent and does not necessarily affect the child directly, except insofar as the child is made aware of the failure of support, either by court order that has officially restrained the father from being within the vicinity of the child, movement of the child from their primary customary residence to a distant place where the father cannot be involved regularly, or simply apathy in that the father does not want the responsibility for the child. It is clear from the voluminous research that, for instance, daughters that have a regular father figure with whom they are connected "have significantly fewer suicide attempts and fewer instances of body dissatisfaction, depression, low self-esteem, substance use, and unhealthy weight."[42] These daughters of involved and caring

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http://www.dailymail.co.uk/femail/article-1343899/Gender-equality-myth-Women-want-rich-husbands-careers.html.

[40] Warshak, *supra* note 1, at 292 n.62 (citing Sandra Berns, *Parents Behaving Badly: Parental Alienation Syndrome in the Family Court—Magic Bullet or Poisoned Chalice*, 15 AUSTL. J. FAM. L. 191 (2001) (discussing findings of unreported judgments in Australia)).

[41] *Id.* ("There are two established foundations and one being formed that deal with some aspect of pathological alienation, and all three were founded by alienated mothers. Many of the women involved in such organizations, and those who participate in online discussion groups, view PAS as a lifeline offering understanding and hope for their own distressing situations.").

[42] MEG MEEKER, STRONG FATHERS, STRONG DAUGHTERS: 10 SECRETS EVERY FATHER SHOULD KNOW 23 (2006) (citing Diann M. Ackard et al., *Parent-Child Connectedness and Behavioral and Emotional Health Among Adolescents*, 30 AM. J. PREVENTATIVE MED. 59 (2006)); *see Why Fathers Count*, FATHERSFORGOOD.ORG, http://www.fathersforgood.org/ffg/en/fathers_essential/count.html (last visited Nov. 12,

fathers have "higher academic success,"[43] "exhibit less anxiety and withdrawn behaviors,"[44] and "wait longer to initiate sex and have lower rates of teen pregnancy."[45] The intangible benefits, while variable, are very real. The societal cost to take care of potentially tragic consequences created by the lack of a father's involvement could be enormous, and for this reason, the current administration is spending money to reengage fathers in the parenting process.[46]

C. Attempts to Discredit Dr. Gardner

A constant source of conflict has arisen in the literature over the initial theories propounded by Dr. Gardner and their foundational accuracy regarding the legitimacy of the current PAS debate and action. As a result, Dr. Gardner developed the idea that PAS is a response to a marked increase of abuse allegations, and more specifically, to allegations of sexual abuse by one parent (overwhelmingly the mother) against the other parent (overwhelmingly the

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2012) (indicating that children may be *more* likely to be abused in a fatherless household than otherwise). Citing a national study, *Why Fathers Count* states that:

> An analysis of child abuse cases in a nationally representative sample of 42 counties found that children from single-parent families are more likely to be victims of physical and sexual abuse than children who live with both biological parents. Compared to their peers living with both parents, children in single parent homes had:
> - a 77% greater risk of being physically abused
> - an 87% greater risk of being harmed by physical neglect
> - a 165% greater risk of experiencing notable physical neglect
> - a 74% greater risk of suffering from emotional neglect
> - an 80% greater risk of suffering serious injury as a result of abuse
> - overall, a 120% greater risk of being endangered by some type of child abuse.

Why Fathers Count, *supra* (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: FINAL REPORT (Sept. 1996)).

[43] MEEKER, *supra* note 42 (citing Rebekah Levine Coley, *Children's Socialization Experiences and Functioning in Single-Mother Households: The Importance of Fathers and Other Men*, 69 CHILD DEV. 219 (1998)).

[44] *Id*. (citing Karine Verschueren & Alfons Marcoen, *Representation of Self and Socioemotional Competence in Kindergartners: Differential and Combined Effects of Attachment to Mother and to Father*, 70 CHILD DEV. 183, 190 (1999)).

[45] *Id*. at 24 (citing Lee Smith, *The New Welfare of Illegitimacy*, FORTUNE, Apr. 18, 1994, at 81–86).

[46] Jordan Fabian, *Obama Announces Fatherhood Initiative*, THE HILL'S BLOG BRIEFING ROOM (June 21, 2010, 9:43 AM), http://thehill.com/blogs/blog-briefing-room/news/104421-obama-announces-fatherhood-initiative.

father).[47] The phenomenon of PAS manifested itself, according to Dr. Gardner, as an offensive tactic by one parent against the other, usually within the framework of "the scorned woman," hence gaining the unfortunate label by some authors as the "Medea Syndrome."[48] Dr. Gardner's claim that many of these abuse and sexual abuse allegations were made *after* the breakdown of the relationship between the parties is particularly enlightening. Unfortunately, this fact does not receive much attention in popular literature which has excoriated Dr. Gardner and his opinions as "pseudo-science."[49]

Despite the treatment of PAS in scholarly literature as a legitimate phenomenon from definitional and historical perspectives, as well as from gender-equity points of view, much of the current backlash against PAS stems from the belief that PAS, when posited as a legal theory, is often used *exclusively* as an offensive weapon by an abuser. PAS can be used against the abused parent in order to gain an unfair or unwarranted advantage in the case or to shift the focus from abusive and extreme bad behavior by one parent by shining a spotlight on the other.[50] Therefore, according to this literature, the entire concept of unreasonable rejection should be completely dismissed, as its use "unintentionally assists in obscuring genuine abuse and reinforces courts' dismissals of mothers seeking to protect their children and themselves."[51]

This, of course, completely discounts the situation where a non-abusive parent is intentionally the subject of a campaign of ridicule and rejection by the other parent. The automatic assumption that alienation is only a tool of the abuser correspondingly denigrates the right of the rejected parent to know and raise their child without interference. Where the child has been the subject of abuse or has

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[47] *See* Richard Gardner, *Recommendations for Dealing with Parents Who Induce a Parental Alienation Syndrome in Their Children*, 28 J. DIVORCE & REMARRIAGE 1, 3 (2008); *see also* Meier, *supra* note 12, at 235–36 (discussing Gardner's belief that PAS could be used as an offensive tool in this way); Warshak, *supra* note 4, at 39 ("As is true of most, if not all, newly proposed syndromes, Gardner based his identification and description of PAS on his clinical experience.").

