COMMENT

PARENTAL ALIENATION IS OPEN HEART SURGERY: IT NEEDS MORE THAN A BAND-AID TO FIX IT

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> [O]ur children will resemble our own misery and spite and anger, because we give them no choice about it. In the name of motherhood and fatherhood... we threaten and suffocate and bind and ensnare and bribe and trick children into wholesale emulation of our ways.
>
> — June Jordan[1]

> *I'm Sarah and I'm six. I'm crying—and that makes me feel funny. Daddy and Mommy are talking about me, and they're both mad I don't drink they're mad at me, but they yell a lot since the divorce-whatever that is. Dandy says Mommy is bad, she spends too much money, doesn't feed me the right food, has bad friends, and other things. I don 't understand what he means. Sometimes he says Mommy is a bad person and I should stay with him instead Mommy says things like that about Daddy, too. Or, sometimes she makes faces at him and laughs. I don 't know whether to laugh or cry.*
>
> *I don't want to have to choose between Mommy and Daddy. I want them both. I'm confused.*

Every day, children of divorce travel between custodial parents and non-custodial parents. Usually the journey is trouble-free. Rarely is the transfer a dangerous or traumatic event. But more and more frequently, divorced parents encounter difficulty sharing the one "property" they cannot divide: their child. Custody is increasingly a multifaceted weapon wielded by divorced parents, and the courts struggle to find a way to disarm, or at least control, the combatants.

This Comment specifically discusses parental alienation, a process by which one parent consciously tries to divide the child, to pry the child loose from involvement with the other parent. Section one deals with statistics of children of divorce and the creation of custody agreements. Section two considers the traditional spousal tort of "alienation of affection" and its ill fit to the parental alienation situation. In section three, current theories regarding parental alienation are discussed. Section four outlines identification of parental alienation. Section five discusses traditional tort remedies for the alienated parent. Section six suggests remedies for countering potential or ongoing parental alienation.

I. DIVORCE AND THE CREATION OF CUSTODY AGREEMENTS

A. The Numbers

Marriage is attempted at least once by nearly 95% of the adults in the United States.[2] Of those marriages, approximately 95% create families with children.[3] The divorce rate, after rising rapidly in the 1970s with increased societal acceptance and no-fault divorce statutes, peaked by 1980. In 1990, the marriage rate was just double the divorce rate (2,400,000 marriages to 1,200,000 divorces).[4] There is a divorce in America every thirteen seconds.[5]

Today, almost 10% of our children live with a divorced parent, compared with 2.1% in 1960.[6] Approximately 35% of the minor children in the United States have experienced the divorce of their parents in the 1980s and 1990s.[7] Most of these children of divorce are subject to some type of agreement or judicial order for custody and visitation.[8] By necessity, the judicial system is directly involved in the lives of many children.

B. The Custody and Visitation Agreement

On the personal stress index, divorce tanks second only to death of a loved one,[9] and causes tremendous change in the family unit. To share a child, two people who have publicly declared their unwillingness or inability to get along must nonetheless attempt to cooperate on a regular basis (sometimes for many years) after their joint life is terminated.[10]

In order to discuss custody and visitation arrangements, divorcing parents are forced to confront and acknowledge one of the greatest losses in a divorce: the loss of time each can spend with their child.[11] In the face of that loss, cooperation between the parents to create and agree to a parenting plan and a visitation schedule is not just a monumental task during an already highly emotional time, but often an ongoing (sometimes bitter) struggle throughout the child's minority.[12]

Ideally, despite the difficulty of divorce, both parents should remain actively involved in their child's life.[13] To achieve this goal, planning for a child's post-divorce welfare through a custody agreement must be a paramount consideration of parents and the court system. Custody of a child can take several forms including. sole, split, divided, and joint.[14] Within each form, a complex array of options is available.[15] Custody and visitation arrangements are as varied and individualized as the families who create them—or are ordered to obey them.[16]

Despite tremendous obstacles, about ninety percent of divorcing couples are able to reach a mutual agreement for custody and visitation with little or no court intervention, albeit some receive help from professional mediators.[17] In the remaining ten percent of couples, the parties reach impasses, and custody arrangements are eventually ordered by the court.[18] In a brief hearing, a family court judge, armed with a case file and, sometimes, a mediator's report or recommendation, must listen to the accusations hurled by the hostile parties, sift out the truth, and decide what custody arrangement is in the best interest of the child.

Because those parents who cannot initially agree on custody will likely continue to disagree on parenting issues, courts strive to create flexible arrangements that will continue to work as families grow and change.[19] The task is difficult because there is no magic formula that works in all, or even most, situations.[20] Individual custody settings are fluid environments that constantly change.[21] Thus, even if parents are amicable, children grow and have their own ideas as to how their time should be spent and split. These parties need more than a formula. They need an individualized agreement tailored to their specific situation.

The adversarial nature of our judicial system does not help the process of creating such specialized agreements because in a courtroom, one party must win and the other party must lose. "Uninhibited warfare inflames the passions of litigants and often undermines the cooperation and communication needed for post-divorce parenting."[22]

That warfare (indeed any negative effect of divorce on the mental and emotional stability of a parent) indirectly affects the well-being of the child[23] who is caught in the middle of a battle between parents.[24] Children of divorce become a prize to be won or lost in an escalating competition, often against a hated opponent.

The battle over the custody of a child officially begins when a couple separates and the family home is broken up. However, because of the nature of American families, a mother's role and a father's role in an intact family are very different: the mother is generally supportive and nurturing, while the father is characterized as powerful and assertive.[25] Thus, the affections of a child during a marriage, and the allegiance of that child during and after a divorce, are defined from birth.[26]

During a marriage, a parental alliance generally exists between the mother and father.[27] As the possibility of divorce moves towards reality within a family unit, that adult alliance begins to deteriorate. The alliance can disintegrate completely with separation and divorce.[28] How could a child of that marriage not be affected?

To complicate the process of divorce, a couple with children has two relationships to redefine: spousal and parental. These two relationships are intricately intertwined; thus, terminating the spousal affiliation without damage or destruction to the parental union is a delicate task—one which most individuals are not well-equipped to handle.[29] The "winner" of the battle for the child is chosen at the granting of a divorce or other judicial decree, namely the parent receiving custody of the child. Too frequently, that battle is merely the first stage of a war which will continue to rage (perhaps even escalate) until the child reaches the age of majority.

For parties engaged in a high-conflict custody dispute, a child becomes not just the prize to be won, but a weapon to be wielded.[30] In one study, sixty-one families with children were followed through a five-year period beginning at the initiation of divorce proceedings.[31] The researchers were surprised to find that a divorce decree did not bring an end to marital conflict.[32] After five years, many of the divorced parents were still fighting, and "nearly one-third of the children [in the study] were party to intense bitterness between the parents."[33] The researchers should not have been surprised. Anyone who has experienced a divorce involving minor children would understand those results.

Similar studies abound. The official journal of the Family Law Division of the American Bar Association devoted an entire issue to children of divorce, noting that while these children are often discussed, more frequently "those debates focus on the rights of parents rather than the responsibilities they have to their children."[34]

For the divorcing parents. the creation of a custody and visitation agreement serves merely as a road map for raising their mutual child. The actual, day-to-day process of ushering that child into adulthood is much more complex.

