

### Parental Alienation Syndrome

Parental Alienation Syndrome (P.A.S.) may be defined as the manifestation of a child's systematic alienation from his parent, caused by any one or more of these four factors: (1) conscious programming by the other parent (brainwashing); (2) subconscious or unconscious programming or manipulation by the other parent; (3) factors within the child; and (4) situational or environmental factors. This term was coined by Dr. Richard Gardner, M.D., a clinical professor of child psychiatry at Columbia University, and author of numerous texts on custody litigation.

In his book, *Family Evaluation in Child Custody Mediation, Arbitration, and Litigation* (1989 Creative Therapeutics), Dr. Gardner devotes a chapter to describing his clinician's view of this disorder within the context of the psychologist's process of evaluation, recommendation and testimony in custody litigation. This book is certainly required reading for the family practitioner and should be considered the source document on the phenomenon of parental alienation syndrome. This paper will attempt to explain the disorder Dr. Gardner has identified and labelled for us, to present a practicing attorney's perspective of the syndrome and its recognition within the legal system in the province of Québec.

### Parental Alienation Syndrome - A Social Perspective

To understand the reasons behind the increasing incidence of this disorder, let us consider the social perspective in which custody litigation has evolved.

We live in a society which is in a profound state of transition and social upheaval. There are two principal trends affecting the stability of the nuclear family which are profoundly in conflict. There is the one trend of the epidemic of family breakdown with an explosion of divorces and separations, as well as a formidable number of families headed by single mothers. This makes for a blossoming number of children raised in one-adult families, without the modulating effect of two-parent interaction under one roof.

At the same time, there is the trend of developing social acceptance of the respect of the child as autonomous participant in the social contract, endowed with rights as inalienable as those of his elders. This has led to the development of the concept of the child advocate, the right of the child to testify and the nomination of the tutor *ad hoc* (read, *ad litem*). Concomitant with this acknowledgement of the legitimacy of the rights of the child have been the tumultuous revelations of the degree of child neglect and abuse that had been previously tacitly sanctioned by all of us.

These two principal trends -- liberalization of family law and recognition of children's rights -- appear superficially to be beneficial. There is no longer a stigma in being an illegitimate child, an unmarried mother, or for that matter, being a divorced person. Fault is no longer required in most jurisdictions throughout North America to obtain a divorce. Children are no longer viewed as the property of their parents (or, even

more traditionally, children and their mothers as the chattels of the men). These trends appear to be part of the greater recognition of individual rights and freedoms.

However, a society predicated upon rights and freedoms without recognition of obligations and duties may fail to make the grade in protecting its children. The importance attached conceptually to rights and freedoms was a valid response historically to the oppressions of tyranny and autocracy. In a contemporary democracy, surely there is more to the social contract than merely the assertion of what one may *not* do to one's fellow man -- or child.

Indeed, there is a moral failure in smugly asserting that children have "rights" without taking into account their evident lack of autonomy and their material and psychological vulnerability to control and manipulation. In any divorce, the "right" of the child to being in the care and custody of his two parents has been breached without his consent and often without his participation. In divorces marked by parental alienation syndrome, where a child is polarized between his parents, he is particularly unable properly to express his own best interest. The "rights" of the child invariably presuppose a party or other entity available to *assert* such rights - a parent, an attorney, the State.

During a marriage breakdown, when the parents are themselves the most vulnerable and caught up in their own emotional agendas, they may be the persons least suited to assert the rights of their children. And as for the State, the limitations of budgets and the crushing burden of dealing with gross cases of child abuse negatively affect intervention in the majority of cases involving "mere" psychological manipulation. Who, then, is left to assert the rights of the child?

In a previous era of lesser social examination of the internal functioning of families, an era of children who were "seen and not heard," there was less preoccupation with custody and access in divorce proceedings. Custody was traditionally offered to the mother, almost irrespective of an examination of the notion of the "interest" of the child. Fathers were similarly relegated to the status of occasional visitors and could be effectively excluded from their children's lives by a determined mother, with little effective legal recourse.

A mother's possessiveness or obsession in respect of her children was not then perceived to be potentially detrimental to their healthy emotional development. Similarly, a father had to be able to prove an objective lack of fitness in the mother to be able to obtain custody. To the extent that objective proof was available, one did not have to consider the impact upon children of being with a father who was able to conceive of debasing their mother, the very woman with whom the father would have once known love and tenderness.

However, the disappearance of this "tender years doctrine" (for example, *Droit de la Famille* 7 [1984] C.A. 350, *inter alia*) and the presumption of equal parenting "rights" (Articles 443 and 648 C.C.Q.) set the foundation for the flood of custody litigation which we have witnessed, particularly in these last ten years. Concomitant with

this trend has been the increasing use of the psycho-legal expertise in custody litigation, with the psychologist cast as the hired gun engaged to put forth to the court the negative opinion of the contesting parent under the guise of an “expertise”. When a divorce action is instituted in Quebec in the 1990’s, the children are up for grabs even more so than the generally partitionable family assets.

Thus, there is not only the lack of security that the majority of children must face who will not likely live in an intact home throughout their childhood, but there is the added insecurity that a ritualized adversarial process will one day be engaged in order to determine where, with whom and in what conditions these children will live.

This has proven to be the fertile ground in which the seeds of parental alienation syndrome have been sown.

### Symptoms of Parental Alienation Syndrome

An attorney will rarely happen directly to encounter all the members of a family caught up in the throes of this disorder. Family therapists, social workers and child psychologists are the professionals favoured with the opportunity of such direct access. An attorney is likely to be consulted by the alienating parent seeking representation to cut access of the child to the other parent; by the alienating parent accompanied by the children seeking a child advocate to this same end; or by the alienated parent seeking recourse to remove obstructions to the exercise of access or custody. Occasionally, one is consulted by grandparents or other collateral relations cut off from contact with the children because of their very filiation with the alienated parent.