[48] *See* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 195–98 (1996). Dr. Wallerstein and Ms. Blakeslee are referring to the main character of Euripedes' *Medea*, who was the lover of the mythical Jason (of Argonaut fame). Jason left Medea for Glauce, the daughter of King Creon. Medea, in a vengeful rage, sent poisoned clothes to Glauce, killing her and further killed her two children by Jason.

[49] Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 CHILD. LEGAL RTS. J. 1, 22 (2006) ("PAS's twenty-year run in American courts is an embarrassing chapter in the history of evidentiary law. It reflects the wholesale failure of legal professionals entrusted with evidentiary gate keeping intended to guard legal processes from the taint of pseudo-science.").

[50] *See* Joan S. Meier, *Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree*, 7 J. CHILD CUSTODY 219, 223 (2010).

[51] *Id*. at 224.

witnessed abuse by a parent of either gender, however, alienation is more reasonable. Any attempt to deflect that activity should surely be attacked on the grounds that the claim of alienation in that instance is baseless and frivolous. But when such a reaction exists that is neither rational nor reasonable—for example, where the child one day has a loving and respectful relationship with the parent and, only days after learning of a break-up or divorce, the child demonstrates intense loathing for the once-loved parent with no logical or rational reason for the new change of opinion—the Court and mental health professionals involved must be allowed to ask questions regarding the child's change of heart. Ultimately, the Court must (and should) consider the possibility that one parent is committing an act of alienation to place an unreasonable fear or hatred between the child and the other parent, in order to hurt the rejected parent for hurting the alienating parent.

D. Current Court Approaches to the Issue of Parental Alienation

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

Despite criticism that the standard is variable, subjective, and not easily reduced to a clear understanding, the primary objective of family courts is to act in the child's "best interests."[52] The best interests of a child may override the expectations, rights, and duties of a parent when that child's emotional and physical development is at risk.[53] The reason for this is presumably clear insofar as the child is unable to protect or defend against the machinations of the adults who run the child's world, and so, in the interest to protect the powerless, the law places the needs and desires of a parent beneath that of a child. While the best interests

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[52] 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.1, at 479 (2d ed. 1987) ("Nearly all judicial discussion of custody begins with the statement that custody must be so awarded as to promote the child's best interests. . . . A little reflection is enough to reveal, however, that this is not a legal principle in the usual sense but merely a statement that when the child's welfare seems to conflict with the claims of one or both parents, the child's welfare must prevail.").

[53] *Id.*

standard for a child's well-being appears to be a sacrosanct principle, the desires of the parents *must* always be regarded in the determination to raise their children as they see fit.[54] When the child has suffered a harm at the hands of one of the persons who are most directly responsible for the child's well-being, that parent should be held to a level of accountability that is higher than the general duty to which all persons have to treat one another with reasonable care. The parent lies in a special relationship with their child and therefore has a duty to protect their child from harm.[55] Therefore, just as a parent has been traditionally able to sue for the loss of a consortium of a child,[56] and as a child may now be able to sue in a respectable minority of jurisdictions for the loss of consortium of a parent,[57] so too should this principle extend to situations where a parent is responsible for destroying the relationship between the child and the other parent, and be amenable to suit by the rejected parent for the resulting alienation.

Most family courts typically respond in one of three ways to a suit where the court believes, by experience, evidence, evaluation, interview, or a combination of these factors, that a child is unreasonably rejecting one parent: (1) issuing an order prohibiting disparagement of the other parent within the child's hearing; (2) threatening, or actually imposing, a custody change; and (3) nonaction. The rejected parent is usually the "visiting parent," and such rejection has been caused, consciously or unconsciously, by the activities of the other parent who is often, but not always, the "custodial parent."[58]

1. Orders Against Disparagement

Under the first approach, the court may order a parent not to disparage the other parent or allow any other person to do so to the child or within the child's hearing.[59] This is usually done in a standing court order or temporary order that is

[54] *Id.* at 480 ("When [the parent's desires in a child custody case] are heard, they must be given some weight, not merely because they are related to the child's welfare, but because we recognize that a parent's interest in the training, upbringing and companionship of his child has an independent importance in our society which must be respected.").

[55] DAN B. DOBBS, THE LAW OF TORTS 884 (2000).

[56] *Id.* at 842.

[57] *Id.* at 842 n.3 ("Children's claims for loss of parental consortium began to be recognized in 1980 with the decision in *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690, 11 A.L.R.4th 518 (1980). Other courts gradually accepted the claim throughout the 1980s and 1990s. At this writing, about 16 courts have done so.").

[58] *See generally* Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender and Fathers' Rights*, 40 FAM. L.Q. 315 (2006) (identifying parental attempts to alienate a child from the non-custodial parent as one of two major causes of rejection).

