Legal Responses to Alienation and Parent Contact Problems

Chapter: (p. 177) Legal Responses to Alienation and Parent Contact Problems

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Abstract and Keywords

This chapter addresses the issue of contact problems through the lens of the best interests of the child, an approach that is now dominant in the developed world. It begins with a discussion of the critical role of custody evaluators and mental health experts in cases involving parent-child contact problems. It then turns to a discussion of the legal responses to a postseparation rejection of a parent by a child that the court concludes is not justified—that is, to cases of alienation. The chapter concludes with a discussion of suggestions for how the family justice system should be structured to allow the most effective responses to children's resistance to parent contact, including a discussion of case management and the need for early identification, and appropriate and effective intervention.

Keywords: intervention, custody evaluators, mental health experts, family justice system, case management

Child's "Rights," Parental Duties, and the Best Interests of the Child

Much of the discourse about postseparation parent–child contact through most of the 20th century focused on the "right" of each parent to have a relationship with a child following separation, and in particular on the right of a noncustodial father to have contact with his children, who in this period almost invariably lived with their mother. By late in the 20th century, however, judges and commentators began to say that children have the "right" to have a relationship with both parents after separation. This "children's rights" approach was, for example, articulated by Lord Justice Balcombe in the 1994 English case of *Re J. (A Minor: Contact)*:

> The principles which a court applies in cases such as this are well established. Contact with the parent with whom the child is not resident is the *right of the child* and very cogent reasons are required for terminating such contact.[1]

While there are situations in which it is useful, and indeed important, to use the rhetoric of children's rights, there are also situations in which the use of children's rights discourse can be highly problematic. In particular, where alienation may be present, it is very easy for an alienating parent and an alienated child to shift the rhetoric and say that if the child has the right to *have* (p. 178) a relationship with a nonresidential parent, the child also has the right to *not have* contact with that parent. This rhetoric may then be used in an attempt to inappropriately empower the child, and allow the child to decide to reject a parent. Accordingly, many judges have adopted a different rhetorical approach, preferring to talk about the "duty" of each parent to support their children's relationship with the other parent. Thus, in the 2005 New York appellate decision in *Usack v. Usack*,[2] the court wrote that each parent has a "duty to rise above his anger … to affirmatively encourage the children to have a relationship with" the other parent.

The most appropriate and widely accepted rhetorical approach to relationships between parents and children, however, is to focus not on the rights or duties, but rather on the best interests of the child. Courts and statutes generally presume that it is in a child's best interests to have a relationship with both parents, but this presumption is rebuttable, if for example, there are significant concerns about abuse or violence. The best interests approach was, for example, articulated by the Ohio Supreme Court in 1997 in *Davis v. Flickinger*:

> the best interest of a child encompasses not only the home environment, but also the involvement of both parents. In today's society that fully admits the need for parenting by both parents, each parent should have full involvement in a child's life, where possible and desired by the parent. When one parent begins to cut out another parent, especially one that has been fully involved in that child's life, the best interest of the child is materially affected.[3]

The advantage of a best interests approach is that it focuses on the child, not the parents, and the focus is on the interests and needs of the child, not the child's wishes or rights. While children will often benefit from a relationship with both parents, this will not always be in a child's best interests.

In this chapter we will largely address the issue of contact problems through the lens of the best interests of the child, an approach that is now dominant in the developed world.

There are strongly divergent views among commentators and professionals about the extent to which the best interests of the child are promoted by having the family justice system involved in responding to cases where a child is reluctant or unwilling to have contact with a parent or there are allegations of alienation. Some argue that it is invariably contrary to the best interests of a reluctant child for a court to force that child to spend time with a parent, and futile for a court to make an order for a child or parent to have counseling to help improve their relationship (Bruch, 2001; Walker, Brantley, & Rigsbee, 2004a). Others emphasize concerns about potential harm to children from coercive legal responses and advocate a very cautious approach to judicial (p. 179) involvement in alienation cases (Jaffe, Ashbourne, & Mamo, 2010; Johnston & Goldman, 2010).

Most experienced legal and mental health professionals support early, appropriate, and effective legal responses for high-conflict cases in general, and for alienation in particular. Responding to parent–child contact issues at an early stage may prevent them from becoming severe and entrenched (Fidler, Bala, Birnbaum, & Kavassalis, 2008; Friedlander & Walters, 2010; Jaffe, Ashbourne, Mamo, & Martinson, 2010). While these cases involving parent–child contact problems are complex and challenging, and require a range of responses, many commentators accept that it is in the best interests of children for the legal system to take a lead in identifying and understanding cases where children are resisting contact with a parent. This will often result in a judicial effort to promote the child's relationship with the rejected parent, but there are also clearly cases where it is contrary to the child's interests for a relationship to be maintained, due to issues of domestic violence, child neglect or abuse, or significantly compromised parenting.

This chapter begins with a discussion of the critical role of custody evaluators and mental health experts in these cases. An initial challenge for the courts is to determine the reason for a child resisting contact with a parent: is this is a case of alienation, justified rejection (realistic estrangement), or a “mixed case” with each parent bearing significant responsibility for the situation? The court must then determine what response will be in the best interests of the children involved, sometimes making decisions on an interim basis before there is full knowledge of the cause for the child's resistance to parental contact, and there is uncertainty about how the parents and children will respond to different clinical or judicial interventions. Mental health professionals, especially independent court-appointed evaluators, can have a critical role at this stage.

The chapter then turns to a discussion of the legal responses to a postseparation rejection of a parent by a child that the court concludes is not justified—that is, to cases of alienation. In many less severe cases, the principal role of the judge at a pretrial stage will be educative, exhorting parents to appreciate the importance of their children having a relationship with both parents, and warning a parent who is engaging in alienating conduct and resistant to compliance with court orders about the judicial sanctions available, including the possibility of loss of custody.

In most jurisdictions it is accepted that courts have the jurisdiction to order children or parents to undertake counseling or participate in psychoeducational programs. In some cases, a parent who is being denied contact will seek to have the other parent found in contempt of court, which might result in a fine, an order to provide services in the community, or even imprisonment of an alienating parent, though courts are reluctant to take such a punitive approach to family problems. Courts may also sanction recalcitrant parents by ordering them to pay the legal fees of the other parent, and in a few jurisdictions there may be a suspension of support obligations if a court finds (p. 180) that there has been a deliberate effort by a parent who is receiving support to undermine a payer's relationship with the children. In some cases, the police may directly enforce an access order, though police enforcement is clearly very intrusive and not a long-term solution. In some cases, a court will order a change from sole to joint custody, to give the rejected parent a greater degree of control, and to allow for a strengthening of the relationship between the child and the rejected parent; this may also serve a warning to the favored parent that a full loss of custody may occur if that parent continues to undermine the relationship between the child and the rejected parent.

In some moderate cases and in most severe cases of alienation, a clear warning that in the event of noncompliance with the provisions of the parenting time order, a change of custody is likely to occur, may suffice to ensure compliance with contact orders (Bala & Bailey, 2004; Gardner, 1998a; Johnston & Kelly, 2004; Lee & Olesen, 2001; Sullivan & Kelly, 2001). In other cases, however, a change in custody is required to ensure the ongoing relationship between the child and the rejected parent and to protect the child from the emotional harm being perpetrated by the alienating parent.

The most intrusive response to alienation is an order for placement of the child in the custody of the rejected parent, in some cases with contact between the child and the favored parent also suspended, at least temporarily. While an order for a reversal of custody with a suspension of contact with the alienating parent as a response to alienation—sometimes called a “parentectomy”—is controversial, courts seem increasingly prepared to make these orders in the most severe cases. As will be discussed in this chapter, there are also cases in which the court, or the rejected parent, recognizes that attempting to force a child to have a relationship with a rejected parent will be contrary to the child's best interests, and legal efforts to enforce contact should cease, perhaps with mechanisms in place to try to preserve some minimal contact in the hope that this will allow for a meaningful relationship to be reestablished at some point in the future.

The chapter concludes with a discussion of suggestions for how the family justice system should be structured to allow the most effective responses to children's resistance to parent contact, including a discussion of case management and the need for early identification, and appropriate and effective intervention. Such structures are not only desirable for alienation cases but are also generally the most effective and efficient ways to respond to all high-conflict family cases.

Although there are generally broad similarities in different jurisdictions in the legal responses to cases where a child is refusing to see a parent, there are also some important differences, as responses are affected by legislation, as well as by local resources and court culture. In this chapter, important differences in approach between jurisdictions will be discussed; unless differences are noted, readers can assume that there is significant similarity between jurisdictions,

and the reference to cases or statutes in a particular jurisdiction is for illustrative purposes only.

(p. 181) The Role of Mental Health Experts in Resolving Alienation Cases

The initial, critical issue that a court must face in deciding how to respond to a claim of alienation or resistance to contact with a parent is a determination of the cause of the child's reluctance to have contact with a parent. In every family court system, there is some provision in legislation or the rules of court for a judge to direct the appointment of a neutral mental health professional to conduct an evaluation, assessment, investigation, or home study of the parties and submit a report to the court regarding custody or access issues.[4] These professionals may be social workers, psychologists, or psychiatrists. In England, New Zealand, Australia, and some jurisdictions in North America, the government will often pay for the preparation of such a report, but in many places the parents will be required to pay for any such report, and if they are unable to do so, no evaluation will be done.