C. After the Decree: Post-Divorce Custody Disputes

After a divorce, the parent-child relationship that existed in the intact family must change.[35] The day-to-day familiarity of parent and child is replaced by a relationship foreign to parties whose only experience is a typical nuclear family unit.[36] The traditional family role of "parents with child" mutates, painfully and slowly, into three separate and distinct roles: parent, child, and parent. Each parent wants a relationship identified as "parent and child." But a child cannot be in two places at once, however much she wants to be.

King Solomon once suggested a solution: "Cut the living child in two, and give half to one, and half to the other."[37] Such a judgment would have ended with each party walking away with one-half of his or her desire, a seemingly fair and equitable solution. No one completely wins, but neither does anyone completely lose.

Today, no such easy solution is available to the judicial system, although some advocates offer the joint custody model as its equivalent. The courts must contend with custody disputes which remain active in the system, sometimes viciously fought, until each child involved reaches adulthood. The rendering of a decision in a custody dispute is, in many cases, just the beginning of a court's involvement in the life of a child.

II. PARENTAL ALIENATION V. SPOUSAL ALIENATION

A. The Traditional Tort of Alienation of Affections

To judges and attorneys, "alienation of affection" is a familiar term. The common law traditional "heart-balm" tort of alienation of affection is a cause of action against a third party adult who "steals" the affections of the plaintiff's spouse.[38] The roots of the tort are in eighteenth century England, where, upon marriage, a wife became the property of her husband, as did all of her separate property.[39] That relationship entitled a husband to his wife's society and services, and to an action against anyone who "stole" that society and those services.[40] In 1866, New York was the first state to recognize the tort of alienation of affections.[41] Other states followed New York's example.

In the late 1940s, courts attempted to create a new application for this cause of action by allowing a child to recover in a similar situation (i.e., where a third party adult "stole" a parent away from the family home, thus alienating the stolen parent's affections and services from the child).[42] However, few courts followed the holding of the early cases;[43] and most courts today

decline to recognize a cause of action by a child for the alienation of a parent's affections by a third party.[44] Additionally, Section 702A of the Restatement of Torts (Second) specifically states that a child does not have a cause of action for alienation of the affections of his parent.[45]

As to spousal alienation, the advent of public acceptance and legislative approval for no-fault divorce caused most jurisdictions to statutorily eliminate the cause of action.[46] Most states saw the law as creating a dangerous weapon to be used by one party against another party in a family setting.[47] Yet the cause of action is not completely dead. In August 1997, a nine-woman, three-man North Carolina jury awarded a highly-publicized $1 million judgment to a former wife whose husband's affections were successfully "stolen" by his secretary.[48] A momentary sensation, that decision is not expected to start a trend of legislatures reinstating the tort.[49]

In abolishing the cause of action, some legislatures were terse;[50] some, like Nevada, were verbose.[51] Some states clearly abolished alienation of affection between two adults only;[52] other states eliminated any type of alienation of affection.[53] Michigan's statute is particularly clear: "The following causes of action are abolished: (1) alienation of the affections of any person, animal or thing capable of feeling affection."[54]

B. Alienation of a Child's Affection for a Parent

Alienation of affection occurs not only in the spousal context, but also in child custody situations where cooperation between parents is absent or diminished.

Co-parenting following a separation and/or divorce is no easy task unless one parent simply stops fulfilling the role.[55] Some type of ongoing cooperation is needed to resolve the myriad of parenting issues that confront a family.[56] However, as stated earlier, terminating a spousal relationship without damaging a coexistent parental relationship is a difficult task When one parent refuses to allow the other parent to be involved in the life of their child, insurmountable conflict and a probable return to court may result. This may also occur where one parent (intentionally or unintentionally) sabotages the other parent's role in the child's life; or when a child, for whatever reason, is estranged from a parent. That is "parental alienation."

Many years ago, a California court stated that parental alienation occurs when a parent pursues a consistent course of action calculated to prevent any close relationship existing between the child and the other parent, causing the child's mind to become "poisoned and prejudiced" against the other parent.[57] That court's definition inappropriately places the blame for a child's alienation solely on one parent.

C. Spousal Alienation v. Parental Alienation

The term "alienation of affection" accurately depicts both the theft of a spouse's love, and the destruction of a child's love for a parent. Thus, in states that have abolished the cause of action for alienation of affection, a cause of action for "parental alienation" has been effectively precluded. However is states eliminating the tort of alienation of affection with an imprecise statute, the legislative ambiguity has left open to debate the existence of a cause of action for parental alienation.[58]

A Virginia court discussed in dicta the possibility of a viable tort claim for parental alienation.[59] The court clearly rejected a mother's argument that finding a cause of action for parental alienation would damage a child by making him a "pawn in a battle inspired by greed."[60] The court passionately defended the sanctity of parenting, stating that

> [t]he implicit threat of an avalanche of cases, arising whenever one parent makes an uncomplimentary remark about the other, simply is not perceived by us as seriously undermining society or its laws. The harm of deliberate frustration of a close and affectionate relationship between parent and child,... where there is no remedy available to a parent who as a result was psychologically damaged strikes us as more potentially a danger to society.[61]

The Supreme Court of Minnesota, on the other hand, rejected its appellate court's creation of the tort of "intentional interference with custody rights," noting that children can be "devastated by divorce," and "[a]t a minimum, the law should not provide a means of escalating intrafamily warfare."[62] The court further opined that any action that would have a profound and permanent effect on family relationships (e.g., the tort of intentional interference with custody rights and, by inference, parental alienation of affection) should be studied by "a broader segment of our society," such as the legislature.[63] The court felt that such a study should determine both the breadth of the tort's scope and the reach of its damages.[64]

Thus, the widespread acceptance of a specific cause of action for parental alienation seems unlikely to occur in the near future; yet parents continue to alienate and continue to be alienated.

III. CURRENT THEORIES REGARDING PARENTAL ALIENATION

Parental alienation is, in fact, the current popular complaint in child custody disputes.[65] Several mental health specialists advocate its recognition as a cause of action.

A. Parental Alienation Syndrome

Richard Gardner claims that relationships between parents and children are rarely as simple as the California definition of parental alienation implies.[66] Gardner coined the phrase "Parental Alienation Syndrome" ("PAS") to describe the characteristics evident in a child brainwashed by an alienating parent's actions. PAS also provides a label for a new cause of action in a custody battle against the alienating parent. Gardner believes that the child contributes to the development of the alienation process.[67] However, in his opinion, the predominant source of the alienation is one parent, most frequently the mother, against the other parent.[68] The credibility of his work has been questioned, in part because of its apparent gender bias.