[59] *See, e.g.*, McLennan Cnty. Dist. Court, First Amended McLennan County Standing Order Regarding Children, Property and Conduct of the Parties § 1.6 (May 19, 2008), *available at* http://www.co.mclennan.tx.us/distclerk/Standing_Order.pdf ("The District

put in place in the very preliminary stages of a custody suit, or some time later when it becomes clear that one or both parents may be saying inappropriate things to a child about the other parent.[60] While these orders are admirable in that they seek to limit behaviors by parents that could and do injure relationships between them and their children, the efficacy and enforceability of these types of orders is highly questionable. In the throes of emotional and financial turmoil, orders like these do little to actually curb the insistence of one party to undermine the child's confidence in, and opinion of, the targeted parent. More often, when a child hears disparaging comments from a trusted source like a parent, the child takes the statements as true, and thus begins to align with the alienating parent, who often presents themself as the party unworthy of the injuries to which they are being subjected.[61] As has been said about criminal laws meant to curb the activities of law-breakers and scofflaws, laws only affect those who follow the law.[62] In the face of the passions of family law and the feelings of the allegedly wronged parent to voice their hurt and anguish, regardless of the harm to the child who may be hearing such epithets, parties feel that it is their right, and that the orders of a dispassionate tribunal do not apply to them.[63]

Courts of McLennan County have adopted this order because the parties and their children should be protected and their property preserved while the lawsuit is pending before the Court. THEREFORE, IT IS ORDERED: . . . Both parties are ORDERED to refrain from doing the following acts concerning any children who are subjects of this case: . . . Making disparaging remarks regarding the other party or the other party's family in the presence or within the hearing of the child or children."); Dallas Cnty. Dist. Court, Dallas County Standing Order Regarding Children, Pets, Property and Conduct of the Parties § 1.5 (Nov. 1, 2007), *available at* http://www.dallascounty.org/department/districtclerk/forms/AmendedStandingOrder.pdf; Denton Cnty. Family Dist.Court, Denton County Standing Order Regarding Children, Property and Conduct of the Parties § 1.6 (Oct. 10, 2011), *available at* http://dentoncounty.com/dept/District_Clerk/Acrobat/DCSORCPCP.pdf.

[60] *See* Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interest of the Child*, 53 VILL. L. REV. 173, 196–97 (2008); *see also* TENN. 3D JUD. CIR. CT., R. 22 ("Upon the filing of a petition for divorce . . . the following temporary injunctive relief shall be in effect against both parties until the final decree is entered . . . . The parties are mutually restrained and enjoined from: . . . making disparaging remarks about the other to or in the presence of any children of the parties . . . .").

[61] *See* Warshak, *supra* note 1, at 278–79 (defining "Medea syndrome" as a condition where children alienate the noncustodial parent due to a vindictive parents "fostering, encouraging, supporting, and accepting the child's irrational aversion toward the [noncustodial parent]").

[62] As Plato noted, "Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws." PATRICIA J. PARSONS, ETHICS IN PUBLIC RELATIONS: A GUIDE TO BEST PRACTICE 67 (2004).

[63] *See* Shulman, *supra* note 600, at 174–76. Professor Shulman explores how one parent's denigration of the other parent's religious beliefs is yet another way in which one parent can disparage the other. *Id.* He argues that, in light of the possible severe ramifications of the violation of court orders enjoining such disparagement, courts have a

This conveniently leads into the next problem with such court directives: the vague quality of the meaning of the term disparagement. In defense, many courts have tried to define what specifically a parent may or may not say about another parent, attempting to more narrowly tailor the orders to the circumstances of each individual case.[64] This is done because bringing the enforcement powers of the court to bear to impose an injunction against disparagement requires the court to define such orders with particularity, to place the parent on notice as to exactly which behaviors will not be tolerated.[65] Without such particularity, the order or injunction loses its teeth, and the ability of the court to enforce the order through real consequences by contempt is tremendously curtailed. But even with situational definitions and orders, what directive could possibly cover all of the circumstances under which one parent may undermine, denigrate or attack another parent?

Also complicating the definition of disparagement is the process of alienation, which may be overt, through direct statements (whether true or false) about the rejected parent's fidelity or truthfulness, or subtle and sometimes unconscious clues given by one parent to the child. Two examples from the author's experience are illustrative. These unconscious references may, for example, take the form of: insistence that the child call the alienating parent *every hour* when with the visiting parent, in order to tell the custodial parent how the visitation is going; or making an emotional scene by decrying leaving the child with the visiting parent in front of the child at every custody exchange.[66] It is also probable that a parent of a child who is later estranged from the other parent has occasionally made conscious, inappropriate comments in front of the child. It is the continuous and deep-seated distaste of one party for another, however, that is more likely to develop the kinds of behaviors which characterize the unjust rejection of a parent by a child. As the behaviors by the parents may be any combination of subtle and/or overt actions, it is impossible for a court to anticipate all of the particular ways parents may undermine each other, and subsequently place these mannerisms into an order. Thus, the injunctions against disparagement are ineffectual concerning alienation

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duty to not allow such religious intolerance to be taught to the children, regardless of any perceived right to instruct the children in moral or religious matters as freedom of speech and religion. *Id.*

[64] *See id*. at 196.