Orders for preparation of a report are most often made with the consent of both parties but may also be made by the court on its own motion, or in the face of opposition from one parent. Judges generally recognize the value of an independent, court-appointed expert in cases where parents are litigating about their children, especially where alienation issues arise.[5] While the nature of the investigation undertaken varies considerably by jurisdiction and will depend on the qualifications and training of the expert and the resources available, there will almost always be a number of meetings with the children involved and observation of interactions of the children with each parent, as well as contact with individuals like new partners, grandparents, and teachers. Depending on the qualifications of the expert, there may also be psychological testing. Despite the value of such reports, in some cases concerns about delay, expense, or a lack of availability of a qualified expert may militate against appointment of any expert by the court, and as will be discussed, there are also cases where the opinion of a court-appointed expert is disregarded by the court. There are also cases in which it is clear from the material filed that a claim of alienation is unfounded, and that the lack of contact is justified by abuse or other inappropriate parental conduct; an evaluation in such cases may be viewed as unnecessary, intrusive for the children, and an unjustified expense.[6]

A study of reported Canadian case law on parental alienation from 1989 to 2009, by far the largest study in the literature of court cases on alienation, gives a picture of how these cases present and are dealt with in one country (Bala, Hunt, & McCarney, 2010), including an examination of the (p. 182) role of mental health professionals.[7] In this Canadian study, a report about alienation was provided from an independent expert in 187 of the 232 (81%) of the cases. In another 5 cases (2%), the court ordered an assessment for use at a later stage in the proceedings. In 70 of the 232 cases (30%), more than one court-appointed or independent expert was involved, and in 20 of these 70 cases (29%), there was significant disagreement in the opinions of the court-appointed experts. In some of the cases, either the independent expert(s) did not provide an opinion about the question of whether or not alienation occurred, or it was not possible to ascertain the opinion of the expert(s) from the judgment. Of the cases where the independent expert(s) expressed an opinion about alienation, the judge took a different position than the expert(s) in less than 10%. In a number of the cases where the opinion of a court-appointed expert was followed, the court chose between the conflicting views of two (or more) court-appointed experts. Of the 8 cases where the opinions of the court-appointed experts were rejected, some were cases where the judge felt that circumstances had changed since the report was prepared, while in a few cases the judge simply disagreed with the conclusions of the experts.[8]

While most commonly when mental health professionals are witnesses in high-conflict cases involving allegations of alienation they are appointed by the court, in 46 of the 232 cases (20%), one or more privately retained mental health professionals were also called to testify. In 38 of these cases, there was one privately retained expert, while 8 cases involved two or more privately retained experts. In 35 of the 46 cases involving privately retained experts, the experts

testified to either critique or support the opinion of the court-appointed expert. The court preferred the opinion of the privately retained expert in only 3 of the 35 cases where there was a difference in opinion between the court-appointed and privately retained expert about whether or not there was alienation.

In the cases in the Canadian study where the court concluded that alienation was present without an expert testifying, there was evidence from child protection workers or police about unfounded allegations of sexual abuse by the alienating parent, or there was proof of abduction by the alienating parent. If there is no evidence from mental health professional, testimony from neutral government employee like a child protection worker or police officer is likely to be important if alienation is to be established, though in a very small (p. 183) number of cases the court was satisfied that alienation occurred even without such evidence.

A similar but less detailed study of reported cases in Australia that raised alienation issues found that the recommendations of a court-appointed expert were followed in 84% of the cases and not followed in 11%, with the remainder unclassified (Bala, 2012).

Although there is clearly some variation between jurisdictions, there is significant reliance on the opinions of court-appointed experts in all countries. On the other hand, in no jurisdiction is the opinion of a court-appointed expert determinative of whether alienation has occurred, nor will a recommendation of the expert necessarily be followed. A party who disagrees with the views of a court-appointed expert always has the right to challenge the expert by cross-examination or by calling other evidence, and it is the judge, not a mental health professional, who makes the final decisions.

An example of the common situation of a court preferring the opinion of court-appointed experts to the view of an expert retained by one party is the 2010 New Brunswick case of *L.B.L. v. S.B.*,[9] where the main issue was the custody of four adolescents. A court-appointed social worker with expertise in child development interviewed all four of the children and concluded that they genuinely preferred to live with the father. This social worker did not believe that the father had “alienated” the children but, to the contrary, testified that they had become “estranged” from their mother by her conduct. The mother called an expert in domestic violence, who also professed to have expertise in alienation and who claimed that the children had been “alienated” from their mother. The court preferred the testimony of court-appointed expert, noting that she made much more reference to the social science literature while the mother's expert did not seem “unbiased, but to the contrary seemed to be an ‘advocate.’”

It is understandable that judges generally place significant reliance on independent, court-appointed experts, who are expected to have the education and training to understand the dynamics of these complex cases. Further, unlike a privately retained expert, the court-appointed expert has access to all of the parties, the children, and collateral sources. Of course, in some jurisdictions the parents are required to pay for an expert, and they may not be able to afford one. There are many locales where it is difficult to find a qualified mental health professional to conduct an evaluation, especially for cases as complex as those involving alienation claims, and in some cases it is apparent that the court-appointed expert does not, in fact, understand the complexities of an alienation case.[10]

An interesting example of the court rejecting the recommendations of a court-appointed expert was the 2011 Chicago case of *Wade v. Wade*,[11] where (p. 184) the Domestic Relations Court awarded sole custody of two boys, aged 8 and 3 years, to their father. The court-appointed psychologist suggested that the mother's “alienating conduct and attitudes” were “moderate to severe” but recommended that she was to continue to have sole custody. In rejecting the expert's recommendation, the judge focused on the fact that the expert had made a number of important factual errors in assessing the case and had relied on a number of statements by the mother about her conduct that were proven in court to be lies. Judge Renee Goldfarb found that the mother's alienating conduct was more severe than

the psychologist believed, and that she was less willing to support the boy's relationship with their father than the expert expected. The judge concluded:

> This court finds that [the mother] has embarked on an unstoppable and relentless pattern of conduct for over two years to alienate the children from their father, and lacks either the ability or the willingness to facilitate, let alone encourage, a close and continuing relationship between them.

Although the father was awarded sole custody, the mother was to have “regular parenting time” every second weekend plus vacations. It may not be coincidental that in this case the alienated parent who challenged the recommendation of the expert was a prominent, wealthy basketball player with enormous resources that he was able to devote to the trial, which was one of the longest in Chicago family court history, lasting 38 days. His lawyers were able to adduce very detailed evidence to establish that the court-appointed psychologist was gullible to the mother's distortions and lies, and accordingly her recommendations should be disregarded.

Enforcement Issues and Judicial Remedies

The Challenge of Enforcement and the Role of the Family Justice System

Noncompliance with court orders and separation agreements is common in high-conflict cases, especially those with alienation issues. This in part reflects the fact that alienating parents often persuade themselves that noncompliance is promoting the interests or protecting the rights of their children. It also reflects the high incidence of personality disorders, and the corresponding distortion in perception, in this high-conflict population (Grych & Fincham, 1999; Jenuwine & Cohler, 1999). In these cases, failure to enforce an order against alienating parents only reinforces their narcissism, false sense of power, and disregard for authority (Gardner, 2001a; Johnston, 2005a; Rand, Rand, & Kopetski, 2005). However, judges are aware that enforcement of parenting orders can be very difficult: the law is a blunt instrument and not well designed for the promotion of good parenting.

(p. 185) As Justice Mossip acknowledged in the Ontario case of *Reeves v. Reeves*,[12]

> The most difficult issue with respect to parental alienation and changes in custody with regard to older children is that such orders are very difficult to enforce. There is no point in me taking the difficult path that I have unless I do everything possible to ensure the order is complied with. This order is in the best interests of [the children]. … I must ensure that the father and his mother obey this court order.[13]

While in some cases involvement of the justice system is essential if the child is to have a relationship with a rejected parent, resorting to the justice system is costly in both financial and human terms. The justice system is formal and inherently adversarial; each parent is expected to adduce his or her own evidence and challenge the evidence of the other party. As Ontario Justice June Maresca observes, “the fundamental underpinnings of our system are adversarial,” which may “contribute” to heightened tensions.[14] In some cases, lawyers may be unscrupulous or ill informed about the deleterious effects of their actions on parental and child conduct. Toronto lawyer Brian Ludmer argues that “the actions and inactions of lawyers acting for aligned parents can be a significant contributor to respect for court orders and respect for the parental role of rejected parents.”[15]

Resorting to the adversarial system, and especially the trial process, will tend to push the parents apart, while the optimal outcome for children will involve parental cooperation and compromise. As noted by Massachusetts Judge Carey,[16]

> legal systems can sometimes perpetuate [alienation] … because the more court appearances you have, the higher conflict with the greater opportunity for arguing, and that is a mechanism that a rejected parent in frustration will sometimes use … repeatedly bringing a case to court, but that drives a stake between that parent and the kids. For every court appearance, the emotional level of the parents goes up, and the emotional level of children goes up because they invariably know what is going on or when there is a court hearing, so while the justice system does not create alienation … it can foster it.

Because of the recognition of the potentially harmful effects of resorting to the justice system, judges and other professionals generally encourage (p. 186) separated parents to resolve their disagreements without a trial, and if possible outside of the justice system. However, it is also recognized that in some cases resorting to the adversarial system is necessary to protect the interests of the children or an abused spouse, and there must always be caution not to pressure a reasonable or abused parent to settle a case with an unreasonable, disturbed, or abusive parent.[17]

Experienced family judges increasingly recognize the importance of early, effective legal responses to alienation and access problems, a view especially clearly expressed by Chief Justice Peter Boshier of the New Zealand Family Court:[18]

> I think that judges have got to be robust. It is not only the discipline of psychology that we have to be conscious of. We also have the integrity of the family court system … the failure of family court systems to act promptly and meaningfully can exacerbate problems and be contrary to the long-term interests of children.

The Role of the Rejected Parent in Seeking a Legal Remedy

Depending on the circumstances, a parent who is having difficulty in exercising his or her parenting time or enjoying a relationship with a child has a range of legal options, but it is important to appreciate that it is up to that parent to decide what remedies, if any, to seek. Unlike with child support, which in most jurisdictions is enforced by a government agency without charge to the recipient, in the absence of voluntary compliance, parents must apply to the courts to have parenting time or contact orders enforced. Applying to the court often requires significant financial resources and emotional energy, and many rejected parents simply give up trying to maintain a relationship with their children.