How then may one discern the symptoms of parental alienation syndrome? What words or attitudes on the part of the presenting client should set off alarm bells ringing in our minds? After all, we are not educated as mental health professionals and yet we may be called upon to deal with a disturbing psychopathology involving a child’s obsessive “hatred” for *one* parent -- how will we fit this into our roles as the litigators of an adversarial system and as officers of the court?

#### (1) The Alienating Parent

The attorney invariably begins by receiving in his office a client in a state of emotional distress involving the most intimate facets of his life: his love life, his children, his home. The client is required to reveal these intimacies, failures and all, to the attorney in private consultations (albeit without benefit of the couch). In a consultation with a mental health professional, such emotional upset is worked through within the confines of the office, removed from the exigencies of the outside world. The emotional morass dumped on the attorney, however, is formulated into a call to arms, a mandate to *act*.

Now, in a typical situation of family breakdown, there will be invariably conflicting emotions in all members of the family. Indeed, an attorney may consider a certain degree of expression of anger and upset as desirable in a client. After all, negative emotions are healthy in a balanced individual who is trying to work through the devastation and loss of an imminent divorce. A client who expresses some venom in respect of his spouse in the initial period after the couple's separation is still reacting unthinkingly and unhappily, and may still be relied upon to calm down in due course.

However, it is a danger signal when a client expresses a persistent and unreasoned anger at his spouse which cannot be worked through in the course of a few conversations. One may test this by asking questions about subjects about which the client is not explicitly angry, and in particular, by steering away from marital issues (infidelity, betrayal). Can the client observe any positive parenting qualities in the spouse? Can the client state ways in which the children resemble or have personality traits of the spouse (and are these positive or negative traits)? If one reassures the client that the contentious issues which are making him angry can be dealt with in court, does the client's anger abate? Can the client recognize the need of the children to have a positive relationship with the spouse?

A client may justify the desire to restrict or deny access with allegations of deficient parenting. Fair enough -- a court will certainly be able to assess the veracity of such allegations in due course by examining objective evidence dispassionately presented. However, in parental alienation syndrome, the hostility of the alienating client just never seems to be reasonably linked to the seriousness of the incidents alleged. The alienating client often relies blithely on his child's professed refusal to see the other parent as evidence of the inadequacy of the other parent.

The method to assess credibility here is to test the client's openness to therapeutic intervention. What does the client think will happen if the other parent accepts individual therapy or family counselling? Does the client realize a child who refuses categorically to see his *one* parent may need some kind of third party counselling? Can the client recognize that the alienation expressed by the child for the "hated" parent may be symptomatic of a troubled relationship with the client, the "loved" parent, again mandating therapy?

Or does the client persist in an unshakeable image that "nothing is wrong" with the children and himself, and that all the blame and fault lie with the other parent, who merits rejection and exclusion from the children's lives?

The insistence upon the negative aspects of the spouse's character and behaviour coupled with the inability to see existing or even potential positive traits in the spouse are manifestations of an alienating attitude. Such a client appears to objectify his spouse as an evil *thing*, no longer a person with at least a few redeeming qualities. There is a loss of the ambivalence which characterizes healthy human relationships. Indeed, such objectification of the spouse as "all bad" should be taken to be a sign of significant disorder in the client himself.

Thus, even in such cases in which the children themselves have not yet expressed any symptoms of alienation against their other parent, they nonetheless require protection from the parent with the alienating attitude. The fact of being in the custody of such a parent is not in their best interest; a parent who sees fit to denigrate and deprecate the other parent is himself displaying deficient parenting.

I wish here to underscore that there is a pressing social need to be aware of such a parent's potentially abusive attitude towards his children when he denigrates the other parent. An attorney should not slough off his client's hostile remarks in respect of the other spouse's parenting as being insignificant to the long-term well-being of the children involved in the custody litigation. Again, a healthy parent may unthinkingly say some inappropriate things and be irrationally angry at his spouse (and isn't all anger irrational?), but such anger should abate with time. An attorney may indeed help in this regard in allaying a client's fears and encouraging therapeutic intervention for those clients who are overwhelmed by their hostilities and their sadness.

## (2) Children Suffering from Parental Alienation Syndrome

(Semantically, there is already the problem in characterizing children as "suffering from" parental alienation syndrome. Some mental health professionals prefer to view this syndrome as a psychopathological "process", as opposed to an "illness". Similarly, if we say such children are "alienated", we cast them as victims, and yet they may be actively contributing to the alienation; if we say they are "alienating", we cast them as aggressors, and yet they are generally the unwitting victims of a manipulative parent. To simplify matters, let us call them "P.A.S. children".)

P.A.S. children will express themselves like perfect little photocopies of their alienating parent. There is a process of splitting in their identification with their parents, with one parent viewed as being "all good" and the other viewed as being "all bad." The "good" parent can do no wrong; the "bad" parent is berated for the most anodyne events. The "bad" parent becomes the object of an irrational vilification.

The "good" or "loved" parent is often the parent with whom the child may have the more troubled relationship. The need to please the "loved" parent at any cost may reflect the child's underlying fear of this parent. Similarly, the child may unconsciously perceive the "loved" parent as being the weaker parent more in need of the child's protection from the "hated" parent. Finally, the "loved" parent may control and manipulate the child out of an obsessive love which may not reflect a genuine warmth, but rather is the cover-up for an underlying hostility.

One must probe the complaints the children express, looking attentively to both form and content, the primary indication of P.A.S. being the exclusivity of complaints about *one* parent. Healthy children usually have many complaints to voice about both their parents, but their complaints are characteristic: there is appropriate affect commensurate with the problem being discussed; they are able to love their parents

and forgive them their mistakes; they complain of children's issues (homework, chores, mislaying a favourite toy).