[65] *See, e.g.*, *Ex parte* Slavin, 412 S.W.2d 43, 44 (Tex. 1967) (finding that where an injunction is vague and subject to multiple interpretations, the respondent may not be held in contempt of order, because "'[t]he rights of the parties under a mandatory judgment whereby they may be subjected to punishment as contemnors for a violation of its provisions, should not rest upon implication or conjecture, but the language declaring such rights or imposing burdens should be clear, specific and unequivocal so that the parties may not be misled thereby'" (quoting Plummer v. Superior Court, 124 P.2d 5, 8 (Cal. 1942))).

[66] There are two separate and comparatively mild examples of behavior by parents in actual cases handled by the author wherein the activities of one parent influenced and changed, for the worse, the attitudes of children toward a formerly loved parent.

and exist primarily to make the parties feel that the court has acknowledged and is watching these behaviors, while having no real method of enforcement.

2. Custody Change

The second and far less common method to deal judicially with the concept of unjust rejection is the threat of custody change or actual change in residential custody of the child from the alienating parent to the unjustly rejected parent.[67] The actual change in custody of a child who is highly aligned with one parent by delivering the child to the *maligned* parent, will carry with it entirely novel problems, both psychologically and legally.

First, it must be accepted that changing the actual physical custody of the child from one parent to the other in an alienation context can carry very harmful results for the child.[68] While children are acknowledged as being highly adaptable, there are several experts who suggest high degrees of caution when dealing with the potentially harmful psychological effect on children who are so closely aligned with one parent when those children are moved to the custody of the rejected parent.[69] This may be seen by the child as a punishment of the aligned parent, or the child, or both, thereby subjecting the rejected parent to even more hatred and rejection. Further, the child tends to act out the patterned rejection by acting openly hostile toward the rejected parent when in that parent's home, thus hindering the ability of the rejected parent to rebuild a relationship with the unreasonably alienated child.[70]

The reality of these situations lies in the fact that the rejected parent—already victimized by the other parent in creating these emotionally destructive actions—is further victimized when custody is changed. The child who had been so aligned with the other parent is now placed with the rejected parent, usually at the lowest point in the relationship between the two. In the author's experience, the child, who through the court process often discovers their ability to manipulate the system and the parties involved, usually spares no time in making their feelings

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[67] *See* Warshak, *supra* note 36, at 49–50.

[68] *See* JANET JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 3–6 (1997).

[69] *See* Steven Friedlander & Marjorie Gans Walters, *When A Child Rejects A Parent: Tailoring the Intervention to Fit the Problem*, 48 FAM. CT. REV. 98, 103 (2010) ("In nonhybrid cases of alienation, or in hybrid cases in which the alienation is open, direct and conscious and, in either case, when there is a satisfactory rejected parent, a change in physical custody may be considered. However, in the hybrid cases, that is, those involving alienation and enmeshment or alienation, enmeshment and estrangement, careful attention must be paid to elements of enmeshment in order to insure that the intervention does not create a crisis for the child.").

[70] *See* Kelly & Johnston, *supra* note 7, at 263; Jolivet, *supra* note 9, at 178.

known either through emotional outbursts, threats, or destruction of property. In the author's experience, it is not unusual for the rejected parent to regret the decision to push for custody of these children because of the turmoil and upheaval which can be caused by the addition of children to other families.[71] Further, when the rejected parent "gives up" on the child who is acting out, the child's worst fears of that parent rejecting the child are realized, as are many of the prophecies of the alienating parent, causing an even deeper rift in the relationship between the parents and the child.[72] Many times, there are also reasons that the rejected parent might not want a significantly alienated child to enter the household, as in the instance where the rejected parent has a new spouse or new, very young step-siblings, whose safety cannot be easily assured by the addition of a potentially violent, older, alienated child to the environment.[73] While the rejected parent may indeed be desperate to restart a relationship with the child who was once so loving and respectful, it is not unreasonable for that rejected parent to feel like they cannot compromise their attempts to move beyond the failed relationship with the alienating parent and not want a potentially out-of-control, alienated child to be a part of that scenario. It is also not uncommon for parents to have to make the agonizing choice between new marriages, new children, and older potentially disruptive children from prior relationships. In these cases, parents might choose the option to forgo the relationship with the alienated child in favor of the obligations presented by a new family, thereby allowing the alienating parent to once again control the situation through the manipulation of the child. A rejected parent might feel justified choosing their new family as a way responding in kind to their own perceived mistreatment by the alienated child.[74]

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[71] The author, as a family law practitioner, has experienced these situations in numerous cases where custody was changed from one parent to another.

[72] Kelly & Johnston, *supra* note 7, at 259 ("When rejected parents feel that they are being abusively treated by an alienated child who is also refusing all efforts to reconnect, they can become highly affronted and offended by the lack of respect and ingratitude afforded them. Hurt and humiliated, some rejected parents react to the child's alienation with their own rejection. Their anger might also stem from sheer frustration and lack of patience or might arise from retaliatory needs to treat the child in the same manner in which they have been treated.").

[73] The author has frequently observed this scenario in practice. For example, in one case, a child who had been alienated rifled through the belongings of the rejected parent while in the rejected parent's home for visitation, looking for evidence that could be used against the rejected parent by the other parent. When some items were discovered missing, the child was confronted and admitted to the activity. The rejected parent had no choice but to lock the entire second floor of their house from the intrusions of the child, including the use of security measures such as alarms.

[74] Kelly & Johnston, *supra* note 7, at 259.