If the problem is that the alienating custodial parent is not honoring an existing order, then the rejected parent may need to establish that there has been contempt of court—a willful violation of the court order—and the alienating parent should be sanctioned. The rejected parent may also seek variation of the existing parenting order, perhaps to seek a change in custody or residence. Both types of proceedings may be joined together. In practice, there are often a number of court appearances before a matter is concluded, and the judge is likely to try to persuade the parties to resolve their dispute, often (p. 187) urging the alienating custodial parent to respect the rights of the other parent and promote their child's best interests by supporting the relationship with that parent.

Legal responses and penalties for contempt of court (noncompliance with court orders) include:

- requiring the defiant parent and children to undertake counseling;
- compensatory parenting time (“makeup time”);
- requiring the defiant parent to pay the legal costs of the rejected parent;
- requiring the defiant parent to pay any financial expenses incurred but wasted (e.g., airfare); and

- finding a parent in contempt of court and imposing a fine, a community service order, or even a jail sentence.

Finally, a court may vary custody in cases of noncompliance, giving the rejected parent joint or even sole custody, though this must not be done to be punitive with the alienating parent, but only if it will promote the child's best interests.

There is a fairly broad consensus that judicial enforcement of court orders is vitally important in alienation cases, though there is considerable debate over the nature and extent of appropriate sanctions (Bala & Bailey, 2004; Clawar & Rivlin, 1991; Gardner, 2001a; Lund, 1995; Stahl, 1999; Sullivan, 2004; Sullivan & Kelly, 2001; Turkat, 1994; Warshak, 2006). Some maintain that the penalties courts have customarily imposed for violation of access orders are too lenient, while others argue that some penalties, such as incarceration or having to pay fines, are excessive and ultimately not in a child's best interest. Furthermore, punitive judicial actions may be counterproductive to the extent that the punished alienating parent is then portrayed to the child as a “martyr,” which in turn only serves to reinforce the child's negative reaction and alienation. Some commentators even argue that while judges should “encourage” custodial parents to support their children's relationships with nonabusive, noncustodial parents, coercive judicial action to enforce contact between a child and parent is not appropriate.[19]

The Importance of Detailed Parenting Plan Orders

Separation agreements, minutes of settlement, and court orders that establish a parenting plan for high-conflict families often lack sufficient detail and precision to effectively structure their troubled coparenting relationship. When parents can cooperate, a lack of specificity provides the flexibility to deal with inevitably changing circumstances, but in a high-conflict case, (p. 188) ambiguities and insufficient detail in court orders or separation agreements only serve to exacerbate parental conflict. In alienation cases, any opportunity for the favored, often custodial, parent to control the parenting time schedule may be exploited. Incomplete or ambiguous parenting plans provide one such opportunity, as do provisions permitting flexibility in the parenting time schedule; such flexibility is not appropriate for high-conflict and alienation cases. Although legal and mental health professionals are increasingly aware of the need for detailing parenting plans, the need for highly structured and specified terms for high-conflict families cannot be overstated (Fidler, 2007).[20] For a court judgment to be effective in cases of alienation, the order must be detailed, explicit, and comprehensive; these are sometimes referred to as “multidirectional” orders, with directions not only for both parents, but also for third parties such as schools and health care providers (Bala, Fidler, Goldberg, & Houston, 2007; Sullivan & Kelly, 2001; Turkat, 1994).

In high-conflict cases involving parental alienating behavior, the greater the degree of specificity and structure in the order, the higher the likelihood of success in carrying out the terms as envisioned by the judge, and if necessary, to address enforcement. In these cases, the order should be detailed, explicit, unambiguous, and comprehensive.

Therapeutic Interventions and the Court Process

If children are resistant to contact with a parent, there are often emotional, psychological, or relationship issues that may be addressed through some form of counseling or therapy. In some cases, either or both parents would benefit from therapeutic intervention, while in other cases the child needs counseling; in some cases it may be beneficial for there to be counseling for a parent and child, or for both parents to meet together with a counselor. While judges, lawyers, mental health professionals, and parents themselves often recognize the potential value of therapeutic interventions, there is significant (p. 189) controversy about the extent to which judges should order, or even encourage, parents and children to attend counseling or therapy in cases where alienation is a concern.

In this section we explore the differences in judicial attitudes to the question of whether, as a matter of law, a court has jurisdiction to make an order for a parent or child to have counseling, and then consider whether such orders can effect change. In the following section, we turn to some of the practical questions that arise in making orders or agreements that provide for counseling.

Jurisdictional Controversy: Orders or Recommendations?

An initial legal question is whether a court has the jurisdiction to make an order that a child or parents attend counseling as a condition of exercising parenting rights. In most countries, the courts are of the view that judges have the jurisdiction to make orders for parents to have counseling as a condition of exercising custody or contact rights. Further, as discussed below, if a custodial parent is found guilty of contempt for violation of an order for contact, most courts accept that an order to attend counseling may be part of a sentence for contempt.[21] Although more controversial, some courts also accept that a judge can direct that a parent with custody must ensure that a child has counseling, or undertake reintegration or reunification therapy to improve the child's relationship with a rejected parent. Some judges, such as those in Quebec, take the position that they do not have the legal jurisdiction (or power) to make an order requiring counseling for a child or parent, but they are prepared to make “recommendations.” In practice, there may not be much difference between these legal approaches, since the real consequences for failure to engage in counseling may be the same, whether the court has made an “order” or a recommendation: as discussed more fully below, if counseling and other therapeutic interventions fail, the court may be faced with the “stark dilemma” of either a variation in custody arrangements or an abandonment of legal efforts to try to force the child to have a relationship with the parent.

Decisions Ordering Parents to Attend Counseling

The 2007 Ontario Court of Justice in *Kozachok v. Mangaw* is an example of a case where the judge in a high-conflict separation situation made an order for *both* parents to “co-operate in engaging the services of a counselor skilled in (p. 190) providing child and family counseling in high-conflict separations, and once found, they are to participate in such counseling.” Justice Jones observed:[22]

> High-conflict situations do not automatically turn into low conflict situations merely with the passage of time. To expect these parents, without intervention, to learn to co-operate in the interests of their children, is simply unrealistic and potentially harmful to the children's well-being. If I were to accede to the request of the father and force the mother to deliver the children to him for lengthy, unsupervised periods of time, I would expect the conflict to escalate because neither parent would have adjusted his or her behavior or attitude towards the other.
>
> The parties are quite entrenched in their current positions around access. The conflict between the parties, if it continues, is not in the best interests of these children. The parties must accept the fact that neither party is blameless and that the ongoing conflict is fuelled by both …
>
> Third party intervention through counseling is the best option to improve this situation. The parties need to understand the position of the other and how their conduct is negatively affecting the well-being of their children.

Orders for Counseling for a Child and Parent

In many alienation cases in which counseling or therapeutic intervention is ordered for the child(ren), the judge will make the order with the explicit goal of reestablishing the child(ren)'s relationship with the rejected parent, while

leaving the child(ren) in the custody of the alienating parent. In these cases the judge is *ordering* that the *alienating parent* ensure that the child attends counseling as a "condition" or "incident" of custody.

In some alienation cases, one or both parents may be ordered to undertake counseling with the objective of improving their communications skills and understanding of the effects of their behaviors on their children. For example, in the 2008 Ontario case of *McAlister v. Jenkins*, Harper J. ordered that the mother was to have no contact with her two daughters, aged 12 and 8, until she was able to interact with the father and his new wife "as parents [are expected to] do" to meet the interests of their children.[23] Further, as a condition of resuming contact with the daughters, the mother was required to attend a program designed to educate parents on how to avoid placing children in the middle of disputes.[24]

(p. 191) The 2008 Ontario decision of Turnbull J. in *L. (J.K.) v. S. (N.C.)*[25] provides a detailed discussion of whether a court can order counseling for a child. In this case, the judge found that the 13-year-old boy had been alienated by the custodial father to reject the mother. The judge ordered that custody be transferred to the rejected mother, and the alienating father's contact with the child be suspended. There was extensive evidence in the decision about the value to the boy of participation in the psychoeducational Family Bridges workshop of Drs. Rand and Warshak. Justice Turnbull recognized that the child faced the very real challenges in adjusting to the sudden change in custody. While the court did not directly order the boy to undertake any treatment and left discretion to his mother to decide what treatment or program the boy would receive, Turnbull J. did require the mother to report on the boy's participation in any such program to court, and thus to the father. Justice Turnbull concluded:[26]

> Our courts have regularly ordered children to participate in counseling. In this case, the order of the court is simply granting custody of LS to his mother with no access for a period of approximately four months by his father. It is not ordering LS to undertake any treatment or to participate in any program. It is leaving such discretion to his mother who, if the workshop program of Dr. Warshak and Dr. Rand is decided upon, is to report such participation to the court … I interpret the law to require the consent of an informed person who has attained the age of 16 to be obtained before a course of treatment is instituted. I do not think it is applicable to a child who the court has ordered to be placed in the custody of a parent, who is able to act in the best interests of the child. To accede to the submission that no treatment or counseling for LS and his mother can be undertaken without LS's consent would effectively mean that there is no remedy in law for an alienated child in these circumstances. It would mean there is nothing the alienated parent could do to remedy the situation and the wrongdoer would be rewarded for his conduct. I do not accept that is the law …
>
> It is inconceivable to me that that … legislation could be interpreted to protect conduct, which a trial court determines is not in the best interests of LS.

In the 2009 Ontario case of *Sickinger v. Sickinger*,[27] Greer J. concluded that the mother of children ages 9, 12, and 16 years, had been alienating them from their father and had been undermining their relationship with him. (p. 192) One issue in this case was that the mother had sent one of the children to a therapist selected by her. The father was concerned that this therapist was undermining his relationship with the girl.[28] The judge concluded that it was "imperative" that the girl receive counseling to help her "deal with her anxiety and emotional problems, arising out of her parents' marriage breakdown" and observed that the "therapist must be a person both parents have confidence in." She ordered the mother to cease sending the child to the therapist whom she had selected, and to send the child to a therapist whom the parents could agree upon. Failing their agreement about a therapist, the judge said that she would select a new therapist. The Ontario Court of Appeal dismissed the mother's appeal, implicitly accepting the judge's authority to make such an order, as well as recognizing her wisdom in expecting both parents to agree on the

selection of a therapist.