Gardner's work is one reason for the judicial and professional skepticism surrounding parental alienation. A clinical professor of child psychiatry, Gardner based his theory on observations of his minor patients who he claims were "brainwashed" and "programmed" against one parent by the other parent.[69] His PAS theory was initially touted by plaintiffs' attorneys, and embraced with sighs of relief by some courts, as the much sought after explanation of and resolution to the growing issue of parental alienation.[70] However, the crowds thronging to Gardner's theory have,

by and large, found that they were merely grasping at straws.[71] PAS has not been subjected to peer review or accepted by experts in the fields of psychology or child advocacy,[72] nor is editorial discretion exercised regarding the theory because Gardner's own company publishes his manuscripts.[73]

Gardner's theories are also discounted by professionals in the mental health field because of his belief that only the most severe cases of parental alienation should be remedied.[74] Studies show that lesser cases have "significant effects" which also require intervention.[75]

Despite insufficient verification of the authenticity and accuracy of PAS, some courts have used Gardner's PAS theory to quickly diagnose PAS, abruptly remove a child from a custodial parent who alleges abuse, and place the child in the custody of the allegedly abusing parent simply because the custodial parent has alleged that the non-custodial parent was abusing the child.[76] Gardner's PAS theory justifies such a drastic measure because, in his opinion, a custodial parent's claim of abuse of the child by the non-custodial parent is almost always a fabrication intended to alienate the child from the non-custodial parent as a tactic in a custody battle.[77] Gardner claims that the only way to handle such false claims is to take the child away from the brainwashing parent for "deprogramming."[78] If some abuse allegations are true, and some children are actually damaged by the PAS diagnosis, Gardner believes that damage is justified to protect their parents from unjustified and untrue accusations.[79]

Gardner's critics find no basis for his belief that "the vast majority" of sex-abuse allegations made by children and raised while parents are involved in a custody dispute are false.[80] In fact, Gardner himself admits that he can produce no data to substantiate his claim that most of the allegations are false.[81] He just believes it.

Gardner's definition of parental alienation, like the California court's, is neither correct nor complete; nor is finding a definition by any means simple. The process by which a child's affection for one parent lessens is extremely complex, with both patents and the child contributing.[82] The following examples illustrate this: a male child whose father leaves his mother for another woman is alienated from the father to some degree simply by the father's rejection; a father who verbalizes disapproval of a mother's drug abuse in conversation with their child is engaging in alienating behavior, despite his positive intention of discouraging like behavior by the child; a mother who denies visitation to a physically abusive father is actively alienating the child's affections for the father, but is also acting understandably in the child's best interest.

B. Malicious Mother Syndrome

Ira Turkat named the Malicious Mother Syndrome ("MMS") to identify "mothers [who] not only try to alienate their children from their fathers, but are committed to a broadly based campaign to hurt the father directly."[83] Turkat notes that interference with visitation has affected over six million children.[84] Citing results of two studies, Turkat claims that forty percent of divorced mothers admit denying visitation to punish their former spouses, and fifty percent of divorced fathers claim their visitation rights have been denied.[85]

In his article, Turkat advocates Gardner's PAS, even though, in Turkat's words, "necessary scientific research on this syndrome has yet to appear."[86] Turkat admits that his MMS theory also lacks confirming scientific research.[87]

Turkat's syndrome loses credibility not only because of lack of research and acceptance in its field, but because, like Gardner's PAS, it is so blatantly anti-mother. There is no male version of MMS;[88] yet fathers are certainly capable of denying visitation as a means of punishing a former spouse.

Opponents of MMS and PAS claim that "[t]hrough the use of these spurious and discredited psychological 'syndromes,' an abusive parent may successfully portray the protective parent as mentally unstable and undeserving of custody" to a court seeking to protect a child.[89] MMS, like PAS, advocates a change of custody from the alienating parent to the alienated parent in extreme situations.[90] Yet neither syndrome considers in any detail, and in some ways summarily discounts, the possibility that the extreme situation could result from the alienating parent protecting the child from an abusive parent. In such a situation, taking a child from the protective parent and placing him with the abusive parent is a dangerous and totally inappropriate action.

A leading expert on scientific and psychological testimony, Professor John E. G. Myers, believes that PAS and MMS may "give [judges] a false sense of security" in an area where they have little other guidance, and the unproven syndromes should not be used as a diagnostic tool.[91]

C. Parental Alienation as a Continuum

Unlike Gardner and Turkat, Matthew Sullivan contends that parental alienation, rather than being a "syndrome," occurs along a continuum during and after the divorce process.[92] He agrees that a charge of parental alienation sends a court into uncharted waters because little information is available about the manifestations of such behavior.[93] However, current evaluation of a claim of parental alienation in a child custody dispute is frequently a misunderstood process.[94]

To begin with, because the claim is relatively new, identification of parental alienation is often carried out incorrectly, leading to erroneous results and raising skepticism in judges about its applicability in custody determinations.[95] Yet parental alienation exists; it is identifiable and it should be considered an important component of custody considerations.[96] Children and parents, already bombarded with trauma, can be further damaged by family law attorneys and judges who fail to accurately recognize and halt the "highly destructive process" of parental alienation.[97]

D. Court Interpretation of Parental Alienation

The various parental alienation theories may be incomplete or even inaccurate, but nonetheless parents exert a great deal of control over the minds and actions of children, and some parents abuse that control. Even if it is ignored or denied, parental alienation will continue to batter the doors of family courts.

With respect to the PAS theory, a Florida court noted that there has been no claim of general professional acceptance of PAS as a tool for diagnostic evaluation; and, in fact, there is no consensus by experts that such a syndrome exists.[98] It is appropriate for a court to decline to recognize a syndrome that has not been scientifically proven; but it is inappropriate for a court to decline to recognize the *injury* that results. Courts need to deal with this situation on two levels: as a tort to a parent whose minor child has been turned against him or her, and as a family law issue resulting in damage to children through a parent's diminished role.

A Pennsylvania court, when confronted with a claim of parental alienation, quoted The Restatement (Second) of Torts § 699 (1977): "One who, without more, alienates from its parents the affections of a child, whether a minor or of full age, is not liable to the child's parents."[99] The court noted that a cause of action by a parent for alienation of a child's affections has been rejected in a majority of the jurisdictions that have considered the issue.[100] The Pennsylvania court found only one case recognizing the claim.[101]

Likewise, a Georgia court of appeals affirmed a lower court's dismissal of a father's complaint for alienation of his minor son's affections by the child's mother. The court's reasoning was based on the Georgia legislature's prior abolition of alienation of affections by OCGA § 51-1-17 (Code Ann. § 10S-1203), which states that "[a]dultery, alienation of affections, or criminal conversation with a wife or husband shall not give a right of action to the person's spouse. Rights of action for adultery, alienation of affections, or criminal conversation are abolished."[102] Although the plaintiff argued that the court's application of a statute regarding the relations of a husband and wife to the relations of a father and son was inappropriate, the court held that the statute was vague enough to cover the situation and chose not "to place such a strained construction [as limiting it to marital relationships] on the statute."[103] The Georgia court declined to consider the facts of the case or the injury claimed by the plaintiff to his relationship with his son because such a cause of action did not exist.