P.A.S. children often present with little affect at all -- the complaints they voice about the *one* parent have the quality of a litany, a recitation of a memorized list of faults. There may be rage, but indeed this will be rage all out of proportion to the presenting issue. The denigration of the alienated parent may in fact be overwhelming in its expression: cursing, hanging up the telephone, refusing to visit with the parent, refusing even to look at the parent. Finally, the denigration may be readily expressed to any available listener, even in very public situations.

Then one tries to sit down and examine the actual complaints of the child. Again, alarm bells should be ringing if a seven-year-old complains that his parent has "ruined the family's name amongst the business creditors" -- this is surely the alienating parent's agenda, not the child's.

Similarly, a child may claim to "remember" incidents which took place when he was an infant, or incidents to which he could not have been a witness. One must then ask oneself *who* informed the child of the inflammatory incident, and to what end.

A child may recount an incident which simply never took place. P.A.S. children are not receptive to an objective reality which negates the veracity of their complaint against the alienated parent. Their psychological reality overwhelms them and adversely colours their perceptions. Indeed, P.A.S. children will often be unable to perceive the "loved" parent's negative actions as being wrong. (Confronting such a child with the reality of his misperceptions should perhaps be left to the therapist.)

Finally, a child may simply recount trivial incidents which do not justify the rejection of the alienated parent. This presupposes that the child's otherwise sympathetic adult audience will also have a critical ear, and be ready to *weigh* the child's complaint. Given that the child attending the lawyer's office will often be accompanied by the alienating parent, it is also of interest to observe the degree to which such an alienating parent may support a child's trivial or unjustified complaint against the other parent, thereby undermining the child's relationship with the other parent .

P.A.S. children are unable to find something positive to say about the *one* parent. They cannot conceive of a fun outing with this parent. The loss of ambivalence in the relationship with the alienated parent is detrimental to the child's best interest. The shutting out of the parent may last for years, in the absence of a healthy environment geared to promoting a re-establishment of contact. This shutting out often extends to all the members of the alienated parent's family, in the all-encompassing expression of the child's hatred.

When such a child becomes an adult, the awareness of the enforced absence of the alienated parent for those many years may have a devastating impact and leave long-terms feelings of guilt and loss. The alienating parent may then suffer the wrath his

adult child feels for having precipitated this loss, and be in turn shut out of the child's life. It probably does not hurt to point this risk out to a client with an alienating attitude.

### (3) The Alienated Parent

The alienated parent often presents himself at his attorney's office with the new and sudden refusal of his children to see him, or a long-standing denial of access to the children. A critical element here is the existence of a positive and warm parental relationship prior to the onset of litigation or a "precipitating" event (such as a wife discovering her husband is seeing another woman).

This precipitating event often has nothing to do with the direct issue of the welfare of the children. However, there may be a "precipitating event" in that the other parent has alleged the physical or sexual abuse of the child, in a context in which there is no prior indication of dysfunctional parenting. The explosive quality of such allegations provides a legitimate justification for the child to refuse to see the alienated parent. Nonetheless, one must note that even children who have in fact been beaten and abused by a parent will not express the kind of unqualified hatred and rejection of a parent that a child will freely express in parental alienation syndrome. In P.A.S., the focus of the child is on his unremitting hatred of his parent, irrespective of the objective importance or even the truth of the alleged blameworthy events.

The frankness of the alienated parent in discussing his difficulties with his children over the years is important to be able to assess the client's credibility. A non-abusive, alienated parent should be readily open to the suggestion of psychological evaluation of his parenting capacity -- he knows the allegations of abuse are untrue, and how else can he show the court he is not the monster his own children paint him out to be?

An alienated parent will recognize the need for therapy for the children and himself to root out the factors underlying the alienation. An attorney should consider that an alienated parent-client who is fixated on the children's "badness" for lying about what may be genuinely untrue allegations may nonetheless exacerbate the P.A.S. The "truth" is surely not a parent's primary goal in dealing with his own child's suffering -- the child has been thrust into the breakdown of his own family by disputing parents and, in P.A.S., has been the subject of control and manipulation by the alienating parent. An attorney should not be called upon to bludgeon the child with his "lying"; one may indeed break the witness in cross-examination, but the child may be irretrievably lost.

In any event, even an abusive parent should be able to have the access to the children which is consistent with their best interests. An abusive, alienated parent who is willing to accept therapeutic intervention does a great service to his children in seeking to build a healthier relationship with them, and should be supported accordingly. A child *not* suffering from P.A.S. will readily forgive even an abusive parent, given a supportive environment. The absolute rejection of a parent is *not* indicative of child abuse.

Indeed, the principal delineation of the alienated parent is the blatant incongruity between the child's labels for the parent (whore, slut, bastard, pig, etc.) and the more banal reality of the often unremarkable individual one actually meets.

(4) Situational or Environmental Factors

Finally, an attorney may assess the impact of the outside world on the dynamics of the family. The state of the pending litigation and the aggression often inadvertently encouraged by the adversarial process may exacerbate the fears and insecurities of the litigants. The judicial wish to maintain the *status quo* in the lives of children pending the outcome of hotly contested litigation may work in favour of an alienating custodial parent. The longer the children are in a non-supportive environment, the further they will drift away from their non-custodial parent.

In this regard, a family law practitioner should always question a custodial parent who seeks to move with the children far away from the non-custodial parent. There is nothing like significant geographical distance to help deepen a child's alienation from his other parent. The motives of the custodial parent should be carefully examined, including his plans for the maintenance of reasonable access to the non-custodial parent.