Courts That Will Only "Recommend" Therapeutic Intervention

In some jurisdictions, like Quebec, judges are generally of the view that they do not have the legal authority to make an order for counseling for either parents or children in a family law case. However, these judges are prepared to "recommend" counseling for parents or children in appropriate alienation cases, and to note in their decisions if a parent has agreed (often after discussion with the judge) that counseling will be undertaken.[29]

Until 2008, judges in England could not make orders directing therapeutic involvement or counseling, but the law was changed in that year specifically to allow the courts to deal more effectively with alienation cases and make such orders.[30] In the 2004 English Court of Appeal decision of *Re S (uncooperative mother)*, Lord Justice Thorpe made clear that even where courts cannot order counseling, the failure of an alienating parent to follow recommendations for such therapeutic involvement may result in a change in custody. He explained the value of a therapeutic approach to alienation problems, as well as warning the alienating custodial mother of the potential consequences of not adequately addressing the concerns about the lack of contact by the children with their father.

> Manifestly there are between these adults unresolved areas of conflict which, unless resolved, will continue down the years to (p. 193) resound to the prejudice and harm of these two children. A process of family therapy is infinitely more likely to lead to resolution than continuing litigation between them … So whilst the court has no power to order the [mother] to re-engage in a process of family therapy … if it emerges … that … proposals, reasonable as to time and location have been advanced for the revival of the family therapy and she has continued to refuse, then she must understand that the court may draw adverse inferences against her.[31]

As Thorpe L.J. explains, the consequences for a parental failure to follow through with such a recommendation or undertaking will not be a finding of contempt of court, but it may well affect how a court will deal with custody or contact problems in the future. Thus, there are only limited practical differences between the "recommendation" and the "order" approaches, since a failure to respect a court order to undertake counseling is unlikely to result in a sanction for contempt of court. Perhaps the real difference is psychological, as some parents may feel greater compulsion to follow a judge's "order" than a judicial "recommendation," even if the consequences of noncompliance are similar.

The Limits of Court-Ordered Therapeutic Intervention

Beyond the question of whether courts have the jurisdiction to order counseling, important concerns have been raised about the effectiveness of court-ordered therapy. There is no guarantee that therapy will be effective; mere attendance at counseling is not the outcome that is desired, and individuals who are undertaking counseling only because it is required by a judge may be highly resistant to change. Further, many community agencies that provide counseling without charge or at subsidized rates have long waiting lists for service, and the high cost of fee-for-service interventions are financially inaccessible to many parents.

In cases of less severe alienation, a judicial "push" toward therapy may have positive effects. Counseling is most likely to be effective when a judge persuades parents of its value and of the importance of the child(ren) having a positive relationship with both parents. However, counseling may be ineffective if the parties are highly resistant to counseling and are only attending to avoid a finding of contempt of court.

In the 2009 Ontario case of *Snider v. Laszlo*, Boswell J. accepted that the mother had been alienating the two boys,

aged 12 and 14, from their father, but refused the father's request for an order for "reunification therapy," commenting:[32]

> While the court has the inherent jurisdiction to order reconciliation counseling, *such orders are made sparingly …* There should be (p. 194) compelling evidence that the counseling will be beneficial to the participants.
>
> The likely benefit must certainly be questioned where, as here, the counseling is resisted by three of the four proposed participants [the alienating mother and the two boys]. That said, resistance cannot and should not be the sole determining factor when the welfare of the children is in issue. It is not difficult to envision circumstances where the court may be justified in imposing counseling, even though there is opposition to it. But I come back to the fact that there is an assessment just underway. I believe it will be greatly beneficial to have the views and findings of the assessor before imposing any particular form of counseling on the parties and the children.

In more severe alienation cases, counseling alone, while the child continues to reside with the alienating parent, is unlikely to be effective in restoring a relationship between children and a rejected parent, as it will be undermined by the alienating custodial parent. In severe cases, only a change in residence and an interim interruption in contact with the favored parent are likely to allow for the rejected parent to reestablish a relationship with the children. If in a severe case the court awards custody to the alienated parent, that parent will often be well advised to engage therapeutic or counseling services to help the children adapt to a difficult transition and reframe their perception of the rejected parent.

Depending on the jurisdiction, a judge who reverses custody may have the authority to order the new custodial parent to provide services for the child. However, it is generally preferable to allow that parent the discretion to determine what services to seek. While a judge may be well advised to "remain seized" of an alienation case (continue to have responsibility for) after a reversal of custody and to require a review hearing, the custodial parent should generally have the flexibility to decide what services to seek for the child, and to make changes in the therapeutic regime without seeking prior court approval.

Conclusion: Jurisdiction to Be "Cautiously" Exercised

While there is some variation in approach both within and between countries, most judges accept that they have the *jurisdiction* (or legal authority) to order parents to undertake counseling themselves or provide counseling for their children.

Some argue that therapeutic change is necessarily dependent on voluntary participation, and that court-ordered therapy is an oxymoron, as orders are poor motivators to change attitudes and feelings (Bruch, 2001; Darnall & Steinberg, 2008a; Wallerstein, Lewis, & Blakeslee, 2000). This argument has some intuitive appeal, and ultimately no one can be forced to engage (p. 195) meaningfully in therapy. However, the clinical experience of most of the experts interviewed for this book and the literature suggest that in many alienation cases, the education, coaching, encouragement, or threats of a judge can be prime motivators for change, including engagement in therapy.

Many commentators argue that the involvement of the courts is often critical, not only for the effective implementation of a parenting plan (parenting time and decision making), but also for the effective implementation of any treatment or intervention plan in alienation cases (Bala, Fidler, et al., 2007; Baris et al., 2000; Cartwright, 2006; Everett, 2006; Gardner, 1998b, 2001a; Johnston, Walters, & Friedlander, 2001; Lee & Olesen, 2001; Lowenstein, 2005; Lund, 1995; Rand & Warshak, 2008; Sullivan, 2004; Sullivan & Kelly, 2001; Walsh & Bone, 1997; Warshak, 2006). Australian psychologist and therapist Jennifer McIntosh observed:[33]

> Often, I can only do this type of work in the context of a court order, so that I keep the favored parent engaged when the going gets tough, and when we get to the point of trying some reunification visits, that parent is not just at liberty to cut them out.

Therapeutic interventions that focus on helping alienating parents understand the effects of their behavior on their children may facilitate changes in parental behaviors. Changes in parental behavior may then precipitate a shift in attitudes and emotions, even if parents do not gain insight into the psychological roots of their behavior.

However, the judicial jurisdiction to order (or even to recommend) therapeutic intervention should be exercised "cautiously." It should only be done when appropriate resources are available, and when it seems likely that the parent who is the subject of such an order will engage in the process. This parental "willingness" may be a result of judicial persuasion, or even a response to a judicial threat to terminate (or radically alter) that parent's relationship with the child. If the parent seems truly resistant after judicial "persuasion," either there must be a court-ordered change in the relationship with the child, or the judicial effort to effect change should be abandoned.

The Content of Agreements and Orders for Therapeutic Involvement

The Value of Agreements and Orders

Mental health practitioners recognize that clinical intervention in alienation cases must be based on a detailed written document establishing the framework, objectives, and terms on which services are to be provided. That document could be a contract for provision of therapeutic services, though (p. 196) in alienation cases it is prudent to have a court order setting out the basic expectations for counseling (Fidler et al., 2008; Friedlander & Walters, 2010; Johnston et al., 2001; Sullivan & Kelly, 2001; Weitzman, 2004). Even if both parents are initially willing to undertake a voluntary response to a child's resistance to contact with a parent, a consent order for therapy may be desirable because it is difficult to know in advance which cases may become severe and require the threat of legal enforcement, and which cases will be less intense with a high degree of voluntary engagement. Without a court order, clients can revoke their consent for treatment for any reason at any time, including the not uncommon circumstances of feeling challenged by, suspicious of, or dissatisfied with the therapist who is redirecting alienating parental behaviors. If treatment is pursuant to a court order, issues related to payment of the counselor or therapist should also be properly addressed in the order.

If the alienation becomes more severe as time and therapy progress, which is not uncommon, it is important for the therapist to be able to provide a summary report back to the court so that the judge can consider the new information when making further orders. The responsiveness by both parents to therapy and changing their own behavior is a critical consideration for a court in dealing with enforcement and variation issues. When reporting to the court, the therapist will necessarily use discretion, limiting where possible details of personal history, and focusing on the parent's receptivity, engagement, and his or her ability and willingness to change behaviors and relationships.

In some jurisdictions, such as Australia, there are significant constraints on the amount of information that government-funded therapists can provide to the courts, beyond the fact of attendance or nonattendance. While concerns about confidentiality of therapy are generally very important, in alienation cases, legal restrictions on information sharing with the courts can undermine the ultimate effectiveness of these interventions, as their effectiveness may depend on an alienating parent having the expectation that the judge will be informed about parents' willingness to truly engage in therapy, as opposed to whether they are merely attend.

Timing: Diverting a Request for an Evaluation Into a Request for Counseling

Given the need for early intervention and the inevitability of delays in securing a court-ordered evaluation report (not to mention the financial cost), a mental health professional approached by lawyers about the possibility of doing an evaluation for the court may choose to explore treatment alternatives with the lawyers during the referral stage. This is an important consideration, as it is not uncommon for treatment to be recommended in any event. As previously noted, alienation is likely to worsen not only the longer it remains unaddressed, but also because the custody evaluation process itself can often result in the child and favored parent becoming entrenched in their positions, in effect upping the ante.

