

Parental Alienation: The Quandary Lawyers and Judges Face

by Elizabeth M. Vinbal

Too often, parents use their children as the ammunition they fire at each other in custody battles. Whether a parent asserts a warped right to exclusivity of a child's love, time and affection, or uses this as a venal financial tactic makes no difference. The damage to the child is immeasurable, and the remedies at law are sadly impotent. A parent can administer the poison, so to speak, through subtle innuendos that imply the other parent no longer cares for the child, or more obvious statements like "Your father does not love you!" Regardless, the children are the casualties of any custody war.

As family law practitioners we have heard our clients complain that their spouse is turning their children against them. What advice do we give them to stop this behavior? More importantly, what statutory and case law do we rely upon? Allegations of parental alienation raise a host of questions for family lawyers, including how to explain to our clients the consequences of such behavior and the remedy for resolving the issue within the court system.

The term "alienation of affections" originally evolved in the spousal context when one spouse would allege that the other spouse's love and affection was stolen by a romantic interloper. However, today the term "alienation of affections" is utilized in custody battles when a parent is accused of brainwashing their child against the other parent to such an extreme that the child's affections are alienated from the other parent, other-

wise known as parental alienation.

This alienation can occur in the most subtle form when one parent makes a statement to a child that could reasonably lead the child to believe the other parent does not care about him or her. The following are examples of statements made by a parent that are forms of subtle parental alienation: "I wonder why your dad was not at your baseball game? I thought he said it was important to him." "Why does your mom spend so much time with her new boyfriend instead of you?" and "Nobody loves you more than I do!" More overt forms of alienation consist of a parent bribing a child with toys and/or fancy vacations, in return for the child not spending time with the other parent, or statements as blatant as "Your father doesn't love you. If he did he wouldn't have done this to us!" The most severe cases of alienation include a parent prompting their child to falsely allege sexual and/or physical abuse.

Parental alienation is the constant and unrelenting process through which a parent denigrates and marginalizes the other parent in their child's eyes, which in turn, alienates that parent's relationship with the child. The alienating parent's manipulating behavior creates hostility from the child toward the other parent, thereby placing the hapless youngster in the middle of a loyalty battle. Ultimately, the child rejects the alienated parent, often parroting the abusive parent's allegations about him or her, which can, and often does, create an irreparable breakdown in the parent-child relationship.

Acknowledgment of a child's irrational rejection of another parent was first recognized by Judith Wallerstein and Joan Kelly in their study "The Effects of Parental Divorce: Experiences of the Child in Later Latency."¹ The study discussed a child's harsh rejection of one parent, which resulted in the child no longer wanting to visit with the other parent. Thereafter, in the mid-1980s, Dr. Richard Gardner, a child psychiatrist, coined the phrase "parental alienation syndrome" (PAS). He defined the syndrome as "...a disorder that arises primarily in the context of child-custody disputes.... Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification against a good, loving parent."²

Dr. Gardner distinguished parental alienation from PAS. He believed parental alienation was a general term that encompassed any situation where a child is alienated from a parent (*i.e.* physical abuse, verbal abuse, sexual abuse, etc.). PAS, on the other hand, he defined as a "subtype of parental alienation," which was caused "by a parent systematically programming the children against the other parent, who has been a good, loving parent."³

Dr. Gardner identified three levels of parental alienation: mild, moderate and severe. He was a proponent of utilizing family therapy in mild or moderate cases, but was confident that only a change in custody from the alienating parent to the alienated parent would suffice in severe cases.⁴

In part, because of Dr. Gardner's

strong stance in transferring custody in severe parental alienation cases, his research has been the subject of significant scrutiny over the years. Many critics claim PAS is based on opinion with no empirical research to support it. Others claim that since PAS is not listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM) IV, it does not exist. Critics have gone so far as to claim that since Dr. Gardner's works are self-published, he is essentially a fraud.