The interactions between siblings, the influence of other family members, school and community and the maturity and inner strength of the child are all contributing factors to the resistance from or the succumbing to P.A.S. Different siblings may be differently affected; danger signals in this regard include: the younger sibling adversely affected by the bitterness of his older sibling's involvement in the matrimonial dispute; the younger siblings lead and directed by the older siblings; the unusual vulnerability adolescent children may display in divorce; and finally, the group alienation in which the children band together against the "hated" parent. This latter phenomenon is fascinating when one realizes the extent to which such children may parrot each other's hatred of the parent word for word.

(5) Remarks

In the absence of gross parental deficiency, a non-custodial parent should be able to enjoy reasonably free access to his children. Similarly, a long-term custodial parent should not suddenly find his children leave him for the other parent and refuse all contact. Finally, in the event of various restrictions on access, the cogency of the complaints that have been communicated to the alienated parent are important to understand in order to assess such parent's own contribution to the conflictual situation.

A lawyer must also keep in mind that the syndrome of parental alienation cuts across all social strata. Inadequacies in human relationships, including in particular, psychological manipulation and physical abuse of children, are not limited to the poor and ill-educated. Indeed, this particular disorder is more likely to appear in its blackest form in more intelligent people.

A greater intellectual endowment is not a guarantee or even a measure of emotional health. The brighter the alienating parent is, the better he is able to engage in the subtler forms of manipulation and emotional blackmail which will turn the children against the other parent. Similarly, the brighter the child, the greater his awareness of the depths of his parents' conflicts, without any countervailing maturity and perspective to be able to digest this awareness and maintain a balanced relationship with both parents.

Finally, a lawyer may keep in mind that when he meets either parent or the children, that he is only observing a small slice of a family dynamic which has been formed over many years. The observation of an incipient or advanced parental alienation syndrome is invariably a sign of long-term pathology in a family. If, when the family was intact, the children were able to form strong psychological attachments in a serene environment, by virtue of living with parents who fostered their children's sense of self-esteem, such children will be better-equipped to the trauma of eventual family breakdown and will be less vulnerable to alienation. Of course, such children will be better-equipped to deal with all of life's later traumas with a sense of emotional strength.

An attorney should consider that the adult client seated in front of him may be an adult survivor of child abuse or neglect, or may simply have been poorly parented. Such an adult may either relive his own childhood traumas by inflicting similar suffering on his children, consciously or not, or he may relive his own childhood traumas by assuming a victimized role and not taking the necessary steps to assert his parental role in a positive way. One must remain sensitive and aware of the abused child who may be hiding as much within the aggressive as within the victimized parent.

Vulnerable adults, vulnerable children, family breakdown. How can the judicial system help?

### The Recognition of Parental Alienation Syndrome in the Judicial System

There has long been recognition of the existence of "brainwashing" in custody litigation, usually conducted by the custodial parent who has the better opportunity to inculcate the children. Such brainwashing is the conscious programming present in parental alienation syndrome.

This conduct is in fact explicitly sanctioned in the *Divorce Act*, at section 16(10):

(10) **[Maximum Contact]** In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

This section recognizes as a precept a child's need to have a meaningful relationship with both parents. It is critical to observe that this is the only explicit principle which the law obliges the courts to respect, apart from the general precept of the child's "best interest" expressed in section 16(8).

Further, given the decision of the Supreme Court in *Vignaux-Fines v. Chardon* [1987] 2 R.C.S. 244, the use of the word "person" includes any third party who may be seeking custody of the children as well. Thus, *any person* to whom custody may be awarded by a court must show a willingness to facilitate contact between the children and their non-custodial parent or parents.

Examining this provision, one must ask how much must a custodial parent *do* in order to satisfy the statutorily required "willingness to facilitate contact"? A restrictive reading of this provision would lead one to believe it merely seeks to sanction conscious brainwashing, *i.e.* a manifest *unwillingness* to facilitate contact with the non-custodial parent.

Such an interpretation would be insufficient to deal with many cases of parental alienation syndrome, in which the children themselves express the unwillingness to have contact with their non-custodial parent. The alienating parent may glibly assert that he is indeed willing to facilitate contact, but that he cannot force the children to see the other parent against their will. However, one must read section 16(10) more broadly to require the custodial parent to *do* whatever it takes to change the children's attitude in respect of the non-custodial parent. A failure to read section 16(10) in this way is an categorical failure to respect the children's best interests.

Current work in the field of child psychiatry indicates a developing awareness of the inherently different parenting styles of mothers and fathers, and the need of children to benefit from both mothering and fathering. One may say that children *hunger* for each parent, and that it is axiomatic that any separation of a child from a parent, whether because of separation, divorce or death, is contrary to the child's best interest. The suffering of even very young children in coping with the loss of a father due to divorce is evidenced in various papers written by Dr. James M. Herzog, M.D., a professor of psychiatry at Harvard Medical School.

Thus, a court must respect a child's best interests by requiring that the custodial parent (or person) *do* everything in his power to ensure real contact between the child and the non-custodial parent. No custodial parent would expect a judge to accept that the child be permitted not to attend school because he didn't feel like going. Why then should a judge accept that a child not visit his other parent for the same reason?

Also, a judge must recognize that a child's rejection of his parent, even in instances of neglect or abuse, indicates a disturbance within the child which must be tended to, and not simply ignored. One must rely on positive steps by the custodial parent to rectify the alienation within the child, in that child's best interest.

In the decision of the Supreme Court in *King vs. Low* [1985] 1 R.C.S. 87, Mr. Justice McIntyre examined the evolution of societal views of the role of parents, at page 93:

The law relating to the custody of children and the rights of parents where custody claims are involved has undergone progressive change since early in the nineteenth century when the parent, usually the father, had a right to custody of an infant child unless disqualified by reason of some serious circumstance, having to do with the welfare of the child, making him unfit to have custody. By legislative intervention and evolving case law the situation has changed. The law has moved, first, toward an increase in maternal rights; a progressive diminution of parental rights; and then, a corresponding increase in the consideration of the interest or welfare of the infant, as the significant factor in custody determination. This latter factor has become progressively more important until it may now be said that the welfare of the child is the paramount consideration when the courts address the problem.