(p. 197) If parents, in the early stages of mild or moderate parent–child contact problems, can agree that it is indeed in their child's best interest to have contact with the rejected parent, irrespective of the cause, a treatment intervention based on an agreement may be indicated rather than a court-ordered evaluation for use in litigation. If both parents agree with this approach and court proceedings have commenced, their agreement should be clearly delineated in an on-consent court order.

In such cases, the mental health professional who has been engaged will need to undertake a clinical assessment to develop a treatment plan, necessarily taking into account the causes of the strained relationships. If serious allegations of abuse emerge during this process, the therapist may need to make a recommendation for a comprehensive court-ordered evaluation (to be carried out by another professional). A further safeguard is that a therapist would be required to report to the child protection authorities any reasonable suspicions of abuse or neglect.

The possibility of diverting a case from custody evaluation and litigation to a voluntary therapeutic response can be appropriate for some less severe alienation cases; judges, lawyers, and mental health professionals need to be aware of this possibility. However, this should only be done if there is genuine agreement by the favored parent that a relationship between the child and the rejected parent is desirable. If the favored parent continues to dispute whether it is indeed in the child's best interests to have contact with the rejected parent, a comprehensive custody evaluation and judicial resolution will be necessary.

Court Orders for Counseling: Elements of the Order

Table 9.1 lists the suggested components of the order governing counseling in alienation cases (Fidler et al., 2008). As will be further discussed in this section, the list recognizes that there may be more than one mental health professional involved in providing counseling, though the number of professionals involved will depend on the nature of the case as well as the resources of the parties.

Distinction Between Role of Therapist and Decision Maker

Once it has been determined by the court or agreed by the parents that it is in the child's best interests to attempt to repair the child's relationship with the rejected parent, there may be a provision in the order or agreement for reunification therapy. As previously discussed, while one objective of such therapy is for the therapist to work toward reintegrating the child with the rejected parent, the goals go beyond that and include addressing the child's overall adjustment.

While the therapist's role includes conducting a clinical assessment of the family's dynamics and needs, to develop an appropriate and child-focused (p. 198)

Table 9.1 Court Order for Intervention and Counseling

treatment plan, the therapist is not conducting a forensic assessment in the sense of addressing *if* it is in the child's best interest to have contact with the rejected parent. That determination has already been made by the court or agreed to by the parties. However, in some situations, circumstances may develop to the point that the therapist determines the therapy should cease or that a report to a child protection agency is required.

In undertaking reunification therapy, the therapist attempts to implement a court-ordered or agreed-to parenting time schedule, preferably one that is detailed and unambiguous. If this therapeutic approach is being undertaken voluntarily, it may be helpful to specify that the favored parent is to retain legal custody (decisional authority to make major child-related decisions), provided that the other parent has contact as specified in the order or agreement. This may decrease the favored parent's resistance and insecurities to the extent that he or she participates meaningfully in the treatment intervention, and may also actively encourage the child to do so, as well as outwardly support the child's relationship with the other parent (Rand, 1997a; Warshak, 2001). Further, it may encourage compliance with the treatment plan if the judge gives an implicit, and sometimes explicit, message to favored parents that they can only be assured of retaining custody if they to comply with court orders, engage in therapy, and alter behavior.

The therapist cannot act as the person who will determine the parenting time schedule. The role of the family therapist must remain distinct from that of a mental health professional who might be retained as a decision maker, such (p. 199) as a parenting coordinator or mediator/arbitrator. Assuming the roles of both therapist and decision maker poses ethical issues and clinical obstacles and may raise legal concerns as well (Darnall, 2010; Greenberg, Gould, Schnider, Gould-Saltman, & Martindale, 2003; Kirkland & Kirkland, 2006; Sullivan, 2004).[34] More specifically, if the child and favored parent believe the therapist/facilitator has the authority to determine whether or not parenting time occurs, there is little likelihood of progress to achieve the stated objectives. It is far preferable for a therapist/facilitator to be able to acknowledge awareness of the fact that the child may not want to see the parent, while also noting that the therapist has no control over parenting time schedule/orders. The therapist/facilitator can then advise the child that the objective of the therapeutic intervention is to try to implement the parenting time schedule that was either agreed to by both parents or ordered by the court. Within that broader objective, the child is invited to participate by expressing concerns and feelings, and providing ideas about how to make that time manageable and more enjoyable.

As noted, any order for parenting time assumes that the specific contact is in the child's best interests, and thus this is not open for further determination by the reunification family therapist. Several options exist for the court in establishing a parenting time schedule in cases where reunification therapy is being undertaken. For example, an order might include a specific gradually increasing parenting time schedule, contact may be limited to the therapy sessions only until further order of the court, or contact may be supervised by a family member or at a visitation center and limited to a certain amount of time each week. Frequently, the court-ordered parenting time is not occurring when the therapy begins. In these cases, the order may continue to specify the parenting time that is expected, with the understanding that the objective is for the therapist to gradually implement that ordered plan during the counseling. The therapist may have some authority to determine the pacing of the implementation depending on how the therapy is proceeding, but not to determine whether it is to occur. In these situations it is common for the order to set a date for reestablishing the parenting relationship as specified or for review by the court.

Ensuring That the Family Therapy Proceeds

It is not uncommon for difficulties to arise either getting the reunification therapy started or during the therapy; these delays in many cases result in an exacerbation of alienating behaviors. Consequently, the order should indicate (p. 200) a date by which the parents must contact the therapist, a court return date to follow up on the treatment

progress (or permission to return on short notice), and a provision that neither parent may unilaterally withdraw from the therapy prior to the previously agreed to minimum duration of the therapy or the assigned review date. If treatment is proceeding without incident, this court date can be postponed by the therapist informing counsel and the court. However, when difficulties are encountered, having a specified return date will ensure the court's direction without inevitable delays.

Specifying Who Should Attend

As noted, the entire family needs to be involved in the intervention, and seen in various combinations as determined by the therapist. Frequently, the favored parent is hesitant or even unwilling to attend therapy, believing it is the rejected parent who has problems and thus needs therapy before anything else is to occur. The favored parent may also claim an inability to force a child to attend. The order or therapy contract should specifically name the persons required to participate in the therapy or intervention. Blaming one parent is counterproductive to the intervention goals, especially with high-conflict personalities. Regardless of who has “caused” the problem, or the relative contributions of each parent, both parents are important to the solution. These situations are often complex, and sometimes more than one therapist is involved. For example, the child may have his or her own therapist, and one or both parents may also have an individual therapist.

Notwithstanding the need for an approach that involves the entire family, survey results reported by Bow, Gould, and Flens (2006) indicate that the most common recommendation of forensic custody evaluators in alienation cases is for individual therapy for the child and the parents. In cases where there is alienation, judges quite frequently make orders (or recommendations) for the child alone to receive therapy. Individual therapy for the child by either the same or a different therapist working as a member of a team, without the inclusion of other family members, however, is not likely to be an effective intervention for rejection of a parent, as the attitudes of the parents, especially favored parents, often influences their children.[35]

As noted, often, family resources will limit the extent to which an optimal level of services can be provided.

Confidentiality and Open Communication Between Involved Professionals

Legal and mental health practitioners generally agree that if a court orders counseling, there should be a mechanism to ensure that the counseling occurs, (p. 201) which requires the possibility of reporting back to the court. American psychologist Robin Deutsch explained:

> The court has to continue to monitor these cases before and after the interventions. There has to be a timeline of scheduled reviews. The court needs to know [about what's occurring during the therapy]; it's all about informed consent that is set up at the beginning.[36]

There are different perspectives, though, on the extent of the information that should be shared with the court. A totally confidential process has the benefit of avoiding the negative impacts of public shame and humiliation, and may encourage more candor by the participants. However, the risk of confidentiality lies in shielding the personality disorders and negative characteristics of parents who tend to show disregard for authority, including court orders or the directions of a therapist (Bernstein, 2007; Greenberg et al., 2003; Johnston & Campbell, 1993; Johnston & Roseby, 1997; Johnston et al., 2001; Lebow & Rekart, 2007; Sullivan 2004; Sullivan & Kelly, 2001). Orders are meant to be followed, and parents need to be held accountable. Further, and elaborated more fully later, in the more severe cases, therapy, especially confidential therapy, is unlikely to be effective. Commenting on the value of the lack of confidentiality on the parents and the success of the therapy, Deutsch observed:

> I don't think its shaming. It is what it is. If people think it is shaming, then what does it say about their motivation for their behavior? If there is informed consent, and they know it will only be disclosed if the process doesn't work or the court subpoenas the notes, I think it helps participation. There are other models where the therapy ends up being disclosed to the courts, such as maltreatment, substance abuse, and anger management and [the disclosure] is a very important part.

Completion of therapy in alienation cases usually takes at least 9 months and can take 2 or more years. However, if there is sporadic participation or there has been no change or indications of such in the behavior of the child (i.e., some resumption in contact with the rejected parent) and the favored parent within 3 to 6 months, there will be real concerns about whether therapy will ever be effective in addressing the contact problems.

If at the end of the therapy the parent–child contact problem has not been resolved, the absence of provision for reporting means that valuable information cannot be used by the court, or other professionals who may be involved in the case. Further, in cases where therapeutic intervention is not working, the alienation often becomes worse and more pronounced over the (p. 202) course of treatment, and reporting can be important to allow for an appropriate legal response.

Circumstances vary, the degree of confidentiality expected should vary with the case, and there should always be special consideration for the confidences that a child shares with a therapist. In our view, however, when difficulties are encountered with the therapy proceeding or with the resolution of the alienation, the benefits to the child of the therapist reporting back to the court exceed any benefits associated with total confidentiality. Depending on the nature of the proceedings, the reporting may be to the court, counsel, an arbitrator, or the parenting coordinator.