Putting aside the criticism of Dr. Gardner's research, or the name for the condition, the reality is parental alienation exists regardless of whether it is called PAS, programming, brainwashing, divorce poison, indoctrination, vilifying of a parent, and/or mind control. The label that lawyers or courts utilize to describe the act of abuse in which one parent dispenses hate about the other to villainize that parent in the child's eyes is irrelevant. What is important is how lawyers and courts address the issue in order to avoid perpetuating the alienation in the future.

Lawyers and judges are charged with the difficult task of identifying the emotional abuse of alienation and crafting a remedy that will deter this type of behavior. Interestingly, New Jersey courts have not defined the term "parental alienation," *per se*. As a result, treatment of parental alienation in the New Jersey courts is somewhat inconsistent because a bright line rule to address the issue has not been established. Rather, it is left to the judge's discretion, and therefore dealt with on a case-by-case basis. In fact, there are only a handful of cases, which consist of published and unpublished decisions, specifically dealing with parental alienation in New Jersey.

In making a custody determination courts look to N.J.S.A. 9:2-4(c), which holds, in pertinent, that a court should examine, among other things, "...the parent's ability to agree, communicate and cooperate

in matters relating to the children...[and]...any history of unwillingness to allow parenting time...."⁵ An additional requirement "superimposed upon an analysis of the statutory scheme" is the "best interest of the child standard."⁶ "The 'best-interest-of-the-child' standard is more than a statement of the primary criterion for decision or the factors to be considered; it is an expression of the court's special responsibility to safeguard the interests of the child at the center of a custody dispute because the child cannot be presumed to be protected by the adversarial process."⁷

As early as 1949, in *Turney v. Nooney*, the Appellate Division held that in promoting a child's best interest "the court should strain every effort to attain for the child the affection of both parents, rather than one."⁸ The court further emphasized "the greatest benefit a court can bestow upon children is not so much to be found in determining which parent shall enjoy their physical custody as it is in ensuring that the children shall not only retain the love of both parents, but shall be at all times and constantly deeply imbued with love and respect for both parents."⁹

Turney specifically charges custodial parents to encourage a relationship between the children and the other parent. Almost 40 years later, in *Beck v. Beck*, the Supreme Court reiterated this view when it held that in determining a joint custody arrangement the court must examine whether the children have relationships with both parents in which, among other things, "...the child recognize both parents as sources of security and love..."¹⁰ The Supreme Court opined in *Beck* that "...a successful joint custody arrangement requires only that the parents be able to isolate their personal conflicts from their roles as parents and that the children be spared whatever resentments and rancor the parents may harbor."¹¹

Seven years later, in *Nufrio v. Nufrio*, the Appellate Division held:

...the prime criteria for establishing a joint legal custody relationship between divorced or separated parents centers on the ability of those parents to agree, communicate and cooperate in matters relating to the health, safety and welfare of the child, notwithstanding animosity or acrimony they harbor towards each other. The ability of parents to put aside their personal differences and work together for the best interest of their child is the true measure of a healthy parent/child relationship. A judicial custody determination must foster, not hamper, such a healthy relationship. Therefore, a parent's amenability or inability to cooperate with the other parent, are factors to be considered in awarding joint legal custody.¹²

Our courts have made it abundantly clear that when a trial court determines custody the ability and the inclination of parents to foster their child's relationship with the other parent is paramount. "...[A] parent's right to the care and companionship of his or her child are so fundamental as to be guaranteed protection under the First, Ninth and Fourteenth Amendments of the United States Constitution."¹³ Thus, in a case where emotional or physical harm can come to a child as a result of a parent's behavior "a parent's custody and visitation rights may be restricted or even terminated..."¹⁴

Some lawyers would argue that Dr. Gardner's recommendation to transfer custody in cases where a custodial parent severely alienates a child's affection is appropriate because the emotional abuse is detrimental to the child's emotional well being (*i.e.* destroying that child's relationship with the other parent). Thus, a change in custody is warranted as a means to preserve the best interests and welfare of the child by allowing the child and the alienated parent to repair their relationship before the alienating parent destroys it permanently. Such a transfer also removes the child from the source of the emotional poison-

ing and allows the child to heal.