Should we then not reformulate the words “visiting and taking out rights” and express these to be the *right of the child* to be visited and taken out by the non-custodial parent? This minor semantic modification would underscore the resulting obligation upon the custodial parent to “facilitate contact” as well as the obligation of the non-custodial parent to exercise such access.

The phenomenon of parental alienation syndrome has been explicitly recognized by the courts, and there is authority at the appellate level supporting a change of custody in a situation of P.A.S. In the decision of *PSM vs. AJC*, a decision rendered by Mr. Justice John Gomery on February 15 1991 (SCM 500-12-184613895), and confirmed by the unanimous judgment of the Court of Appeal on June 14 1991, the trial judge was confronted by a case involving four children caught up in a heated custody battle between their parents.

During the course of the marriage, the mother in this family was the primary caretaker, although both parents worked. In the days following the tumultuous separation of the parents, the children became catastrophically alienated from their mother. They went to live with their father, who was permitted to return to the family home, and they refused all further contact with their mother. When she sought to exercise her visiting rights, the children would call the police to have her sent away. They ridiculed her, tore up her letters and expressed nothing but contempt and anger for her.

After numerous psychological evaluations attesting to the alienation of the children from their mother, and after numerous interim judgments of the Court attempting to re-establish contact between the children and their mother, all of which were sabotaged by the father, the children were finally put into foster care. During the several months the children were in foster care, Mr. Justice Gomery became involved and

rendered several interim judgments attempting to obtain the collaboration of the father in a course of psychotherapy, all to no avail.

Finally, when foster care was no longer available, the children returned home to their father. Once back home, it became impossible to involve the children either with their court-appointed attorney, the court-appointed psychologist, the social worker, or any other intervenant perceived to have “failed” to see things from the father’s point of view. A trial was conducted over two days in February of this year to assess the impact of the failed attempts to resolve the alienation and to conclude as to custody.

Since it was evident that the two teenage children would simply run away if given to the mother, and would contribute to the continuing alienation of the younger children, they were permitted to remain with their father. However, the custody of the youngest two children was given to the mother, with a six month interdiction of contact between the children and their father and older siblings. I will reproduce several extracts of this particularly well-written judgment, which relies in its legal perspective on the liberal reading of section 16(10) of the *Divorce Act* that is outlined above (page 25 of the judgment).

In finding that evidence had been made out for the existence of parental alienation syndrome in this case, the learned trial judge stated, at page 12 of his decision:

The parental alienation syndrome to which Dr. Worenklein refers in his affidavit has been identified and described in literature written by Dr. Richard A. Gardner. A characteristic of the syndrome is that the child who has become involved in a marital dispute between his or her parents identifies completely with one parent, who is perceived by the child as being totally good, and exhibits unqualified hatred for the other parent, who is perceived by the child as being totally bad. The rejected parent is in a situation where he or she cannot do anything which is not perceived by the child as being bad or wicked. Even the most innocent remark or gesture is used by the child as evidence justifying the child’s alienation. For example, in this case the children have seen their mother weeping on many occasions, and they unanimously conclude that she is faking and that that is a demonstration of her lack of sincerity. They do not seem be able to comprehend that their contemptuous rejection of her causes her genuine grief.

With respect to the father’s conduct, the learned trial judge stated, at page 17:

The purpose of maintaining the children in foster homes was to separate them from their father. By now, he was perceived by everyone involved in the file, except perhaps himself, as being a negative influence upon the children. His promise of cooperation was accepted at face value but, as time went on, he demonstrated again and again that he had no intention whatsoever of collaborating in any way so as to enable the

children to acquire a more positive perception of their mother. The Court is of the opinion that he disregarded its order and that he continued to do everything that he could to indoctrinate the children to believe that their mother is the evil creature that he himself perceives her to be. As a result all attempts to influence the children by way of therapy, and to help them to see their mother as she really is, were doomed to failure.

With respect to the weight to be given to the desires of the children, the learned judge stated, at page 19:

In determining questions of custody the Court must be guided by the best interests of the child. The desires and preference of each child are factors to be taken into consideration, particularly in cases where the child's wishes are freely expressed are not influenced by pressure or manipulation. In this case, the wishes of the children, especially the younger children, may be safely ignored because they are a result of distortions of the truth that their father has told them, and the psychological pressure to which they have been subjected. . . .

Children do not always know what is best for them. The law leaves it to the Court to decide this question, when their parents are unable to agree, and the law does not state anywhere that the Court must be guided by what the children have to say, although it does require that they should be given an opportunity to be heard. At their request, as it was expressed through their own lawyer, the Court has listened to them. What they have said, and the way they have said it, has served to strengthen the Court's opinion that it would not be in their best interests to continue to let them have their own way.

In explaining his reasons for choosing to grant custody of the younger children to the alienated parent (the mother) instead of to the alienating parent (the father), the learned judge explained, at page 21:

This case represents an extreme example of parental alienation syndrome. Plaintiff is not a perfect person and has not always acted wisely. She loses her temper at times and may use inappropriate language on these occasions. But nothing that she has said or done could remotely explain or justify the rejection and hostility to which she has been subjected at the hands of her children. She is, if anything, a woman who loves her children more than the average mother. She has never mistreated them. She is not mentally unstable as the children repeatedly suggest; indeed her persistence and determination in pursuing this action afford proof of a remarkable capacity to absorb rejection and humiliation, and to continue to function in an optimistic manner.

Of the two parents, Plaintiff possesses a far superior emotional and mental health. Defendant's hatred of her is obsessive and unnatural.