In Virginia, the Fourth Circuit Court of Appeals held a mother liable on a claim of intentional infliction of emotional distress for engaging "in a continuing and successful effort to destroy and to prevent rehabilitation of the relationship between the former husband and their son."[104] As a defense, the child's mother asserted that "alienation of affection by any other name [e.g., intentional infliction of emotional distress] is still the same,"[105] and that the Virginia legislature had eliminated the cause of action for alienation of affection arising after June 28, 1968.[106] The mother virtually admitted to intentionally alienating her son's affections for his father, but defended her actions by asserting that the father had no claim for recovery against her. The father, anticipating the defense, asserted a claim for intentional infliction of emotional distress, and the Virginia court ruled in his favor.[107] In its holding, the court reasoned that the causes of action for intentional infliction of emotional distress and alienation of affection are distinct.[108] This was a victory for alienated parents.

In her defense, the mother asserted that casting her child as a pawn in a battle between his parents would cause the child psychological adversities, and that allowing the father to recover for intentional infliction of emotional distress would virtually reinstate a cause of action for alienation of affection abolished by the Virginia legislature.[109]

The Minnesota Supreme Court would have agreed with the mother, as evidenced by its explanation of a rejection of such a cause of action:

> The circumstances under which the right has been asserted demonstrate the potential for grave abuses, in which a child becomes the object of intra-family controversy, and indeed, a pawn in disputes over monetary matters. In the more usual case of marriage dissolution resulting in deteriorated relationships, a cause of action by one parent against another for alienation of a child's affections would exacerbate the unhappy relationships and become a strategic tool for advantageous use of one family member over another.[110]

The Minnesota court declined to discuss the strategic tool of alienation of affection which one parent may, after its ruling, use against the other parent with impunity. The court justified its decision by stating:

> Nothing in this opinion diminishes other remedies for interference with familial relationships, remedies which make actions for alienation of affections unnecessary as well as undesirable. Violations of judicial orders establishing custodial or visitational rights in one parent may in appropriate situations be corrected by habeas corpus or, more commonly, by citation for contempt of court.[111]

The court declined to recognize that none of its noted remedies would satisfactorily recompense a parent for the loss of his or her child's affection or reclaim the lost relationship.

The Missouri Court of Appeals recognizes a tort of alienation of the affection of a minor or adult child.[112] However, that cause of action requires actual abduction of the child.[113] Startlingly, the court stated that a father's claim that a mother alienated the affection of his child "wrongly assumes a legal duty not to alienate the children's affection. Mother was not so obligated."[114] Thus, in Missouri, the alienating mother did not commit an actionable tort against the father.

Switching to a family law context, the court recognized that "there is a moral duty and the welfare of the children [that] may not be ignored. Nor do we excuse unjustified acts to cause a loss of affection between parent and child."[115] Yet the court immediately ignored the welfare of the children, and excused the "unjustified" acts of the mother by articulating its fears that allowing a parent to recover for alienation of affections of a child will "render the child a hostage in family disputes."[116] Such a rationalization blatantly denies the damage to both the target parent and the innocent child caused by the "legal" actions of the alienating parent, and ignores the undeniable fact that a child is already, in effect, a hostage in a family dispute—a hostage without a voice. In the family law context, the father loses again.

The Florida court, along with other state courts, debunked Gardner's PAS theory when it was presented in their courtroom.[117] However, judges have been given nothing to put in its place to remedy the wrong of parental alienation. The judicial system continues to need a viable remedy.

IV. IDENTIFICATION OF PARENTAL ALIENATION

In order to identify parental alienation and to fashion an adequate solution, Sullivan recommends that the court assess seven areas and four key factors.[118]

The seven areas for assessment are fairly broad and obvious: "(1) the children; (2) the alienating parent; (3) the alienated parent; (4) the relationship between the primary parent and the child; (5) the relationship between the alienated parent and the child; (6) the relationship between the parents; and (7) the family's social context, including extended family, attorneys, mental health professionals and the family court system."[119] In other words, the court should assess the relationships between and among the children, the parents, extended family, and all other parties involved in the divorce situation. Both PAS and MMS evaluate only the relationships of the child with the alienating parent and the child with the alienated parent. Sullivan's far-reaching evaluation would better identify alienating factors other than the so-called "alienating parent."

The factors which Sullivan feels are key to the diagnosis of parental alienation are "(1) where the family is in the divorce transition [e.g., divorcing, recently divorced, long since divorced]; (2) the extent of exaggeration and fabrication in the rationale for the expressed alienation of the child [as determined by a mental health professional]; (3) general psychological functioning of the child; (4) the liabilities and resources in the surrounding system, including economic, extended family and mental health."[120] Evaluation of these key factors, along with the areas of assessment, would give courts a truer picture of the existence and causes of parental alienation. From a more complete picture, a more satisfactory, more effective solution can be fashioned.

Sullivan, like many mental health experts, advocates collaboration between courts and the mental health system to fashion a solution to parental alienation and to help repair the relationship between the child and the alienated parent, whatever the cause of the rift.[121] Even if the other parent is the alienating force, simply providing a one-time tort remedy for the alienated parent is akin to slapping a Band-Aid on a major wound; and this should not be the court's goal. While the availability of a tort remedy may serve as a deterrent, the parents and children affected by parental alienation need ongoing healing as well.

Like Sullivan, authors Carla Garrity and Mitchell Baris recommend a "comprehensive treatment approach that addresses all the contributing factors [which cause parental alienation] and is carried out by a team of professionals trained in family law, conflict resolution and mediation, and child development."[122]

Garrity stresses the need for early recognition of parental alienation because while time is spent identifying and interrupting alienating activities, the alienation becomes more powerful and effective. "The longer this syndrome is allowed to progress, the more difficult it is for the legal system or the mental health professional to intervene effectively to stop it."[123] Like Sullivan, Garrity identities situational factors which explain why parental alienation develops in certain family units. The factors are family dynamics (e.g., a family with little outside interaction or ability to accept responsibility for personal actions); individual dynamics (e.g., self-protective personalities lacking the capacity for intimacy); and situational factors (e.g., infidelity, remarriage, post-divorce sadness, and sudden marital breakdown).[124]

Parental alienation takes many forms: attacks on the value and importance of the other parent; exaggeration of detrimental characteristics of the other parent; "tribal warfare," defined as "extend[ing] the conflict well beyond the immediate family arena...[encouraging others] to take sides and to express contempt for the targeted parent"; direct involvement of children in the problem; and a goading of the other parent into "emotional outbursts" in front of the children.[125] Regardless of the method the court chooses for establishing parental alienation, confronting and correcting the situation (including an attitude adjustment for the affected child) will require considerable court involvement—by an already overwhelmed family court system.

V. TRADITIONAL TORT REMEDIES FOR THE ALIENATED PARENT

Despite the knowledge that parental alienation exists in many child custody disputes, courts are usually at a loss as to how to fashion a tort remedy for the alienated parent. Even more importantly as a family law issue, a method to deter parents from alienating and to stop parents who are actively alienating a child's affections must be found.