The Appellate Court, in *Sbeenan v. Sbeeban*, followed the above line of thinking and held that as a "general rule"¹⁵ if a parent "desires to retain the primary custody of her child, it is her duty to aid and encourage the father's sincere effort to enhance the mutual love, affection and respect between himself and his child and not merely to refrain from active resistance thereto."¹⁶ The Supreme Court echoed this sentiment in *Sacharow v. Sacharow*, wherein Justice Virginia Long authored the opinion holding, in pertinent part, that when analyzing the best interest of a child "the court should take into account the good faith of the parties; the prior history of dealings between them; the relationship between each parent and the child; [and] any efforts by either party to alienate the child from the other parent...."¹⁷

Three years later, in an unpublished Appellate Division case, *Flesche v. Flesche*, the Appellate Court specifically addressed the issue of parental alienation when the defendant/mother appealed an order declaring her ex-husband the primary parent of their 13-year-old son. She claimed the trial court failed to order a plenary hearing or interview their son.¹⁸ The mother accused the father of contributing to their son's negative feelings toward her by calling her a "whore" in front of their son and allowing their son to use vulgar and denigrating language about the mother in his presence. It was undisputed that prior to the parties' divorce the mother had a relationship with the son's hockey coach. Knowing about the affair, the father agreed in the parties' property settlement agreement "to cooperate in every way to help the children better adjust to the circumstances as they now exist and may in the future exist."¹⁹ Subsequent to the divorce, the son refused to spend time with his mother. The trial court record reflected that the parties discontinued counseling sessions after the divorce, and that the mother, since

then, did not seek therapeutic counseling or the court's intervention to assist in reestablishing her relationship with her son. As a result, the trial court awarded the father residential custody, despite the mother's strong claims of parental alienation.

On appeal, the appellate court held that although the mother's affair with the son's hockey coach embarrassed the son, "the actual degree of the father's own culpability, if any, in promoting that alienation is unclear from the paper record."²⁰ The appellate court was "dismayed" that despite the fact that the trial court encouraged the mother to make an application to the trial court for therapeutic reunification, she did not. As a result, the appellate court construed the trial court's order as an interim order, and allowed the mother 90 days to file a motion citing her good faith efforts to obtain therapeutic counseling and if timely opposition was filed instructed the family part to reconsider the necessity of a plenary hearing.

In closing, the appellate court opined:

...The parties and their son have a very challenging and emotional situation. It is incumbent upon both parents to exert their best efforts cooperatively to repair their son's fractured relationship with his mother. The mother, for her part, must take the initiative in pursuing suitable counseling, and in exhibiting appropriate sensitivity, judgment and patience in order to help her son learn to accept her again as a parent with open arms. Likewise, we admonish the father, despite his understandable hard feelings about his former spouse's affair, to honor his express commitment in the PSA, as well as his inherent duties as a co-parent, to show respect for his son's mother, to refrain from disparaging her, and to support the mutual efforts of mother and son to rebuild a constructive relationship. Without such mutual parental cooperation, the son surely will be deprived of the inestimable benefits of his

mother's love and support, and the mother will be deprived of the reciprocal fulfillment and respect that every parent presumptively deserves from his or her children.²¹

A year later, in 2006, the appellate court again addressed the issue of parental alienation in the unpublished decision *E.I. v. L.I.*²² In this case, the mother appealed, among other things, the temporary award of custody to the father, along with temporary suspension of her parenting time, as a result of her falsely alleging her daughter was sexually abused by her father. Only after the parties submitted to polygraphs by consent, which indicated the father was being truthful when he said he did not sexually abuse his daughter, and after hearing the testimony from several Division of Youth and Family Services caseworkers, psychologists, and a polygraph operator, did the trial court determine the mother was motivated to encourage the daughter to make false allegations of sexual abuse in an effort to prevent parenting time and remove the father from the house. As a result, the trial court transferred custody from the mother to the father, and suspended the mother's parenting time pending a psychological evaluation. "The court determined that the children needed to establish a relationship with their alienated father without any interference by the mother."²³