3. Do Nothing Response

The third way that the courts deal with parental rejection is to abrogate their responsibility by effectively doing nothing. Some courts attribute their lack of engagement to the abolished causes of action of alienation of affection,[75] which were developed specifically to remunerate a spouse for interference in a marriage by a third-party paramour.[76] Alienation of affection is wholly inapplicable to PA (despite the similar nomenclature) and when relied upon by a court to deny the right of a rejected parent to obtain relief, it is a clear dereliction.[77]

III. PROPOSAL FOR THE ACCEPTANCE OF A TORT FOR PARENTAL ALIENATION

In the initial analysis, we must first determine what rights a parent has to their children. In traditional torts (which have the main objective of compensating for injuries),[78] or rather, modern and generally accepted torts that have to do with the

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[75] *See, e.g.*, Raferty v. Scott, 756 F.2d 335, 338–39 (4th Cir. 1985); Bouchard v. Sundberg, 834 A.2d 744, 753–54 (Conn. App. Ct. 2003); Hyman v. Moldovan, 305 S.E.2d 648, 649 (Ga. Ct. App. 1983); McEntee v. N.Y. Foundling Hosp., 194 N.Y.S.2d 269, 271 (1959).

[76] DOBBS, *supra* note 55, at 1245–46.

[77] The courts' reluctance to consider claims of alienation of affection is partly because some states have, by statute, eliminated the tort of alienation of affection. *See, e.g.*, *Hyman*, 305 S.E.2d at 649; *Raferty*, 756 F.2d at 338–39. Other courts have concluded that, regardless of the statutory authority, a parent should not be able to recover damages for alienation of a child's affections. *See, e.g.*, R.J. v. S.L.J., 810 S.W.2d 608, 609 (Mo. Ct. App. 1991); Hester v. Barnett, 723 S.W.2d 544, 555–56, 564 (Mo. Ct. App. 1987); Bock v. Lindquist, 278 N.W.2d 326, 328 (Minn. 1979); Bartanus v. Lis, 480 A.2d 1178, 1181 (Pa. Super. Ct. 1984).

[78] The field of tort has been said to deal primarily with compensation, with the prophylactic attendant benefits and aims of deterrence and punishment. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 20, 25 (5th ed. 1984). That is to say, society has determined that persons should have access to compensatory remedies for injuries caused intentionally or negligently by another. The concept of tort developed with the understanding that money, while a poor substitute for use and enjoyment of one's legs, or the loss of a spouse's affections, is the only remedy available to a court which may come close to placing the victim back into the position she was prior to the injury. At one time, the common law did not allow the recovery of money damages for intangible injuries to the plaintiff (such as pain and suffering), due to the very real problem that such emotional injuries were objectively difficult to determine, and created a potential for fraudulent claims. *Id.* at 23–24. Over the years, however, common tort law has adopted the idea that recovery for intangible damages is not only allowable, but proper and necessary for the administration of the stated purpose of tort recovery. Modern tort cases often encompass damage claims for pain and suffering, emotional distress and loss of consortium, with ever-novel theories of recovery gaining traction in the effort to compensate innocent victims of harm. *Id.*

relationship between parents and children, the specific right of a parent is spelled out in detailed elements. Two of these torts are the modern extension of loss of consortium to the parent-child relationship and interference with child custody.

A. Loss of Consortium

The concept of consortium is historically entwined with the idea of suits by family members suing others for the loss of members of the household. Traditionally, indeed going back to Roman law, a cause of action for the loss of services of a man's wife or slaves due to injury rested entirely with the man, as the man controlled the proprietary interest over his household as the owner and controller of his "servants."[79] The original common law did not accept the right of either a wife or a child to sue for the wrongful death of a husband and father, for the reason that the wife and child of a man were considered upon marriage to be folded into the legal identity of the man, thereby establishing the fiction that a man could not sue himself.[80] While the man could sue for the loss of consortium of his wife or child, the same could not be said for the loss of services of the husband and father.

The modern definition of consortium between spouses, while illusive, has come to be defined by the courts to refer to the "total bundle of tangible and intangible relationships prevailing between spouses including material and moral support, sexual relations, companionship, and mutual assistance of all kinds."[81] The common law, however, for many years also rejected the idea that a child could sue for loss of consortium of a parent. The first case establishing the right of a child to sue for the loss of consortium of a parent was only recognized at the highest state court level in the United States in 1980 by the Massachusetts Supreme Court.[82] Since that time, many courts, but not all, have accepted the right of a child to sue a third party for compensation for the loss of a parent, under the idea that parental consortium carries with it "such sentimental or intangible benefits as the comfort, guidance, affection and aid of the parent."[83] The benefits which extend from a parent to a child not only encompass the obligations of the parent to support the child, but also those intangible benefits from parent to child,

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[79] Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321, 1327 (1992).

[80] *Id.* at 1328–29.

[81] *Id.* at 1324.

[82] *See* Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 692–96 (Mass. 1980).

[83] Mogill, *supra* note 79, at 1324 (citing Gail v. Clark, 410 N.W.2d 662, 668 (Iowa 1987)).

and arguably from child to parent, which "simply follow from living together as a family."[84]

It is not a tremendous leap of logic to hypothesize that the detriments to a child from the permanent loss of either parent due to wrongful death could be completely analogous to the loss of a parent due to alienation. If this premise may be accepted, then we may presume that alienated children have, like children who have suffered loss of consortium, "short-term reactions to familial loss includ[ing] fear for personal survival, separation anxiety, impaired ability to make psychological attachments, problems with control, and regression in developmental stages of growth."[85] According to Claudia Jewett, the long-term effects of the loss of a parent by a child include "depression, alcoholism, anxiety, and suicidal tendencies."[86] In the most severe alienation cases, the child loses a parent in the same helpless way as does a child who has suffered the death of a parent. The loss is similar because the child is made to think that the rejected parent has abandoned the child, will injure the child in some way or had disrespected the favored parent. The loss of the rejected parent in many ways seems like the literal death of that parent to the child, supported by the actions of the alienating parent. In one specific case in which the author was involved, the favored parent held a "funeral" for the rejected parent by candlelight upon the parties' divorce as a means of closure for the favored parent and the child (the custodial parent claimed the "funeral" was recommended by a mental health professional). While the testimony was clear that nothing expressly bad was said about the rejected parent, the message was clearer to the child, as well as the people in the courtroom. The grief and loss felt by the child and the "prematurely deceased" parent, regardless of the causation of the rejection, is very real and potentially emotionally damaging.