Some courts have tried to deal with the tort of parental alienation by finding parallels to the familiar spousal alienation cause of action (notwithstanding its almost complete abolishment). But the tort, even where it still exists, is difficult to define and apply. For example, the Illinois legislature struggled with the difficulty of fashioning an adequate remedy for a tort with indefinite damages—the loss of a child's affection is hard to value.[126]

Even so, for want of a better fitting solution, courts have continued to turn to spousal alienation for direction when parental alienation surfaces, frequently only long enough to throw the claim out of court. For example, the Georgia Court of Appeals held that, because the cause of action for "alienation of affections" was no longer recognized in Georgia (even though the abolishing statute was worded specifically to mean the loss of spousal affection), no cause of action could be sustained for alienation of the affections of a minor child toward a parent.[127] The court apparently found that, in effect, parental alienation equals spousal alienation, and neither one is actionable in Georgia. In that case, a father sued his former wife and others in the extended family for alienation of the affection of his minor son. The court dismissed his complaint for failure to state a claim upon which relief could be granted.[128] A father virtually lost his young son, but a lower court found that he had no claim and thus no remedy, and an appellate court agreed.

Does spousal alienation equal parental alienation of affection? Illinois defines the elements of spousal alienation as (1) love and affection of spouse for plaintiff, (2) actual damages. and (3) overt acts, conduct or enticement on the part of a third party defendant causing those affections to leave.[129] Parental alienation presumes that a child loves his or her parent, and damages would be a parent's loss of that love and affection. The two actions are different in that parental alienation is perpetrated within a former family unit, by one parent against the other parent, and one of the parties is an unwitting minor child.

Basing damages on a patent's right to the love of a child is not firm ground. The historical basis for laws regarding rights in children is property law. Traditionally, one or more adults owned a child and therefore controlled its "discipline, labor, custody, name, religion, and betrothal, as

well as decisions concerning education, medical care, and residence...."[130] Children historically were, and in many ways continue to be, "powerless in the face of neglect, abuse, molestation and mere ignorance."[131] Thus children are frequently easy targets, and cannot enforce claims against their oppressors.[132] In recent years, much has been written and debated regarding the rights of children, including recommendations for the establishment of institutions to "monitor those who have children in their charge and intervene to enforce rights."[133] To some extent, we ask family courts to do just that.

A Washington appellate court held that :

> all members of a family have a right to protect the family relationship ... and that a parent who has been wrongfully deprived of the company of his child, by interference with custody, association, and companionship, may recover damages from the wrongdoer for the mental anguish and wounded feelings and for the expenses incurred in vindicating the parent's rights to have his child.[134]

The court required that the alienation be malicious and allowed a remedy of compensatory damages.[135]

A California appellate court disagreed, holding that a legal father could not recover for emotional distress caused by his ex-wife's attempt to alienate a minor child after disclosing that he was not the natural father of a child born during their marriage.[136] The court denied the recovery based on California's prior abolishment of the "heart-balm" actions for alienation of affection.[137] A dissenting judge argued, unsuccessfully, that the mother should not be allowed to use her child "as a shield to escape liability for her tortious conduct."[138]

VI. FASHIONING A REMEDY FOR PARENTAL ALIENATION

Ignoring the tortious wrong to a parent whose child's affections are intentionally alienated is unacceptable. "It is the business of the law to remedy wrongs that deserve it...."[139] In attempting to fashion a suitable remedy, courts have resorted to various traditional causes of action, including pecuniary damages for intentional infliction of emotional distress and imprisonment or fines for civil contempt.[140] Moreover, a Washington appellate court found that a father had articulated a claim against state case workers for malicious interference with the parent-child relationship.[141]

In the parental alienation context, such remedies are sadly inadequate and virtually ineffective. To be acceptable, a remedy must go beyond the tort remedy of salving the pain of the alienated parent through monetary compensation. The remedy must include a family law component to repair the relationship of the alienated parent and child, and to discourage future disparagement by the alienating parent.

A. Multifaceted Intervention with Mental Health Involvement

Obviously, a purely legal solution to parental alienation cannot resolve the situation for any of the parties. Nor does such a solution fit into the court's mandate of the "best interest of the

child" because it does not purport to prevent, or even lessen, future conduct by the alienating parent, or take any steps toward repairing the relationship between the alienated parent and the affected child. If the judiciary recognizes the importance of the parent-child relationship, any effective tort remedy for damage to or destruction of that relationship must perforce involve the repair of injury and deterrence of further damage.

Such a solution cannot be found in legal treatises alone. Remedies for human relationship issues require involvement by mental health experts. Such a remedy is neither simple nor quick. However, difficulty in fashioning relief for injured parties must not deter the judicial system from taking every step necessary to create a remedy that fits the problem—a remedy that truly rights the wrong.

Litigation alone will likely only exacerbate the polarization of the parents, increase existing alienation and leave the unprotected child squarely in the middle of the combatants.[142] In *Caught in the Middle*, Garrity recommends the involvement of "four distinct and simultaneous intervention components: the parenting coordinator, the children's therapy, strategies for the [alienated] parent, and strategies for the alienat[ing] parent."[143] The parenting coordinator must be an expert in child development.[144] The coordinator's role would include creating the visitation schedule, modifying it, ensuring adherence, and mediating between the parties.[145] One purpose of such a coordinator is to free the parties' individual therapists from serving as "neutral" mediators.[146] Thus, each parent has an advocate.

Because children of divorce are already caught in the middle of an emotionally traumatic situation, requiring therapy for the child provides him with a neutral, caring supporter and confidant.[147] "Most children in alienating families are highly mistrustful, slow to warm up, and wary of sharing their thoughts and feelings."[148] A therapist creates a safe harbor for the child's emotions—a friend.

Strategies for the targeted parent include anger management and assistance in rebuilding the relationship with the child.[149] Strategies for the alienating parent recognize that rarely is any parent wholly to blame, and include teaching insight into the motivation for the alienation.[150]

Unmasking and repairing parental alienation requires a multifaceted approach that heals wounds and helps parties move forward in their relationship.

B. Deterrence Instead of Punishment

Building a mandatory periodic reporting requirement into the initial custody decree may effectively deter alienating behavior or some parents. Each parent, having either custody of. or visitation with, a minor child, could be required to communicate in writing with the jurisdictional court (at least annually) regarding the custody and visitation status. Because a court retains jurisdiction over a family law case throughout the minority of the child (absent a change to another jurisdiction), it would be judicial economy to warn parents at the beginning of a custody arrangement that their adherence to the agreement and their interaction with the child and each other will be systematically monitored by the court. Deterrence of potential parental alienation directly translates to a savings of judicial time and energy.

Mandatory communications could be reviewed by a mental health coordinator and, if both sides agree that custody and visitation is progressing calmly, filed away. If the responses indicate a problem, a mandatory mediation could be scheduled to clarify and hopefully resolve the issues. Only obstinate problems would return to the courtroom. At a minimum, parents would be made aware of their alienating activities, and would perhaps be deterred from continuing such activities.

In the alternative, while less judicially efficient, mandatory annual mediations by a mental health coordinator with both the parents and the child would, in ail likelihood, uncover alienation practices at an early stage—where remediation can be swift.

By identifying parental alienation early in its manifestation, or by deterring it altogether, its harm could be minimized or avoided. Such a remedy is indeed in the best interest of the child.