Despite the trial court's order, the mother never underwent a psychological evaluation, and therefore did not see the children for approximately two years. However, on appeal the appellate court remanded the case to "consider a fair and equitable parenting time for the mother." The appellate court's rationale was based on the fact that the children were more mature in light of the two-year passage of time, and have been able to bond with their father since the entry of the trial court's order. It is important to note that the appellate court did *not* criticize the trial court for transferring

custody; rather, the court reiterated that N.J.S.A. 9:2-4(c) requires the court, in making a custody determination, to look at the best interests of the child, and in doing so *Wilke v. Culp* holds "a parent's custody and visitation rights may be restricted, or even terminated, where the relation of one parent (or even both) with the child cause emotional or physical harm to the child, or where the parent is shown to be unfit, or perhaps where *special temporary circumstances require*...."²⁴

The appellate court upheld the trial court's decision that "the suspension of [the mother's] visitation rights was determined to be in the best interests of the children in order to end the alienation of the children from the father,"²⁵ and thereby warrants the "special temporary circumstances" the *Wilke* court envisioned.

In another unpublished Appellate Division case, *VU v. LU*,²⁶ the appellate court rejected the court-appointed custody expert's recommendation to transfer custody of the two minor children, Carol and Mary, from the mother to the father as a result, in part, of the mother's parental alienation. The trial court interviewed the two girls and noted that although Carol did not want to have contact with her father, Mary once felt that way but has been able to reconnect with her father. The trial court held that despite the "instability that [mother] has imposed upon [Mary] and [Carol], these girls appear to be healthy and [are] doing well in school."²⁷ Essentially, the trial court rewarded the mother, who clearly was alienating the children from the father, with continued custody, because the court found that a transfer in custody was not in the children's best interests.

On appeal, the appellate court affirmed the trial court's decision with a lukewarm endorsement, and held:

The judge was not bound to accept the opinion of the court-appointed

expert, but rather was entitled to accept or reject all, or part, of the expert's opinion. Although another judge may have reached a different conclusion based upon the same facts, we determine that Judge Franklin did not mistakenly exercise his discretion in awarding custody of the parties' two daughters to defendant.²⁸

Like New Jersey, other jurisdictions struggle with the handling of parental alienation. For example, in the North Dakota case *McAdams v. McAdams*, the court denied custody to the father because it found he had alienated the son from his mother.²⁹ In *Brown v. Brown*, the mother requested custody of the child because of predicted future alienation if the child stayed with the father. Although her request was denied, the court stated that "[e]vidence of parental alienation is a significant factor in determining custody."³⁰

In Iowa, in *In re Marriage of Rosenfeld*, the court held that since the custodial father and his wife alienated the children from their non-custodial mother, the children needed to spend more time with their mother, and thereby, transferred custody to her.³¹

On the other hand, the Arkansas case *Blake v. Smith* held that evidence supporting the alienation of a child's affection from a parent should not alone be sufficient grounds to warrant a change in the child's custody.³² Similarly, the Georgia case *Elders v. Elders* held that although a father told the children their mother "was immoral and that she did not love them," the father should not be deprived of the custody of the children because of it.³³

In the New York case *Gage v. Gage*, the Supreme Court, Appellate Division, upheld the award of custody to the father after the father's expert testified that the mother's constant demeaning of the father in front of the child led the court to believe that if the mother was granted custody she would use the children as a weapon against the him.