Despite the fact that some courts have stated that a parent may have a cause of action for loss of consortium (couched in terms of intentional infliction of emotional distress for the intentional and outrageous acts of a rejecting parent to alienate a child from the rejected parent), those courts have still refused to allow an aggrieved parent from moving forward with a tort claim. Courts avoid such a claim to "avoid entangling the children in the emotionally destructive process of discovery."[87] Most commentators, however, would favor a suit by a child against a

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[84] *Id.* (citing 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 12.1, at 650 (2d ed. 1987)).

[85] *Id.* at 1325 (citing CLAUDIA L. JEWETT, HELPING CHILDREN COPE WITH SEPARATION AND LOSS 22–49 (1982)).

[86] CLAUDIA L. JEWETT, HELPING CHILDREN COPE WITH SEPARATION AND LOSS vi (1982).

[87] Segal v. Lynch, 993 A.2d 1229, 1242 (N.J. Super. Ct. App. Div. 2010) (discussing the lack of a cause of action for intentional infliction of emotional distress when a mother had relocated to New Jersey without the father's knowledge or consent, blocked all forms of communication between the father and the children and matriculated the children in a

parent who has been physically or sexually abusive.[88] In the case where there has been long-term alienation between a child and a parent, the devastation visited upon the relationship may be as destructive as that suffered from child abuse. While in no way can the acts which visit physical and sexual abuse upon a child be analogized to the acts which impose severe alienation upon the relationship between a formerly loved parent and a child, the ultimate long-term effects would appear to carry many possible similarities, such as the destruction of the relationship between a formerly trusted authority figure, distrust, and dysfunction. Due to the incredibly destructive nature of sexual abuse, scholars have encouraged lawsuits by the abused child against their abusers, and rightfully so, regardless of whether the suit for harm might further familial animosity. But even in situations where the relationship between parent and child has broken down irretrievably due to the calculated interference of one parent, several courts have not allowed that tort suits by the aggrieved parent would further familial animosity.[89] Considering these factors, the courts should also not so easily dismiss the right of the parent to seek remuneration against the other parent in cases of alienation.

B. Statutory Proscriptions Against Interference with Child Custody

While no laws have yet been enacted to render the specific violation of a parent's rights in the alienation context illegal, there is ample support in the collateral laws on interference with child custody to provide a reference point from which to build the proposed tortious interference cause of action. In recent years, more and more statutes have been enacted that punish, sometimes both criminally and civilly, interference with the custody of the child.[90]

There have also been statutory enactments concerning the issue of parental rights as to visitation and access, making the violation of child support and visitation orders enforceable by the adoption of uniform acts in almost every state in the country.[91] The obvious importance of the rights of parents to have

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local school district under her surname, all in an effort to unlawfully deprive the father of his parental rights for a period of three months).

[88] *See* Ann M. Haralambie, *Children's Domestic Torts Claims*, 45 WASHBURN L.J. 525, 525–26 (2006) (calling for the allowance of torts for child victims of abuse and neglect against parent perpetrators as this abuse "can actually alter the development of neuronal connections in a child's brain, which may permanently affect the child's ongoing development").

[89] *See* Larson v. Dunn, 460 N.W.2d 39, 45–46 (Minn. 1990) (discussing court's unwillingness to recognize tortious claim of intentional interference with father's custodial rights); Zaharias v. Gammill, 844 P.2d 137, 139–40 (Okla. 1992) (declining to adopt the tort of custodial interference in Oklahoma).

[90] *See, e.g.*, IDAHO CODE ANN. § 18-4506 (2004); FLA. STAT. § 787.03 (2007 & Supp. 2012); IND. CODE § 35-42-3-4 (2009).

[91] *See* UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 101 cmt. (amended 1997), 9 U.L.A. 657 (1999) (containing enforcement provisions for child

meaningful access to and possession of their children supports the stated fundamental rights of children to be parented and of parents to parent their children, recognizing the obligations *and* benefits to each.

Even though there exist causes of action that appear to provide remedies for the parent who has been unreasonably rejected, the remedies (providing penalties for violation of visitation orders, loss of consortium, or even interference with child custody) do not adequately cover all of the possible situations in which the rejected parent may be wronged. It is entirely plausible for a parent to maintain visitation with a severely hostile child. This situation may arise where the custodial parent realizes that they may be held in contempt of court if they do not make the child visit the rejected parent, thereby relieving the alienating parent of any responsibility for the technical violation of any orders while still perpetuating the rejecting behaviors. The child, in the meantime, is miserable, hateful, and potentially destructive in the alienated parent's home. There does not appear to be a violation of any statute upon which a claim may be based, leaving the wronged parent without recourse. Although a tort for parental alienation itself arguably has the potential to become a tool used by one parent to alienate the other parent, the same could be said about divorce and child custody cases, but the legal community does not consider abolishing, ignoring, or diminishing the rights of parents to sue for divorce or custody of their children. Although a parental alienation tort may allow unreasonable cases in which parents are merely displaying their animosity toward each other, it also allows all of the legitimate cases where parents need redress for real wrongs and real injury to their relationships with their children.