In addition, there needs to be some ability for the various involved professionals to exchange information; this provision should be explicitly included in the court order and treatment contract. It is not uncommon for alignments, polarization, and fragmentation to occur among and between the various professionals in the same way that these occur within the family. It is not uncommon for the aligned parent to attempt to prohibit the therapist's access to other previous or current professionals involved. However, the order and treatment contract need to include the provision for full communication between the various professionals (Sullivan & Kelly, 2001).

The order or treatment contract also needs to clarify that there is no confidentiality among family members and therapist in the family therapy. While the therapist will necessarily exercise discretion, if therapy is to be effective in alienation cases, there needs to be some sharing of information provided to the therapist by individual family members with other family members.

Appointment of a Parenting Coordinator or Case Manager

Often a number of professionals, including other therapists, physicians, educators, the police, child protection workers, and lawyers for the parents and child, are involved with these families. In many cases, a comprehensive custody and access evaluation has been completed and included recommendations for the clinical interventions. It can be valuable to have a professional who acts as a case manager to coordinate the provision of services and, within the scope of authority vested by the court or agreement of the parties, makes decisions about the day-to-day care of the children that the parents are unable to make together.

In a growing number of jurisdictions, courts are making use of a “parenting coordinator” (or “special master”) to deal with cases where the court has found that alienation has occurred. The parenting coordinator may be a mental health professional or lawyer, who assists the parents to implement their parenting plan with minimal conflict and, where they are unable to agree, will have the authority to resolve day-to-day child-related issues that (p. 203) are not resolved

by the court order or agreement.[37] The scope of decision-making authority of the parenting coordinator may include, for example, the appointment of additional members to the treatment team when parents cannot agree, or a determination of the pacing of the court-ordered parenting time, leaving the therapist entirely out of this role.

In the Washington D.C. case of *Jordan v. Jordan*, the Domestic Relations Court concluded that the custodial mother had been alienating the couple's two daughters, aged 5 and 12 years, from their father, and thwarting his time with the girls. The court responded by awarding joint legal custody to both parents and equal parenting time, and by appointing a parenting coordinator pursuant to the jurisdiction's *Domestic Relations Rules*. The cost of the parenting coordinator was to be borne equally by the parents, and there was an expectation that the older daughter might continue to see an individual therapist to help with the “reunification” process. The Court of Appeal affirmed this decision and explained:

> Dr. Zuckerman [the court-appointed custody evaluator] found both parents to be fit and recommended joint legal and physical custody of the children. Dr. Zuckerman stressed that the children need “to have positive connections with both parents and to be protected from conflict in the post-divorce period.” He further emphasized that it is “strongly in E.J.'s [the 12 year old daughter's] best interests to redevelop a good relationship with her father.” To facilitate the joint-custody arrangement, Dr. Zuckerman recommended the appointment of a “parenting coordinator.” He noted that the parties would need to make significant changes in their attitudes to promote the children's interests, and that the “most important developments” would center around Ms. Jordan, in helping her to normalize E.J.'s relationship with Mr. Jordan. Dr. Zuckerman (p. 204) contemplated that the parenting coordinator would work with the parties “[to create] a plan that would promote the relationships between Mr. Jordan and [his] daughters”; and that the parenting coordinator “should be endowed with authority to speed up or slow down the progress.”[38]

In jurisdictions where legislation or the rules of court allow for the appointment of a parenting coordinator, the court must establish the basic legal framework for custody and parenting time, as judges are not permitted to delegate their judicial powers. The use of parenting coordinators is an important innovation; while parents have to pay for the services of this professional, if there are a number of therapists or there are a significant number of court appearances likely, the appointment of a parenting coordinator can ultimately both save the parents money and help the children.

A growing number of jurisdictions have laws to allow for the appointment of a parenting coordinator without the agreement of the parties; in some cases the courts will make such an appointment over the objection of one parent, usually the favored parent, to attempt to address alienation issues.[39] If there is no legislation to allow for the appointment of a parenting coordinator, the parents may make an agreement for such an appointment, with this professional having an agreed-upon authority to act as a mediator, and failing that mediation, as an arbitrator, recognizing that the processes used are to be informal and expeditious (e.g., use of e-mail) and the range of authority limited. However, where legislation or rules of court do not allow for such an appointment, without the agreement of the parties, judges do not have the authority to give a therapist the authority to make any decisions directing when parents will spend time with the children, as this would amount to an improper delegation of authority by a court.[40]

When numerous professionals are involved, careful case management by a parenting coordinator (or case manager) can facilitate collaboration and full communication between the various professionals (Sullivan & Kelly, 2001). The parenting coordinator attempts to ensure team consistency and continuity to avoid the splitting or pitting of one professional against the other, as polarization of professionals is frequently seen in high-conflict families, particularly in alienation cases. As case manager, the parenting coordinator, subject to the ultimate authority of the court, directs

and manages the team of professionals, defines *consistent* treatment goals, and facilitates the ongoing exchange of information among the team members, while being mindful not to undermine relationships between therapists and clients.

(p. 205) While reporting to the court and an exchange of information among the team of professionals is important, if therapists do not use discretion in disclosing information, work with children can be compromised. When a parenting coordinator is involved, this allows therapists, collateral sources, and children to feel free to communicate with the coordinator, who, in turn, reports to the court. The parenting coordinator may in some instances be able to protect the participants by using different sources of information to formulate any opinions provided to the court or in explaining decisions to the parents (Johnston, 2001; Sullivan, 2004; Sullivan & Kelly, 2001).

In alienation cases it is quite common for favored parents to make repeated allegations of abuse by the other parent, and take the child to different therapists and health care providers to attempt to obtain a report confirming the abuse. To the extent that multiple examinations and investigations are intrusive and pose a risk to the child, it may be necessary for an order to prohibit a parent from taking the child for another investigation or to another therapist without leave from the court, the parenting coordinator, or the consent of the other parent.

Adjusting Parent Contact and Interim Orders

In cases where there are alienation concerns and a child appears to be rejecting a parent without good reason, a court may respond with a short-term or interim order to change the parenting arrangements. The court may order “compensatory time,” with the parent denied contact to make up for lost time with the child. Another option, short of a permanent reversal of custody, is for the court to order a prolonged period of contact with the rejected parent, such as during the summer or an extended vacation, perhaps coupled with restricted or suspended contact with the alienating parent.

Such responses may allow for the restoration of the child's previously good relationship with the rejected parent and prevent the further deterioration of that relationship, and are less disruptive than reversing custody permanently. Further, ordering a temporary change to the parenting time schedule sends a message that the court will respond to alienating conduct while also affording the child and rejected parent the uninterrupted time to repair their relationship.

An example of a court making a short-term change in parenting arrangements is the 2005 Ontario case of *Starzycka v. Wronski*.[41] After extensive court appearances in the year following separation, custody had been granted to the mother of the children; the father was granted alternate weekend and midweek contact with both children, even though only the younger boy was the biological child of the father. Some 8 years after separation, when the younger boy was 9 years of age, the father claimed he was being denied time with his son (p. 206) with increasing frequency, and finally that he was unable to exercise any contact with his son. An order was made appointing the Office of the Children's Lawyer to investigate and report to the court. The mother refused to cooperate with the Children's Lawyer's, although she had been previously ordered to do so, and she continued to disobey court orders regarding parenting time, despite several findings against her for contempt. After citing the mother for contempt, the court ordered that the father was to have interim custody of the boy to facilitate an investigation by the Office of the Children's Lawyer. In transferring “interim custody” of the son to the father and denying contact with the mother for that interim period, the court concluded that “[t]he applicant [mother] has refused to follow any orders of this court for the past year and has been found to be in contempt of this court. She has refused numerous opportunities to purge her contempt by cooperating with the Children's Lawyer and by following the directions of this court.”[42] The judge granted her custody of the oldest child, for whom the father had not persisted in his claims for contact, perhaps because he was not a

biological parent. Justice Wolder was clear that had it not been for the older child who was to remain in her custody, he would have considered incarcerating the mother.

In the 2007 Ontario case of *Pettenuzzo-Deschene v. Deschene*, a court-appointed evaluator concluded that the mother had engaged in a "deliberate campaign of parental alienation," resulting in a 7-year-old girl refusing to spend time with her father, and making it difficult for the father to see his four-year-old son.[43] On an interim motion, Whalen J. decided to transfer physical care from the mother to the father for a 5-week period over the late summer, with the mother to have only supervised access during that period. The intent of the interim order was to allow the children to "re-establish or expand their relationship with their father," with the judge expressing the view that the children might be returned to the primary care of the mother as a result of a trial or settlement, but hopefully with more significant involvement of the father in their lives. There is no report of a trial decision in the case, so it seems likely that this "interim order" had an effect on the mother's attitude and behavior, though they ended up primarily residing with her.

Contempt of Court: Punitive Sanctions and Behavioral Conditions

One of the most frequently used remedies against a person who is in violation of a court order is a proceeding for contempt of court, which may result in fine, imprisonment, or other judicially imposed sanction. While the contempt process, or more commonly the threat of a contempt proceeding, is enough (p. 207) to secure voluntary compliance with court orders in most types of civil cases, there are real limitations to its use by parents who are being denied contact in violation of the terms of a family court order.

A finding of contempt of court only can only be made if there has been a clear and "willful" violation of a court order. A contempt proceeding is a civil process, initiated not by the state, but by the party whose rights are being violated; however, it may result in an order for the payment of a fine or even imprisonment. Because of the severe sanctions that can be imposed, courts require a high standard of proof before making a finding of contempt of court. In many jurisdictions, a finding of contempt is said to require "proof beyond a reasonable doubt" of the violation of a court order; this is the standard of proof normally required in a criminal proceeding. In some American states, the standard is "clear and convincing" evidence of a violation of a court order, higher than the ordinary civil standard, but not quite as high as the criminal standard of proof.