The mother's own expert testified that if she was awarded sole custody, she would continue to negatively speak of the father.³⁴

In Vermont, the appellate court held that the trial court abused its discretion when it transferred custody of the children to the father based on the mother's estrangement from the children, despite the fact the mother had been the children's primary caretaker prior to the parties' divorce. The court found that since the father was the principle cause of the children's estrangement from the mother, the mother was "more likely to provide suitable custody and guidance to the children."³⁵

There is a dearth of authority on parental alienation in New Jersey. Beyond dispute is the fact that courts have an affirmative duty to promote the affection of the children for both parents, as defined by statutory and case law. If one parent is interfering in the child's relationship with the other parent, doesn't the court have a duty to eliminate that parent's negative behavior, or at the very least, protect the child from it?

The author believes the only way to protect a child from this emotional abuse is to remove the child from it. Courts struggle with transferring custody of a child from the alienating parent because of a fear of contravening the child's best interests; however, the author feels, this philosophy only perpetuates the alienation and improperly rewards the abusive parent. Courts must establish some guidelines on how to deal with parental alienation cases. In mild and some moderate cases, family mediation and/or therapeutic counseling could help resolve the issue; however, in more severe alienation cases the likely remedy should be to transfer custody of the children to the non-alienating parent until the court is convinced that the emotional abuse is eliminated. The author believes parents cannot be allowed to systematically and methodically brain-

wash their child against the other parent; this deliberate act alone is contrary to the children's best interest. Until a solution is fashioned, the author fears many children of divorce will continue to suffer this particularly malignant emotional abuse at the hands of one or both of their parents. ■

29. *McAdams v. McAdams*, 530 N.W.2d 647 (N.D. 1995).
30. *Brown v. Brown*, 600 N.W.2d 869, 874 (N.D. 1999)(citation omitted).
31. *In re Marriage of Rosenfeld*, 524 N.W.2d 212 (Iowa Ct. App. 1994).
32. *Blake v. Smith*, 190 S.W.2d 455 (1945).
33. *Elders v. Elders*, 57 S.E. 2d 83 (1950).

34. *Gage v. Gage*, 167 A.D. 2d 332 (1990).
35. *Begins v. Begins*, 721 A.2d 469 (1998).

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ENDNOTES

1. Judith S. Wallerstein & Joan B. Kelly, "The Effects of Parental Divorce: Experiences of the Child in Later Latency," 46 *Am.J. Orthopsychiatry* 256 (1976).
2. Gardner, Richard A., et al., *The International Handbook of Parental Alienation Syndrome*, Illinois: Charles C. Thomas Publisher, LTD. 2006.
3. *Id.* at 6.
4. Richard A. Gardner, "Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndromes Families: When Psychiatry and the Law Join Forces," 28 *Ct. Rev.* 14 (1991).
5. N.J.S.A. 9:2-4(c)(emphasis added).
6. *Kinsella v. Kinsella*, 150 N.J. 276, 317 (1997) (citation omitted).
7. *Id.* at 317-18.
8. *Turney v. Nooney*, 5 N.J. Super. 392, 397 (App. Div. 1949)(citation omitted).
9. *Id.* at 397(citation omitted).
10. *Beck v. Beck*, 86 N.J.480, 497-498 (1981).
11. *Id.* at 498 (citation omitted).
12. *Nufrio v. Nufrio*, 341 N.J. Super. 548, 550 (2001)(emphasis added).
13. *In re of J.S & C.*, 129 N.J. Super. 489 (Chan. Div. 1974).
14. *Wilke v. Culp*, 196 N.J. Super. 487, 496 (App. Div. 1984).
15. *Sheenan v. Sheenan*, 51 N.J. Super. 276, 293 (App. Div. 1958).
16. *Id.* at 291(citation omitted).
17. *Sacharow v. Sacharow*, 177 N.J. 62, 65 (2003)(emphasis added).
18. *Flesche v. Flesche*, WL1586025 (App. Div. 2006).
19. *Id.*
20. *Id.*
21. *Id.*
22. *E.I. v. L.I.*, WL 1764473 (App. Div. 2006).
23. *Id.*
24. *Id.* (citations omitted).
25. *Id.*
26. *V.U. v. L.U.*, WL 2707346 (App. Div. 2006).
27. *Id.*
28. *Id.*