In light of the very real consequences in which parents and children might be damaged by the failure of courts to remedy the underlying loss in a case involving PA, courts should recognize a tortious claim for PA by a wronged parent. This is true especially in those instances where the relationship between the child and the parent is so severely compromised as to be all but irreparably damaged. For example, courts have been reluctant to allow a tort due to the perceived damage that such a lawsuit may cause the children in these situations[92] or the additional

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custody cases rendered in a state or foreign jurisdiction enforceable in any other state of the United States). This uniform statute has been adopted by every state but Massachusetts. Uniform Law Commission, *Child Custody Jurisdiction and Enforcement Act Fact Sheet*, UNIFORMLAWS.ORG, http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (follow "Legislative Fact Sheet" hyperlink) (last visited Nov. 13, 2012); *see also* UNIF. INTERSTATE FAMILY SUPPORT ACT prefatory note, 9 U.L.A. 285 (2005) (containing enforcement provision for the registration and enforcement of child support orders). This uniform statute has been adopted by every state in the United States. Uniform Law Commission, *Interstate Family Support Act (1992) (1996) Fact Sheet*, UNIFORMLAWS.ORG, http://uniformlaws.org/Act.aspx?title=Interstate%20Family%20Support%20Act%20%281992%29%281996%29 (follow "Legislative Fact Sheet" hyperlink) (last visited Nov. 13, 2012).

[92] *See Larson*, 460 N.W.2d at 45–46.

familial strife that may occur as a result of the cause of action.[93] The pain of a legal recovery cannot begin to match the injury to a child or the pain of a rejected parent in not being able to realize the fundamental right to parent their child, or to imbue a child with one's living memory, experience, and sense of family. Courts that dismiss a cause of action based upon some misguided or lazy notion that a legitimate PA claim is precluded by the cause of action for alienation of affection (which the vast majority of states have abolished) are performing, at best, a disservice to the wronged parties who bring these cases before the court. At worst, these courts are denying the right to raise one's children guaranteed by the Constitution.[94] Unlike so many other rights, this right is time sensitive. A child will only be a child for a short period of time, and the noncustodial parent has not only the obligation but also the right to have that child in their life; just because a parent cannot live with the other parent does not mean that one parent divorces the child as well.

C. Fundamental Tort Principles and Parental Alienation

In addition to the reasons supporting the tort outlined above, other justifications for such action include providing compensation for the victim, supporting deterrence, and insuring punishment of the offender.

1. Tort as Compensation for the Victim Parent

A fundamental understanding of tort, as previously described, involves appropriate compensation for wrongdoing or injury.[95] In the case of PA, the wrongdoer who forces the rejected parent to hire private investigators, lawyers, examiners, counselors, evaluators, and visitation supervisors—who must all respond to suits in jurisdictions to which the alienating parent has secreted the children—should likewise be responsible in tort for the harms caused. The wrongdoer should also be ordered to pay compensation for expenses incurred.

If one accepts that alienation also carries with it the potential of psychological injury, then one must also accept that there are other very real costs associated with the remedial nature of the tort. Further, without private intervention by mental health professionals trained in the skills of reconciliation between parents and unreasonably estranged children, any future disability of the injured child or parents will likely be carried in no small part by a larger segment of society. The friends, family, mental health professionals, and any others who engage with these parties but who are clearly not the perpetrators of the act, will bear the burden of the harm. Therefore, directing the alienating parent to incur costs associated with the injury, both moral and remunerative, satisfies the overarching goal of providing

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[93] *Id*.
[94] *See* Meyer v. Nebraska, 262 U.S. 390, 399, 401–03 (1923).
[95] DOBBS, *supra* note 55, at 2.

redress for the recovery of the benefits of parenting and protects society from some of the most obvious costs associated with the tort.

While some detractors will no doubt state that the imposition of a tort for PA will have the impact of nullifying payments by the rejected parent to the favored parent for child support, the payments are fundamentally different. If the child support obligor parent, however rejected, does not pay, the State may exact harsh punishments upon this non-supporting parent (including incarceration);[96] however, a tortious judgment against the wrongdoer may not be enforced by jailable contempt. Further, the courts should not allow a wrongdoer—in this instance a violator of rights deemed fundamental by the highest court in the land—to use the best interests of the child as a shield to limit liability where the individual has clearly committed a wrongful act detrimental to the child and the rejected parent.

2. Tort as Deterrence

The threat of a tort used in PA cases may also act as a deterrent to inappropriate behaviors if explained by the court or legal or mental health professionals at the beginning of a case. According to the author's experience, in most (if not all) child custody disputes, there is a substantial amount of time between the filing of an original petition for custody or modification of custody and the final disposition of the case. Often, months and years may go by, within which time parties are under temporary orders which dictate where the child will live on a temporary basis and the terms of that visitation. These terms include restrictions which are designed to restrain the parents from disparaging each other or interfering with visitation.[97] During these lengthy temporary periods, the parties are watched, sometimes very closely, for signs that they are the friendly parent. The friendly parent is the one who could encourage or facilitate a healthy relationship with the other parent.[98] Attorneys, mental health professionals, social workers and the like frequently advise clients and parties on how to act so as to put on the best face for the court in the eventual custody trial. It is in these times when

[96] *See, e.g.*, TENN. CODE ANN. § 36-5-104 (2010); TEX. FAM. CODE ANN. § 157.166 (West 2008).