There is, unfortunately, no reason to hope that his hostility for his former wife will diminish. He has been asked repeatedly, even begged, to influence the children so that they could agree to see their mother, by the Court, and probably by his own lawyers. Nothing has had the slightest effect upon him.

The children say that they love and respect their father. No doubt they do, and there is also no doubt that if he attempted to convince them to visit their mother, they would do so, if only to please him. When asked in the witness box if he would be prepared to grant his wife access rights to the children, he replied that that would depend upon what the Plaintiff does, and that she would have to “behave differently”. He says that she abuses them, and that she alone is responsible for the fact that they are alienated from her.

Nothing could be farther from the truth. *Defendant has deliberately poisoned the minds of his children against the mother that they formerly loved and needed. In the Court’s opinion, a father who would act in this way represents a grave and persistent danger to the mental and emotional health of his children.*

Hatred is not an emotion that comes naturally to a child. It has to be taught. The person who has taught the C. children to hate is their father. They would be better off if he were to be removed totally as an influence upon their development until they are able to withstand and reject his negative attitudes. *[italics added]*

This is an example of a case where the oft-criticized judicial system fulfilled its role of protection of the children to the fullest. The children’s rights to representation and to a full hearing were scrupulously respected, while the trial judge kept in perspective his role as society’s representative with a duty to care for these children and to see to their well-being.

#### Particularities of Proof and Procedure

I will not attempt to re-invent the wheel and purport to dictate what constitutes adequate preparation of a contested custody proceeding. I will address only those issues in which particular care must be given to meet the challenges posed by a case involving parental alienation syndrome.

##### (1) The Child Advocate and Child Psychologist

This paper introduced the concept of the rights of the child, and it is certainly in the domain of parental alienation syndrome that effect must be given to those rights. We must formulate mechanisms to protect P.A.S. children, in the context of an adversarial system which seeks to promote their individual rights and freedoms. But the Superior Court also has a *parens patriae* jurisdiction, a patriarchal role of protection of children, which, it is respectfully submitted, may supersede their wish to assert their “freedom” to refuse to see their “hated” parent.

Children need protection in three principal areas, which may easily be delineated: the legal domain; the affective domain; and the financial domain. There are existing means by which the needs in these areas may be met. One may engage a child advocate to handle the legal issues, the child psychologist to handle the affective domain, and the tutor *ad hoc* to handle the financial questions.

To the extent this may be overkill, and there is some caselaw which supports this position, one may dispense with the use of the tutor *ad hoc*, given that the financial issues may be addressed satisfactorily in other ways. Alimentary support may be sought by the motion of the custodial parent and the Court may make provision for the costs of the child's attorney and psychologist. A child who is represented by attorney need not necessarily have a tutor *ad hoc* in order "officially" to become a party to the proceedings.

We must define our expectations of the intervention by the child advocate and the child psychologists if they are to be effective participants in the adversarial process, and if they are to be excluded from the manipulation, sabotage and abuse which may characterize the mandate of the alienating parent-litigant.

In this regard, either intervenant may certainly be called upon to enter into a file on the motion of one of the parent-litigants, just as the trial judge may of his own motion name such an intervenant (article 816 *C.C.P.* for the child advocate; article 414 *C.C.P.* for the child psychologist). Ideally, all particulars governing the intervention of the advocate or psychologist should be handled by the judge. It is difficult to appreciate the degree of control the alienating parent-litigant may seek to exercise over the process, in order to sabotage the one outcome he fervently wishes to avoid: the child's return to an open and healthy relationship with the alienated parent.

The trial judge may have to go as far as to make his own choice of the child advocate or psychologist, to avoid the appearance of bias in favour of any one litigant. He should set out the mandate in detail, the modalities of its execution and the provision for payment of fees. One can readily anticipate that the alienating parent will seek to influence the advocate or psychologist to his point of view. Failing such attempt, the alienating parent may be expected to refuse to pay for fees and refuse to cooperate with the execution of the advocate or psychologist's mandate.

This raises particularly thorny problems. The child advocate should not be considered an advocate of the child in the most traditional sense. Rather, it is the role of such an attorney to put forward the viewpoint of the child client to the Court, and at the same time to bring all matters before the Court which would aid in assessing the best interests of the child client. It is not the child advocate's job to opine personally about the child's best interest -- in this regard, the child advocate may be seen to be the liaison between the Court and the child, to explain to the child the Court's view of the child's best interest and to work with the child to implementing such judgments.

This is an attempt to strike a balance between the traditional view that an attorney represents a litigant and has no business telling his client what to do, and the modern view of advocacy of a child's best interests to be assessed by the Court. In this way, we deftly avoid the tricky issue of whether a child advocate should be acting with a sort of personal patriarchal view of his client, while we maintain a sense of responsibility towards the child who may simply not be able to assess his own best interest.

As for the child psychologist, there are again thorny problems, including the not-insignificant issue of the consent of the parents to participating in a full-blown psycho-legal expertise. An alienating parent will refuse to participate in the psycho-legal expertise the alienated parent wishes to have, and may refuse to permit the children to participate. The alienating parent may in the interim go to his own psychologist, accompanied by the children, who will be required to explain to the expert, in their own words of course, why the other parent is a monster.

In such a situation, the psychologist may unwittingly become the tool of the alienating parent and prepare a report indicating the apparently justifiable refusal of the children to have access with their other parent. An alienating parent will be careful to choose a psychologist who will neglect to request the participation of the alienated parent. The alienated parent, in the meantime, has had no access to the children to prepare a rebutting report.

As a preliminary issue, a psychologist who prepares a report as to custody or access without having met both parents and the children is breaching his own professional code of ethics in a grievous way. A psychologist may be called upon to indicate whether one parent is *capable* of having custody or access, but he may not choose one parent over the other, or exclude one parent, without having met and evaluated both, according to the norms of his profession.