The heightened standard of proof makes it difficult, though by no means impossible, for a rejected parent to establish contempt of court. Even if contempt is proven, family court judges often exercise restraint in sentencing. There are a number of reasons for this judicial caution. Courts recognize that "the law of contempt … is a blunt instrument that is not particularly well suited to the complex emotional dynamics of access disputes."[44] In other words, a sanction for contempt may not help to secure compliance with the order, especially in the long term. When alienating parents are sent to jail, they will inevitably tell, or it will be evident to the children, that they are sacrificing their liberty as a result of their efforts to protect what they perceive to be the rights or interests of their children not to see the rejected parent; this "martyr-like" response is unlikely to help the child reestablish a relationship with the rejected parent.

More importantly, there is often a concern about the effect of a contempt sanction on the welfare of the child(ren) involved. As one Alberta judge stated in an access enforcement proceeding, "Children are better off if their parents are not in jail or paying fines."[45]

The limitations and challenges of the contempt process are illustrated by the 2010 English Court of Appeal decision in *CPL v. CH-W*.[46] There had been protracted litigation concerning two children, a boy aged 11 at the time of the final proceeding, who resided with his father, and a girl, aged 9 at that time, who resided with her mother. A court order provided that the father "shall allow the mother to have contact" [the English concept equivalent to parenting time,

access, or visitation] with the boy on specified weekends. On a number of occasions, the mother came to the father's house to get the boy, and the father indicated that the boy was unwilling to go along with the mother. On (p. 208) one occasion, the boy himself came to the door and stated that he did not want to go with her. The trial judge, who had been dealing with the case for some time, found the father in contempt, as he felt that the father had influenced the boy and not done enough to require the boy to go along with the mother. The Court of Appeal reversed the decision. Lord Justice Munby noted that contempt needs to be proven "beyond a reasonable doubt," and the terms of this particular order only required the father to "allow" the boy to have contact with his mother. More generally he noted the importance of the contempt power:

> Committal is—has to be—an essential weapon in the court's armory in cases such as this. Nothing in this judgment should be seen as a charter for avoiding enforcement of contact orders in whatever is the most appropriate way, including, where appropriate, by means of committal.[47]

However, the appellate judge accepted that while the boy may well have originally been influenced by his father, by the time of the proceedings in question, the boy was clearly unwilling to see his father, noting: "The boy now has a weapon that no child should possess: by agreeing to see his mother he can save his father from jail; by refusing he can have his father punished." The judge concluded that the welfare of the boy would not be served by committing the father to prison for contempt of court, and observed:

> A common trope … is that committal in this kind of case is or ought to be a last resort.
>
> I agree, but it is important not to misunderstand what is meant by this handy aphorism. Committal should not be used unless it is a proportionate response to the problem nor if some less drastic remedy will provide an adequate solution. But this does not mean that one has to wait unduly before having resort to committal, let alone waiting so long that the moment has passed and the situation has become irretrievable. That point, in the nature of things, is often easier to identify with the priceless benefit of hindsight—I do not underestimate the difficulties of deciding the right strategy in this kind of case. But I cannot help feeling that, on occasions, the understandable reluctance to resort to such a drastic remedy as committal means that when recourse to it is first proposed it is too late for committal, whereas a willingness to grasp the nettle by making a committal order at an earlier stage might have ended up making all the difference … I have already made. The threat, or if need be the actual implementation, of a very short period of (p. 209) imprisonment—just a day or two—may at an earlier stage of the proceedings achieve more than the threat of a longer sentence at a much later stage in the process. I do not suggest this as a panacea—this is an area in which there is no panacea—but it is something which, I suggest, is worth keeping in mind.[48]

This English decision emphasizes the need to bring a proceeding for contempt of court before the attitude of the children involved becomes so entrenched that it serves no real purpose.

If there is a finding of contempt, the court has the power to impose penalties on the parent who violated the order, primarily intended to encourage future compliance but also as a punishment for the contempt, and may also impose behavioral conditions on the person in contempt to try to ensure that the order will be followed in the future. The court can impose monetary penalties in cases of contempt of custody and contact orders. While fines or community service orders are possible in these cases, they are not often imposed, as they will often harm the children by draining resources from their primary caregiver.

In *Cooper v. Cooper*,[49] Justice Snowie of the Ontario Superior Court of Justice ordered the mother, who was found in contempt of an access order, to pay a fine of $10,000 to the government. In this case, the father had not had contact

with the children since the date of separation. Fifteen orders had been made over several years to address the father's contact. Despite significant efforts by the case management judge and mental health professionals involved, the mother had successfully manipulated the situation to sabotage all contact between children and father. In finding the mother to be in contempt, Justice Snowie stated:

> I am satisfied beyond a reasonable doubt that Mrs. Cooper's actions and lack thereof constituted the offence of civil contempt. It is also clear that the actions of the respondent were contrary to the best interests of all three children. These children, as all children do, needed a mother and a father. It is the right of all children to have a relationship with their mother and their father. There is no evidence before this court that would indicate that Mr. Cooper was anything but a good father, a loving father, and a father who throughout the last seven years wanted to be involved in any capacity in his children's lives. He has admirably and heroically been before this court on at least 15 occasions trying, unsuccessfully, to obtain access with his children. He still continues valiantly to attempt to have a relationship with his children.[50]

(p. 210) In *Cooper*, as is common in contempt proceedings in alienation cases, the alienating mother offered as a defense that she was prepared to comply with the order, but it was the children who were refusing contact. Some judges have responded to this argument by articulating a positive obligation for the custodial parent to encourage the children to attend the scheduled parenting time. In *Cooper*, the custodial mother was found in contempt for having “willfully and deliberately sabotaged”[51] telephone contact between the children and their father. Although she made the children “available” by having them at home when the father called at the appointed time, she would neither answer the telephone nor, in her words, “put the telephone to the children's ears.”[52] The court rejected her argument that “it was up to the children to decide whether or not they would answer the phone” and found her in contempt for “shirking her responsibility and obligation directly, and … indirectly conveying to the children her disapproval of telephone access.”[53]

As discussed previously, there is some controversy over the jurisdiction and effectiveness of orders for counseling, especially for alienating parents and alienated children, as a condition of a custody order. However, judges clearly have the power to impose behavioral conditions on a person found in contempt of court with a view to attempting to ensure future compliance with the order, and it seems to be generally accepted that courts have the power to order a parent who has been found in contempt of court to undertake counseling as part of the sentence for contempt.

In *Cooper*, in addition to finding the mother in contempt and imposing a fine of $10,000, Snowie J. ordered that the mother was to immediately arrange for and be supportive of counseling for one the children. The purpose of this counseling was the reintegration of the father into the child's life. Justice Snowie ordered the mother to take the child to counseling twice a month without exception for the next 6 months. Additionally, if the mother breached any part of the order requiring her to take the child to counseling, directly or indirectly, the court stated that it would consider this to be a further act of contempt of court and the mother would be required to pay a fine of $15,000. The judge also threatened to impose imprisonment penalties if the breaches of the access order continued. Justice Snowie granted further relief to the rejected father by specifying penalties with respect to possible “future” breaches of her order. While the legal authority for the court to make such prospective punishments may be questioned, as it is not possible to impose a sentence for contempt on a prospective basis, the judge wanted to send the mother a clear message.

The 2005 Manitoba case of *C.A.G* is another example of a decision that accepted the jurisdiction to require a parent found guilty of contempt of court to have counseling. A motion for contempt was brought by the mother against (p. 211) the custodial father because of his refusal to allow their two children (aged 15 and 10) to see her. The court found that the “father intentionally acted in such a fashion as to manipulate the children and destroy the relationship

between them and their mother … prevent[ing] the mother from exercising access"[54] and held him in contempt. In an attempt to improve the relationship with the mother, the court ordered the father to have the children "attend at and receive therapeutic counseling with the express intention of attempting to assist them to understand the level of hostility they have learned to feel relating to their mother and with the additional goal of attempting to reunify them with their mother."[55] This objective coincided with the legal framework supporting "maximum" parent–child contact, as well as the judicial responsibility to ensure that access orders are respected. In *C.A.G*., Douglas J. also ordered the custodial father to complete a parenting education course structured "to educate parents about the damage done to children by continuing levels of conflict and animosity between parents."[56]

The courts have generally taken a broad view of their powers to shape flexible responses to findings of contempt in family cases, with a view to attempting to ensure future compliance with the order, with the objective sought by the party bringing the matter to court as well as in the child's best interests. In some jurisdictions, after a finding of contempt (especially a first finding), the judge may delay sentencing to give the parent who has failed to comply with the order an opportunity to "purge" their contempt by complying with the original order until the time of formal sentencing. If the parent complies during that period, the court may decide not to sanction the parent, or reduce the penalty that would otherwise be imposed.[57] This can be an effective method of encouraging immediate compliance.

In addition to imposing fines, courts have also made orders requiring that the aggrieved party be reimbursed for expenses, such as the purchase of an airline ticket, when these expenses were incurred due to parenting time not taking place as ordered. In the British Columbia case of *Poitras v. Bucsis*,[58] the principal issue for the court was whether the evidence supported a finding of contempt against a custodial father for not complying with an order requiring him to facilitate the child's contact with the mother. The father lived in Saskatchewan, and the order required that he send the child to British Columbia for Christmas access. The judge found that civil contempt had been proven, and in addition to ordering additional parenting time for the mother during the next school holiday, the court ordered the father to pay her $1,500 for her legal costs. Additionally, the father was ordered to pay the travel costs of air travel for the extra contact.

(p. 212) Although there is great judicial reluctance to impose a jail sentence for violation of an access order, in some extreme cases concerns about the need to maintain the integrity of the administration of justice result in this sanction. In *McMillan v. McMillan*,[59] the court noted that the father had to bring four separate contempt motions to enforce an access order and reestablish contact with his children. Quinn J. remarked:

> … there is a period of time immediately following the separation of spouses when emotions run high and otherwise sensible people are prone to act like vengeful lunatics. A court order deliberately breached during that delicate time frame may attract the compassion of the court. However, a court order which is willfully, deliberately and repeatedly breached many years after such compassions can reasonably be expected to extend, is an entirely different matter.[60]

In light of the repeated defiance of the access order, Quinn J. held that this was an appropriate case to impress upon the custodial mother, and upon other parents involved in a judicial process that "court orders are to be obeyed."[61] In weighing the appropriate sentence, he concluded that the most important factor was "the need to preserve the integrity of the administration of justice; and that, as I see it, can only be achieved through a sentence of incarceration,"[62] which in the circumstances called for a sentencing of 5 days in jail.