VII. CONCLUSION

Courts are struggling to find a solution to the conflict between divorcing and divorced parents over the affections of their mutual child or children. The solution must be fair and equitable, designed to protect the interests of all parties. Current solutions are sadly inadequate and sometimes inappropriate, and new solutions are needed. That new solution will require the involvement of not only judges and lawyers, but mental health experts as well. The solution must stop the alienation remedy the injury, and repair the damage.

In parental alienation, courts are dealing with heart-rending emotional turmoil. A brief hearing and a bang of the gavel is not enough to salve or solve that turmoil.

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J.D. Candidate. August 1998. California Western School of Law: B.A. Communications, University of Nevada, Las Vegas. *I share the honor of being published with many people: the 1997-98 Law Review Board; John Kormanik, my editor; Professor Janet Bowermaster, for the initial idea, her contagious enthusiasm. and her ability to see all sides of the issue; my daughter Amy (143) for accepting my periods of tunnel vision, and forgiving my occasional and unintentional alienation of her father; and my very special husband, Jim, for his patience and unflagging encouragement.*

FOOTNOTES

1. June Jordan, U.S. poet, civil rights activist, Old Stories: New Lives. Address Before the Child Welfare League of America (1978), in MOVING TOWARDS HOME: POLITICAL ESSAYS (1989).

2. *See* MICHAEL R. STEVENSON & KATHRYN N. BLACK. HOW DIVORCE AFFECTS OFFSPRING. A RESEARCH APPROACH 5 (1996).

3. *See id.* at 5.

4. *See id*.

5. *See* CONSTANCE AHRONS, THE GOOD DIVORCE. KEEPING YOUR FAMILY TOGETHER WHEN YOUR MARRIAGE COMES APART ix (1994).

6. *See* STEVENSON & BLACK, *supra* note 2, at 5.

7. *See id*. at 6.

8. *See* STATISTICAL RECORD OF CHILDREN 837 (Linda Schmittroth ed., 1994).

9. *See* AHRONS, *supra* note 5, at ix. Ahrons advocates cooperation of the parties to create a "binuclear" family, rather than a "broken home." *Id*. at x.

10. *See* Peggie Ward & J. Campbell Harvey, *Family Wars* (visited Oct.. 30. 1997) <http://www.PAS_Report.htm at indigo.ie>. Peggie Ward states that "[u]nder the guise of fighting for the child, the parents may succeed in inflicting severe emotional suffering on the very person whose protection and well-being is the presumed rationale for the battle." Ms. Ward is a member of the Advisory Council of the Professional Academy of Custody Evaluators.

11. *See* STEVENSON & BLACK. *supra* note 2, at 41.

12. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 163 (1992).

13. *See id*.

14. *See* RICHARD A. GARDNER, CHILD CUSTODY LITIGATION, A GUIDE FOR PARENTS AND MENTAL HEALTH PROFESSIONALS 149-51 (1986). Gardner identifies the following types of custody: sole custody, where the children live primarily with one parent and visit the other; split custody, where one parent has custody of one or more of the couple's children and the other parent has custody of the other children; divided custody, where the child lives with each parent approximately one-half of the time, sometimes with the child remaining in the family home and the parents trading off residences; and joint custody where both parents have equal rights and responsibilities, neither being superior, but with no structured visitation schedule. Gardner believes that a misuse of the term "joint custody" is often used "to provide a specious sense of egalitarianism between the parents—when there is in fact none or very little." *Id*. at 151. *See also* Hanson v. Spolnik, 685 N.E. 2d 71. 78 (Ind. Ct. App. 1997) (holding "a trial court abuses its discretion when it awards joint custody to parents who have made child rearing a battleground").

15. *See* AHRONS, *supra* note 5, at 171.

16. *See* JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 121 (1980).

17. *See* STEVENSON & BLACK, *supra* note 2, at 6. *See also* Judy C. Cohn. *Custody Disputes: The Case for Independent Lawyer-Mediators,* 10 GA. ST. U. L. REV. 487 (1994); Judith M. Wolf, *Sex, Lies and Divorce Mediation*, 33 ARIZ. ATT'Y 25 (1996).

18. *See* STEVENSON & BLACK, *supra* note 2, at 6.

19. *See* MACCOBY & MNOOKIN, *supra* note 12, at 296.

20. *See id*.

21. *See id*. at 297.

22. Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 11(1990).

23. *See* STEVENSON & BLACK, *supra* note 2, at 42.

24. *See* Matthew J. Sullivan. *Parental Alienation Processes in Post-Divorce Cases*, ASS'N FAM. CONCILIATION COURTS NEWSL., Summer 1997, at 4.

25. *See* MACCOBY & MNOOKIN, *supra* note 12, at 28.

26. *See id*.

27. *See id*. at 31.

28. *See id*.

29. *See id* at 25.

30. *See* Sullivan. *supra* note 24, at 4.

31. Defined as the time when the parents mutually decide to divorce, or one party initiates divorce proceedings despite the other party's desire to continue the marriage.

32. *See* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE xviii (1990).

33. *Id*.

34. Arnold H. Rutkin, *From the Editor*, 18:4 FAMILY ADVOCATE ii (1995).

35. *See* JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY. SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 99 (1980). Although the relationship of the custodial parent with the child changes less than that of the non-custodial parent. there is change nonetheless. A sudden void created by a child visiting the other parent.

the requirement of consulting the other parent about matters involving the child where no such discussion was necessary previously, the questions from the child, behavioral problems associated with the divorce, and many other such changes bedevil the relationship.

36. *See id*.

37. 1 *Kings* 3:25.

38. *See* 27 AM. JUR. *Husband and Wife* § 519 (1940).

39. *See* Bonnie Miller Rubin, *Adultery Verdict Puts Fault Back in Divorce,* CHI. TRIB., Aug. 17, 1997. at Al.

40. *See* James Leonard, *Cannon v. Miller: The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina*, 63 N.C. L. REV. 1317, 1319 (1985) (noting that "[t]his principle was first articulated in the 1745 English case of *Winsmore v. Greenbank*, and was commonly followed in this country, except in Louisiana").

41. *See* Elizabeth Herlong Campbell, *Court Abolishes Alienation of Affections*, 45 S.C. L. REV. 218, 220 (1993) (citing *Heermance v. James*, 47 Barb. 120 (N.Y. App. Div. 1866)).

42. *See* Jonathan D. Rieff, *Relational Interest: A Minor Child's Action Against a Third Party Who Alienates the Affection of a Parent,* 7 J. FAM. L. 14, 15 (1967) (citing *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945), and other early cases of third-party alienation of a parent's affection for a child).

43. *See id*

44. *See, e.g.* cases holding that state has no valid cause of action for alienation of the affections of a parent, including *Whitcomb v. Huffington*, 304 P.2d 465 (Kan. 1956); *Wheeler v. Luhman,* 305 N.W.2d 466 (Iowa 1981); *Russick v. Hicks*, 85 F. Supp. 281 (W.D. Mich. 1949): *Scholberg v. Itnyre*, 58 N.W.2d 698 (Wis. 1953); *Ronan v. Briggs*, 220 N.E.2d 909 (Mass. 1966); *Hunt v. Chang*, 594 P.2d 118 (Haw. 1979); *Taylor v. Keefe*, 56 A.2d 768 (Conn. 1947); *Roth v. Parsons,* 192 S.E.2d 659 (N.C. App. 1972); *Zarrella v. Robinson*, 492, A.2d 833 (R.I. 1985); *Wallace v. Wallace*, 184 S.E.2d 327 (W. Va. 1971); and *Greene v. Roy*, 604 So. 2d 1359 (La. Ct. App. 1992).