Unfortunately, this does not solve the entire problem. A judge is not empowered to order a party to participate in a psycho-legal expertise against his will. This reflects society's respect for individual rights and freedoms, although perhaps this should one day be tested on the very question of the philosophical underpinning of the argument: a parent should owe a duty to his child and should be expected to sacrifice a certain measure of his rights and freedoms in recognition of his child's interests.

In the interim, I would suggest that we could vastly improve the process of preparation and presentation of the psycho-legal expertise by amending the rules of practice of the Superior Court. I have annexed to this paper a draft proposition of such a set of rules of practice. I invite the reader's comments and hearty criticisms.

## (2) The Testimony of the Child

A P.A.S. child may have strong views about testifying before the Court. Article 31 *C.C.L.C.* reads as follows:

**Art. 31.** The court may, every time it takes cognizance of an application affecting the interest of a child, give the child an opportunity to be heard.

I believe that this article gives very little discretion to the trial judge to deny the child his wish to be heard, even though article 31 is not couched in the terms of a right. Nonetheless, our basic rights and freedoms include the right to be heard, even if one may anticipate that the P.A.S. child wishes to testify only to spit venom.

It would remain appropriate however, for either party to adduce evidence that it may be detrimental to the child's well-being to be called upon to testify in court, and this issue may be decided without the child being present, although certainly his attorney would have to be present, both to "advocate" his wishes and to present any evidence which would aid the court (whether or not such evidence would support his expressed wishes).

In such cases in which the child does testify, whether at his request or at the request of one of the parent-litigants, there are certainly steps which may be taken to safeguard his interests. I would trust that, in 1991, it would be accepted that a child may testify as to questions of his custody or access outside of the presence of his parents. Indeed, in cases of parental alienation syndrome, this is essential.

The arguments in favour of the child testifying in the presence of the parents have evolved in the domain of the criminal law, in which it may be said that an accused has a right to confront his accuser. This does not wash in family litigation, in which the testimony of the child is not an instrument of the condemnation of a parent to a punishment.

In P.A.S. cases, the child should testify in open court, so that a transcript may be available for later examination. The attorneys will have to be present, given that the parents will be excluded from the courtroom. There is nothing shocking about subjecting a child to examination and cross-examination, as long as there is an experienced trial judge willing to circumscribe the conduct of the attorneys, and as long as the attorneys are sensitized to the damage they may cause to their own clients if they hurt their client's own child. The adversarial system should not be an impediment here if the attorneys would simply remember that the child is not anyone's adversary.

A particular danger in P.A.S. is the seductive appeal of the trial judge meeting with the child "in chambers". This is ill-advised in cases of parental alienation. P.A.S. children have learned to view their world as black and white, and along with their alienating parent, will do everything in their power to draw each and every intervenant into their polarized dynamic. It does no good for the trial judge to give the children the opportunity to attempt to draw him into their distorted world in the informal setting of his chambers.

Indeed, the very suggestions I have made for a neutral mechanism of appointment of the child advocate and the child psychologist apply tenfold to the

maintenance of the distance of the trial judge from the unhealthy family dynamic. A trial judge may expect to have his authority sorely challenged the minute he voices a thought or opinion perceived to favour the alienated parent. He must therefore maintain the decorum of his office and the fullness of his authority, and rely on the child advocate he has named to do the face-to-face work of dealing with the children in private consultation.

Finally, lest we forget that our Codes do not have provisions governing the testimony of children, I will make brief reference to the governing provision of the *Canada Evidence Act*. Under the newly modified section 16, a child of even the most tender years may testify if simple conditions are met. The trial judge must satisfy himself that the child under the age of fourteen years must be able to communicate the evidence and must understand the nature of an oath or a solemn affirmation or, failing this, a *promise* to tell the truth. If a child understands the oath or solemn affirmation, he may give sworn testimony; if a child does not understand the oath or solemn affirmation, he may give testimony just as validly if he is able to promise to tell the truth.

There is no longer the requirement that the unsworn testimony of a child of tender years be necessarily corroborated by other evidence.

In any event, the unanimous judgment of the Supreme Court in *Khan vs. The Queen* [1990] 2 S.C.R. 531 has created a legal milestone in the reception of children's testimony. Although this case was decided in the context of the criminal law, it is of importance to the family law practitioner in that it dealt with the sexual abuse of a young girl. This case is authority for two landmark propositions. The first proposition is that the testimony of a child is not to be considered as less "valid" than an adult's testimony, simply because the child has given unsworn testimony. The second proposition is that hearsay evidence may be accepted in situations of children's testimony if the evidence proffered meets a test of being necessary and reliable.

This landmark decision lends itself to abuse by alienated parents in situations of parental alienation syndrome and false allegations of child sexual abuse. The judicial system must be sensitized to the existence of P.A.S. in order to counterbalance the trend of qualifying children's testimony as unassailably sincere. In P.A.S., the child may indeed be sincere and yet fail accurately to report objective facts.

Perhaps we will one day be inspired to move away from our preoccupation with cartesian reality in the domain of family law, and try to concentrate our efforts on repairing damaged relationships between parents and their children.

### (3) Conclusions to be Sought

The conclusions to be sought in proceedings involving parental alienation syndrome are particularly challenging. The alienating parent and the children will ask for a complete shut-off of the relationship with the alienated parent in the most curt terms. It

is up to the alienated parent to conceive of the formulations required to anticipate the inevitable attempts at sabotage which will follow.

For a judgment in a case of P.A.S. to be effective, it must be detailed, explicit and far-reaching. The attorney representing the alienated parent must therefore tax his imagination to cover the ground in the conclusions he postulates. The attorney must also be prepared for a considerable period of frustration as the alienating parent takes advantage of a system in which every time the file returns before the court, a new judge must tackle the problem from scratch. One must be prepared for a multiplicity of interim judgments.