[97] *See, e.g.*, TENN. CODE ANN. § 36-6-101(3) (2005 & Supp. 2006) ("Except when the court finds it not to be in the best interests of the affected child, each order pertaining to the custody or possession of a child arising from an action for absolute divorce, divorce from bed and board or annulment shall grant to each parent [listed] rights listed in subdivisions (a)(3)(A)–(a)(3)(F) during periods when the child is not in that parent's possession or shall incorporate such rights by reference to a prior order. Other orders pertaining to custody or possession of a child may contain . . . [t]he right to be free of unwarranted derogatory remarks made about such parent or such parent's family by the other parent to or in the presence of the child . . . .").

[98] Lawrence v. Lawrence, 20 P.3d 972, 974 (Wash. Ct. App. 2001) ("Under the 'friendly parent' concept, primary residential placement is awarded to the parent most likely to foster the child's relationship with the other parent.").

parents shine or fail miserably. For the alienating parent, it can mean the difference between holding on to custody and losing the child. Given the emotional nature of the custody dispute and the overriding need to win at any cost, many parents are unable to restrain their feelings of disdain or disparagement, or mistreatment of the other parent. If those same parents were threatened with a tort suit, however, it is possible that the tort would act as a deterrent to force the rejecting parent to modify his/her behavior, to encourage a relationship with the unreasonably rejected parent or at least to remain silent in front of the child instead of being reproachful. Once the tort is established, and the phenomenon of PA is accepted, it may be that only a few cases enforced with judgments will be necessary to control and prevent further cases of alienation.

3. Tort as Punishment

Another fundamental idea of tort is to punish wrongdoers, thereby proving a "strong incentive to prevent the occurrence of the harm."[99] While alienation may be subtle or overt, the result is the same—the unreasonable rejection of a parent by a child due to the influence of the other parent. Where the parent knows or should know that their actions may cause feelings of conflict within the child regarding affection for the other parent, yet continues the course of action, that party should be liable for failing to act as a reasonable, prudent parent. As pointed out above, most contested child custody, divorce, or visitation cases take more than a few months to resolve. Within that interim lies an opportunity for both parents to set aside their personal animosity in the best interests of the children. Most states list factors by which the court is to decide who is ultimately awarded the care, control and custody of the minor children.[100] Among these factors is usually the ability of one party to encourage a healthy relationship with the other parent, known as the friendly parent provision. General practice experience dictates that during the temporary period between the filing of the suit and the final trial, parents are supposed to be on their best behavior, and it is the job of a good family lawyer to advocate to clients that the clients should be on their best behavior. This includes a stern discussion with the client to encourage the relationship between the child and the other party, lest the client's visitation and access to the child be restricted or the party lose the ability to have joint or sole control of the child altogether. In the event that the parent is unable to encourage the relationship with the other parent, get past the hurt feelings harbored from the breakup of the relationship, and put the child before themself in the blame game that inevitably follows the filing of a suit for custody, then the court should be ready and willing to impose a tort liability. This liability would exact punishment upon the wrongdoer for acts contemplated

[99] KEETON ET AL., *supra* note 78.
[100] *See, e.g.*, TENN. CODE ANN. § 36-6-106 (2005 & Supp. 2006).

for no other purpose but for the destruction of the relationship between the rejected parent and the child.

Ultimately, it would be incorrect to say that monetary recovery of a tort from an offending parent would be merely a windfall to the rejected parent. Any tortious recovery should be used to repair, if at all possible, the relationship between the rejected parent and the child. If this relationship cannot be repaired immediately then possibly the relationship can be reestablished after the child has reached majority, when the alienating parent cannot so tightly control the interaction between the child and the rejected parent. The costs of therapy between the child and the disfavored parent should not be borne solely by the rejected parent in the instances where it can be proven that one parent has caused the child's unreasonable rejection of the other parent. Fairness dictates that this cost be borne by that party who has brought about the harm. The offending parent should likewise pay additional costs of parenting coordinators, mediators, and mental health professionals, and unwillingness to pay any judgment should be used as future evidence of misconduct in any child related matter filed before the child becomes emancipated.

CONCLUSION

The reluctance of courts to provide a tortious remedy for PA is not supported by the recognition of the fundamental rights of parents to be involved in the upbringing of their children. The courts should keep in mind that within the definition of the family comes not only the State's obligation to do what is in the best interests of the child, but *also* what is in the best interests of the *family*. The relationship between children and their parents is beneficial not only to the child at the center of the alienation controversy, but also to each parent, who gains independently from the close and abiding love and affection of a child. Therefore, when the formerly close bond between a child and a parent is irreparably harmed due to the interference of the other parent, the damage can be devastating to both the child and the rejected parent, with ramifications to the child extending into adulthood. The formative years of a child are limited, and each parent has the right to share the wonder of discovery and the journey of exploration with their children. Where those years are squandered due to unnecessary alignment, courts should be ready and willing to extract swift and just compensation from the alienating parent, in order to: (1) support and further the rights of all parents to raise their children as they see fit; (2) deter other parents from espousing such emotional, violent, and abusive responses to the stresses of divorce, remarriage and custody disputes; and (3) provide compensation for what proves to be a very expensive road to healing therapy and legal drama for the parent who will not give up on their children, regardless of the actions of the other parent.