45. RESTATEMENT (SECOND) OF TORTS § 702A (1976).

46. *See* Marshall L. Davidson, III. *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 629 (1989).

47. *See id*. at 660.

48. *See* Rubin, *supra* note 39, at A1.

49. *See* Nancy Gibbs, *An Antique Law Sends Tremors Through Many A Heart*, TIME, Aug. 18, 1997, at 50.

50. *See*, e.g., ALA. CODE § 6-5-331(1996) ("There shall be no civil claims for alienation of affections."); TENN. CODE ANN. § 36-3-701 (1997) ("The common law tort action of alienation of affections is hereby abolished."); TEXAS FAMILY CODE ANN. § 4.06 (1997) ("A right of action by one spouse against a third party for alienation of affection is not authorized in this state.").

51. *See* NEV. REV. STAT. § 41.370 (1997). The Nevada legislature, in abolishing the cause of action for alienation of affection, stated that:

> The remedies provided by law for the enforcement of actions based upon alleged alienation of affections... having been subjected to grave abuses, caused extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and having been exercised by unscrupulous persons for their unjust enrichment. and having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of this state will be served by the abolition thereof.

52. *See* VA. CODE ANN. § 8.01-220 (1997) ("no civil action shall lie or be maintained in this Commonwealth for alienation of affection, breach of promise to marry, or criminal conversation."); TEX. CODE ANN. FAMILY CODE § 4.06 (1997) ("A right of action by one spouse against a third party for alienation of affection is not authorized in this state."); PA. STAT. ANN, tit. 23 § 1901 (West 1997) ("All civil causes of action for alienation of affections of husband or wife are abolished.").

53. *See* TENN. CODE ANN. § 36-3-701 (1997) ("The common law tort action of alienation of affections is hereby abolished."); OR. REV. STAT. § 30-840 (1996) ("There shall be no civil cause of action for alienation of affections.").

54. *See* MICH. COMP. LAWS ANN. § 600.2901 (West 1997).

55. *See* MACCOBY & MNOOKIN. *supra* note 12, at 37.

56. *See id*.

57. Ludlow v. Ludlow, 201 P.2d 579, 582 (Cal. Ct. App. 1949) (changing custody of child from father to mother because of father's calculated actions to prevent relationship between mother and child).

58. *See* McEntee v. New York Foundling Hosp., 194 N.Y.S.2d 269 (N.Y. Sup. Ct. 1959) (holding that because an action by parent for alienation of affection of minor child was not

"maintainable at common law," such a claim was not barred by N.Y. CIV. RIGHTS LAW § 80-a (1997), which abolished the rights of action to recover sums of money as damages for alienation of affections).

59. *See* Raftery v. Scott. 756 F.7d 335, 339 (4th Cir. 19Y5) (suggesting in dictum that, although the parties stipulated that parental alienation would not be the basis of recovery in that case and thus no decision of the court as to the existence of such a claim was necessary, the term alienation of affection and its fellow causes of breach of promise to marry and criminal conversation, as used in the Virginia statutes, concern "such relationships between adults not necessarily or customarily related by blood," and that a cause of action for alienation of the affection of a child may still exist despite the abolishment of the Virginia alienation of affection statute in 1968).

60. *Id*. at 340.

61. *Id*.

62. Larson v. Dunn, 460 N.W.2d 39, 45-46 (Minn. 1990) (holding that other remedies exist when a parent or other relative interferes with custody arrangements, and that creating a tort of this nature is the job of the legislature, not the court).

63. *Id*. at 47.

64. *See id.* at 47.

65. *See* Sullivan. *supra* note 24, at 4.

66. *See* CARLA B. GARRITY & MITCHELL A. BARIS. CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH CONFLICT DIVORCE 65 (1994) (citing: RICHARD A. GARDNER, CHILD CUSTODY LITIGATION: A GUIDE FOR PARENTS AND MEDICAL HEALTH PROFESSIONALS (1986)). Two chapters in the Garrity and Baris book deal specifically with parental alienation, "Identifying and Understanding Parental Alienation" and "A Comprehensive Intervention Model."

67. *See* GARDNER. *supra* note 14, at 76.

68. *See generally* Cheri L. Wood. *The Parental Alienation Syndrome: A Dangerous Aura of Reliability,* 27 LOY. L.A. L. REV. 1367 (1994) (noting general rejection among professionals of Gardner's PAS theory due to lack of peer review and statistical data to back up his contentions); Priscilla Read Chenoweth, *Don't Blame the Messenger in Child Sex Abuse Cases*, N.J. L.J., Apr. 19, 1993, at 17 (stating that "Gardner's extravagant and conclusory language, and his obvious bias against women, should be enough to give any judge or lawyer pause before accepting his invitation to disbelieve and even punish the messenger [the parent reporting the other parent s sexual abuse of children]").

69. *See* Wood. *supra* note 68, at 1370.

70. *See, e.g.,* Karen B. v. Clyde M.. 574 N.Y.S.2d 267. 271 (N.Y. Fam. Ct. 1991); Karen PP v. Clyde QQ. 602 N.Y.S.2d 709 (N.Y. App. Div. 1993) (holding that custody of a four year old daughter be changed from the mother to the father based on PAS because of the mother's accusation that the father had sexually abused the child).

71. *See, e.g.,* Page v. Zordan. 563 So. 2d 500, 502 (Fla. Dist. Ct. App. 1990) (holding that Gardner's "sexual abuse legitimacy scale" had no "reasonable degree of recognition and acceptability among the spectrum of scientific or medical experts"); Coursey v. Superior Court, 239 Cal. Rptr. 365 (Cal. Ct. App. 1987); Weiderholt v. Fischer, 485 N.W.2d 442 (Wis. Ct. App. 1992); Wood. *supra* note 68. at 1375 (citing Page v. Zordan, 564 So.2d 500, 502 Fla. Dist. Ct. App. 1990), and stating that the allegedly objective test designed to determine validity of alleged sexual abuse of children and purporting to expose fabrication is virtually discredited).

72. *See* Wood, *supra* note 68, at 1365.

73. *See id*.

74. *See* STANLEY S. CLAWAR & BRYNNE V. RIVLIN. CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN 4 (1991).

75. *See id*.

76. *See, e.g.*, Karen B. v. Clyde M., 574 N.Y.S.2d 267 (N.Y. Fam. Ct. 1991).

77. *See* Rorie Sherman, *Gardner's Law*, NAT'L L.J., Aug. 16, 1993, at 1.

78. *See id*.

79. *see id*.

80. *See id*.

81. *See id*.

82. *See* GARRITY & BARIS, *supra* note 66, at 65. *See also* Wood, *supra* note 68, at 1390.