The alienating parent gambles on hitting upon a judge who will refuse to “force” the children to see the alienated parent, or a judge who will be exasperated by the multiplicity of proceedings. The alienating parent also readily interprets to the children every step of the legal proceedings in a way to blame the alienated parent. The fact that an alienating parent may be refusing to respect a judgment of the court is overlooked; but should the alienated parent seek a motion for contempt of court, the children will be told their “hated” parent is trying to put the “loved” parent in jail.

The attorney of the alienated parent, as much as other intervenants in a P.A.S. file, should naturally attempt to put forward conclusions seeking a therapeutic solution to the alienation. A chance should be given to the alienating parent to moderate his views, and accept the intervention of a therapist. The attorney of the alienating parent may consider his role here to help his client to overcome his unreasoned hostility. However, a more drastic solution must be sought in extreme cases of P.A.S. where there is resistance to voluntary therapy, court judgments, and good sense.

In the final analysis, should the alienation not abate, the attorney of the alienated parent should modify the proceedings to seek full custody of the P.A.S. children, with absolutely no contact with the alienating parent for a considerable period of time (three months to one year). In the event the alienated parent is unable to assume custody, one must still consider placing the children with another family member or in any reasonably secure neutral environment for at least a few months, again, with absolutely no contact with the alienating parent, until some kind of relationship has resumed with the alienated parent.

This is predicated upon being able to rely on the alienated parent to seek significant psychological help to undertake a course of therapy with the children. An attorney must keep in mind that a psychologist engaged in a therapeutic role should never be required to give evidence in open court. This role should be maintained by the child psychologist originally engaged for the process of evaluation. A therapist who testifies in open court betrays the sanctity of the therapy; a psychologist who undertakes an evaluation already has the explicit consent of the parties that his evaluation is not confidential vis-à-vis the court.

The solutions suggested of change of custody or even placement seem drastic, and must be considered with due recourse to expert advice. However, it is far from realistic to believe that the children will turn out well living with the “loved” parent simply because there is no superficially evident problem other than the P.A.S. To the contrary, an environment which is supportive of hatred is a frightening one indeed, and I am not convinced that the psychological scars left by P.A.S. may not be deeper than the ordinary scars of “mere” physical abuse.

## EXPERTISES PSYCHO-LÉGALES

1. Toute partie qui désire faire faire une expertise psycho-légale au sujet de la garde, les droits de sortie ou de visite, où l'exercice de l'autorité parentale, doit, en premier lieu, présenter par écrit à la partie adverse une proposition d'expertise incluant les données suivantes:

- (a) les nom, adresse et numéro téléphonique de l'expert proposé;
- (b) le mandat spécifique;
- (c) l'attribution de la responsabilité et l'engagement par la partie de payer sa part des frais;
- (d) l'engagement par la partie de renoncer au secret professionnel;

2. La partie sommée devra faire parvenir par écrit sa réponse dans un délai de dix jours, dans la forme suivante:

(a) en cas d'acceptation, suivant le format des alinéas (a), (b), (c), et (d) du paragraphe 1, (y compris, en particulier, l'engagement par la partie sommée de renoncer au secret professionnel);

(b) en cas de refus, l'affidavit de la partie sommée expliquant les motifs de son refus;

(c) en tout autre cas, la partie sommée propose des modifications suivant le format des alinéas (a), (b), (c) et (d) du paragraphe 1 (la partie proposante pourra à son tour, soit accepter cette contre-proposition, soit recourir à la Règle 3).

3. En cas de désaccord ou ambiguïté, une partie peut:

(a) soit soumettre pour adjudication toute question au sujet de l'expertise psycho-légale au juge qui préside à la conférence préparatoire ou à la fixation de date

(b) soit procéder par la voie de l'article 414 *et seq. C.p.c.*

4. Le juge du procès pourra tirer toute inférence défavorable provenant d'un refus injustifié par une partie de participer à l'expertise psycho-légale. Ceci sera mentionné dans l'affidavit de refus ou l'interrogatoire de l'affiant sur cet affidavit;

5. La proposition d'expertise, l'acceptation ou refus de cette proposition, ainsi qu'une copie de ces règles de pratique, seront envoyés à l'expert désigné. Ce dernier procédera selon les normes de l'art à son évaluation, rencontrant ainsi les parties, les enfants, toute autre personne agissant *in loco parentis* face aux enfants, ainsi que toute autre personne qu'il jugera nécessaire. De plus, l'expert devra avoir accès au dossier médical et au dossier scolaire de chaque enfant impliqué dans son expertise;

6. Si l'expert bute contre un obstacle dans l'exécution de son mandat, il devra soumettre les détails par écrit aux deux parties et à leurs procureurs. Une partie pourra avoir recours à la Règle 3 pour résoudre tout problème. Dans l'éventualité d'une

impasse, l'expert anotera son rapport en conséquence ainsi que l'implication de l'impasse dans la validité de ses conclusions;

7. Une fois son rapport prêt, l'expert devra faire parvenir des exemplaires signés aux parties et à leurs procureurs. L'une ou l'autre des parties pourra produire le rapport selon l'article 402.1 *C.p.c.* Le Greffier de la Cour supérieure devra garder le rapport sous enveloppe scellée. De plus, en cas d'expertise ordonnée par la Cour sous l'empire de l'article 414 *C.p.c.*, un exemplaire du rapport devra être envoyé directement au juge qui a ordonné l'expertise.

8. Aucun rapport d'expertise psycho-légale ne pourra être produit sans avoir respecté ces règles de pratique.

RÉDIGÉ PAR ME. ANNE-FRANCE GOLDWATER