83. Ira Daniel Turkat, *Management of Visitation Interference*, 36 JUDGES' J. 17, 18 (1997).

84. *See id.* at 17.

85. *See id*.

86. *Id*. at 18.

87. *See id*. at 19.

88. *See* Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, JUDGES' J., Fall 1997, at 38, 41 (noting that Turkat "relies upon questionable statistics to document the problem of visitation interference by so-called malicious mothers. Like Gardner, Turkat's research apparently comes only from his own clinical observations." Smith also cites that the American Psychological Association has found no data to support PAS or MMS.).

89. *Id*.

90. *See* Turkat, *supra* note 83, at 46.

91. Smith & Coukos, *supra* note 88, at 41.

92. *See* Sullivan, *supra* note 24, at 4. Sullivan presented a paper on "Parental Alienation Processes in Post-Divorce Cases" at the Association of Family and Conciliation Court's Third International Symposium on Child Custody Evaluation in 1997.

93. *See id*, at 19.

94. *See id*.

95. *See id*. at 4.

96. *See id*.

97. *Id*.

98. *See In the Interest of* T.M.W., 553 So. 2d 260, 262 (Fla. Dist. Ct. App. 1989).

99. Bartanus v. Lis, 480 A.2d 1178, 1181 (Pa. Super. Ct. 1984) (holding that a cause of action for alienation of a child's affection is not recognized in Pennsylvania. The parent claimed alienation of his son's affections by the parent's sister and her husband.).

100. *See id*. (listing Georgia, New Jersey, North Carolina, Minnesota, New York, Massachusetts, Iowa, Vermont, and Arkansas as states rejecting alienation of a child's affections as a cause of action).

101. *See id*. (citing Strode v. Gleason, 510 P.2d 250 (Wash. Ct. App. 1973)).

102. Hyman v. Moldovan. 305 S.E.2d 648, 648 (Ga. Ct. App. 1953) (holding that Georgia does not recognize a cause of action for alienation of affection).

103. *Id*. at 648.

104. Raftery v. Scott. 756 F.2d 335, 337 (4th Cir. 1985).

105. *Id*. at 338.

106. *See id*. (citing VA. CODE ANN. § 8.01-220 (Michie 1981)).

107. *See id*. at 339.

108. *See id*. at 339 n.4. Intentional infliction of emotional distress requires an intentional or reckless action by outrageous and intolerable conduct, a causal connection and severe emotional distress. Alienation of affection, however. does not require "a showing of severe emotional distress," but only "a 'malicious' (meaning unjustifiable) interference or an intention that such interference result in the loss of affection."

109. *See id*. at 340.

110. Rock v. Lindquist, 278 N.W.2d 326, 327-28 (Minn, 1979).

111. *Id*. at 328.

112. *See* R.J. v. S.L.J., 801 S.W.2d 608, 609 (Mo. Ct. App. 1991) (holding that although mother has moral duty not to alienate children's affection with respect to father, she did not have a legal duty).

113. *See* Meikle v. Van Biber. 745 S.W.2d 714, 717 (Mo. Ct. App. 1987) (holding that enticement by a party to "induce a child of sufficient maturity to leave the home of its custodial parent" does not constitute alienation of affection).

114. R.J. v. S.L.J., 801 S.W.2d at 609.

115. *Id*. at 609-10.

116. *Id*. at 610 (quoting Hester v. Barnett, 723 S.W.2d 544, 555 (Mo. Ct. App. 1987)).

117. *See In the Interest of* T.M.W.. 553 So. 2d 260, 262 (Fla. Dist. Ct. App. 1989).

118. *See* Sullivan, *supra* note 24, at 4.

119. *Id*.

120. *Id*.

121. *See id*.

122. GARRITY & BARIS, *supra* note 66, at 81.

123. *Id* at 69.

124. *See id*. at 72-77.

125. *Id*. at 79-80.

126. *See* 5 ILL. COMP. STAT. ANN. § 740 (West 1997). The statute states:

> It is hereby declared, as a matter of legislative determination, that the remedy heretofore provided by law for the enforcement of the action for alienation of affections has been subject to grave abuses and has been used as an instrument for blackmail by unscrupulous persons for their unjust enrichment, due to the indefiniteness of the damages recoverable in such actions and the consequent fear of persons threatened with such actions that exorbitant damages might be assessed against them. It is also hereby declared that the award of monetary damages in such actions is ineffective as a recompense for genuine mental or emotional distress. Accordingly, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by limiting the damages recoverable in such actions and by leaving any punishment of wrongdoers guilty of alienation of affections to proceedings under the criminal laws of the state, rather than to the imposition of punitive, exemplary, vindictive or aggravated damages in actions for alienation of affections.

127. *See* Hyman v. Moldovan. 305 S.E.2d 648, 648 (Ga. Ct. App. 1983).

128. *See id*. (citing GA. CODE ANN. § 105-1203 (1997)) ("Adultery, alienation of affections, or criminal conversation with a wife or husband shall not give a right of action to the person's spouse. Rights of action for adultery, alienation of affections or criminal conversation are abolished." The court rejected the father's claim that the statute was intended to deal only with the alienation of the affection of a spouse and did not abolish a cause of action for alienation of a minor child's affections: the court refused to "place such a strained construction on the statute." The court interpreted the statute to apply to any claim of alienation of any affection.).

129. *See* Wheeler v. Fox. 307 N.E.2d 633, 635 (Ill. App. Ct. 1974).

130. Bernardine Dohrn. *Children and the Law*. CHILDREN'S LEGAL RTS J., Winter/Spring 1993, at 39.

131. Onora O'Neill, *Children's Rights and Children's Lives,* in CHILDREN'S RIGHTS RE-VISIONED, PHILOSOPHICAL READINGS 29, 29 (Rosalind Ekman Ladd ed., 1996).

132. *See id*.

133. *Id*. Although the rights of children are currently being seriously debated and defined, and play an integral part in the separation of a family. a discussion of those rights is beyond the scope of this Comment.

134. Strode v. Gleason, 510 P.2d 250, 253 (Wash. Ct. App. 1973) (quoting McGrady v. Rosenbaum, 308 N.Y.S.2d 181 (N.Y. Sup. Ct. 1970).

135. *See id*.

136. *See* Steve H. v. Wendy S., 67 Cal. Rptr. 2d 90. 97 (Cal. Ct. App. 1997).

137. *See id*. at 95.

138. *Id*. at 102.

139. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 11 (2d ed. 1955).

140. *See* Raftery v. Scott, 756 F.2d 335, 339 (4th Cir. 1985); Bartanus v. Lis, 480 A.2d 1178, 1178 (Pa. Super. Ct. 1984).

141. *See* Waller v. Washington, 824 P.2d 1225, 1236 (Wash. Ct. App. 1992).

142. *See* GARRITY & BARIS, *supra* note 66, at 83.

143. *Id*. at 84.

144. *See id*. at 85.

145. *See id*. at 86.

146. *See id*. at 86.

147. *See id*. at 88.

148. *Id*. at 89.

149. *See id*. at 91-92.

150. *See id*. at 94.