An even more dramatic example of a severe judicial response to violation of a court order concerning parent contact is the New York case of *Aurelia v. Aurelia*. The parties shared joint legal custody of their three children; the father had primary physical custody, but he was obliged to facilitate phone calls with the mother and bring the children to

the local police station every second weekend so that the mother could have them for the weekend scheduled contact. He consistently failed to comply with the order, the mother was eventually awarded sole custody, and contact with the alienating father was terminated. The Family Court also sentenced him to 6 months imprisonment, a decision affirmed by the Supreme Court, which commented:

> Significantly, respondent [father] testified that he does not think that it is in the children's best interests to have *any* contact with petitioner [mother], that he is against any relationship between petitioner and the children at this time and that he even objects to being required to provide petitioner with written notice of the children's health and educational needs. As long ago as [four years earlier the Family Court found that the father's] … disparaging (p. 213) remarks about petitioner in the presence of the children were "particularly vulgar" and that he used the children "to vent his frustrations" about petitioner. We also note that, in response to questions from the children's Law Guardian, respondent testified that, when the children refuse to do something he directs them to do, he disciplines them, but that he does not direct the children to do anything that he feels is not in their best interests.
>
> On this record, we find a complete absence of evidence of any efforts by respondent to facilitate compliance with the court-ordered visitation … there is ample support for Family Court's conclusion that respondent "willfully refused to comply with the parenting order and has actively encouraged the destruction of the relationship between his children and their mother" and that respondent "violated all relevant court orders, permanent and temporary, about the parenting relationship between the petitioner and her children."[63]

Such long sentences for contempt of court by alienating parents are very rare. Significantly in *Aurelia*, the relatively long period of imprisonment would not affect the care of the children and actually helped ensure that there could be no violation of the order since the alienating father was to have no contact with the children.

In most jurisdictions, a party who is found in contempt can be ordered to pay the "costs" or attorney's fees of the party whose rights have been violated.[64] While these awards may not cover all of the legal fees and in some cases may be effectively impossible to enforce, they are intended to both send a message to the party in contempt as well as compensate the party whose legal rights have been violated.

As this discussion reveals, while contempt can be useful in securing compliance with court orders in some situations, it is "blunt instrument" for seeking to improve parent–child relationships. In some jurisdictions, like Australia, there is such reluctance by family court judges to impose a sanction for noncompliance with violation of orders related to residence or contact that alienated parents rarely bother to even commence this type of proceeding.

Police Enforcement

In some jurisdictions, including most Canadian provinces, legislation specifies that a judge may include a provision in a parenting order directing the police to apprehend and deliver the child(ren) to the person entitled to access.[65] In (p. 214) some other jurisdictions, even without explicit legislative provision, judges may include such "police enforcement clauses" in parenting orders on the basis of their inherent judicial powers. However, an order for police involvement " … is an order of last resort … to be made sparingly and in the most exceptional circumstances."[66]

A Canadian study (Bala et al., 2010) found that police enforcement clauses were included in about 10% of cases involving alienation claims. These orders were almost all made in cases where alienation was found to assist a rejected parent, but also in a few cases where the court concluded that alienation had not occurred but that there were nevertheless concerns about access enforcement. Invariably, judges hope that the fact that a police enforcement order is made will result in compliance with the access order.[67] However, if the police are actually called to enforce

an access order on more than one occasion, serious consideration should be given to other solutions.

In all jurisdictions, even without an explicit "police enforcement clause," the police have some obligation to assist in the enforcement of any court order, including a custody or contact order. In practice, however, whether this is a "police enforcement clause" or not, the police are reluctant to become involved in "family matters." If there is an apparent violation of an explicit order granting parenting time, the police may well go to the home of the custodial parent at the request of the parent seeking to enforce the access order to discuss the matter and encourage compliance with the order, but they will be very reluctant to physically remove children from their homes to have contact with a noncustodial parent. As well as being very unpleasant for police officers, such police involvement may be viewed as intimidating by children and perhaps result in further stated fear and rejection of a parent (Sullivan & Kelly, 2001).

While police enforcement orders are appropriate in some cases, especially on an interim basis, it is invariably contrary to the interests of children to have police coming to take uncooperative children to see a parent on a regular basis. This is reflected in the Australian case of *Sawyer & Reid*, where the mother sought a continuing "recovery order that enables the police to intervene" whenever the 10-year-old boy ran away from the mother and returned to his alienating father. In refusing the order, Judge Altobelli observed that such a continuing order "is completely unacceptable and to make such an order would pour petrol on the raging fire that is already burning."[68]

(p. 215) Supervision of Contact

Some form of contact supervision for a period of time may be an option in some high-conflict separation cases and can serve a number of different purposes. For example, supervision may be ordered in the early stage of proceedings if allegations of alienation are met with counterclaims of justified rejection due to abuse. Supervision can maintain consistent parent–child contact while these issues are resolved in the court. At an interim stage, before the court has sufficient information to determine the validity of the abuse allegations, the court may decide that it is best for the child to continue to have contact with an alleged abuser but require supervision to ensure that the child is not subjected to the *possibility* of abuse. In some cases, supervision may be provided by a family member of the alleged abuser, such as a grandparent, but if there are significant safety issues, it is preferable to involve a supervised visitation program. Supervised visitation programs have been established in many cities, either as part of the services of an existing agency or at a center specifically intended for this purpose. However, cost factors can limit their accessibility in some jurisdictions for some families, and such programs are not available everywhere.

The personnel at supervised visitation programs are not trained as therapists or to attempt to repair the parent–child relationship. Instead, the purpose of supervised visitation is to observe the parent–child interactions while ensuring the process is neutral and the child remains safe. Depending on the policies of the visitation center, a fact-based observational report may be provided by staff to the court and thus assist the court in making future decisions about the case, but such reports do not provide clinical opinions about the parent–child relationship.

Birnbaum and Chipeur (2010) note that while supervised visitation clearly reduces the risk of abuse of children, there is a lack of evidence about the effects of such contact. They caution that even supervised visitation with an abusive parent is not without emotional risk, as there may be verbal or nonverbal subtle threats or psychological harm.

In some cases, by the trial stage, the child(ren) may be severely alienated and may not have been in contact with the rejected parent for an extended period. Faced with these circumstances, the judge needs to decide whether it is in the best interests of the child(ren) to try to "force" reunification. This requires weighing potential benefits and risks, including any possible trauma that may result if the child(ren) fears the rejected parent, even if that fear is not

reasonable. One option in these cases is for the court to order a period of supervised visitation to attempt for gradual reestablishment of a relationship.[69] Such an arrangement (p. 216) may work to address any fears expressed by the child(ren) and the favored parent. However, as previously noted, the personnel at visitation centers are not trained to conduct counseling. In cases of more significant alienation, it is clearly preferable to have some form of concurrent reintegration therapy with supervised contact, involving a trained therapist to facilitate, monitor, and, where justified, supervise visits and support the reestablishment of a relationship.

Supervised contact with a rejected parent is only appropriate when there are reasonable fears concerning a child(ren)'s safety or, if the fears are unfounded, for a short transition period. Because of the unnatural circumstances in which supervised contact usually occurs, unnecessary supervision may impede the process of reunification. For example, where safety concerns are being unreasonably raised by an alienating custodial parent, supervising visits may suggest to a child that these misperceptions are legitimate, thus increasing the child's fear and resistance to contact. For example, in the Ontario case of *Okatan v. Yagiz*,[70] the trial judge refused to extend an earlier order directing supervised access between a father and his 7-year-old daughter. Though the father was found to have "shown some incredible lapses in judgment in speaking to his daughter,"[71] the judge concluded that absent a risk of danger to the child, supervised access was unwarranted, commenting:

> Supervised access is … reserved for exceptional cases. There is no reason to continue it in this case, particularly since [the daughter] views supervised access as "proof" that her father is a bad man … Having visits at the access centre has simply reinforced what [the daughter] no doubt has heard from her mother.[72]

There are also cases where the access parent engages in alienating conduct: for example, by consistently denigrating the custodial parent. In such cases, supervision may be ordered to prevent the alienating parent from engaging in such conduct during the contact.[73] Even if this conduct is not affecting the child(ren)'s attitudes toward the custodial parent, it can be distressing to the child(ren).

Similarly, there are cases where the court orders a reversal of custody, and requires that contact by the alienating former custodial parent is to be supervised, at least for some period of time, to prevent alienating remarks or conduct. In such cases, it may be appropriate to have contact by an alienating parent supervised[74] by an agency or trained professional, as there will likely (p. 217) be concerns that a relative or family member would be unable to control this type of insidious but often subtle behavior. Attending therapy may also serve to provide the supervision required to the extent that the child only sees the former custodial parent during the counseling, at least initially, and until any further consent agreements or orders are made.

Award of Legal Fees

One way for a judge to encourage parents to behave in a child-focused fashion, or at least to comply with explicit court orders, is to require a parent acting unreasonably or using the courts improperly to pay for the legal fees and other litigation expenses of the innocent parent. Such orders are intended to both encourage compliance and compensate a parent for some, or occasionally all, of the litigation costs involved in enforcing a court order. Orders for costs are not uncommon in Canada, especially in high-conflict family cases, provided that the judge concludes that one party is clearly responsible for the situation, and that the child will not suffer economically from a custodial parent having to pay such an award.[75]In the 1988 to 2009 period, legal costs were awarded in 46 out of the 232 (20%) reported cases addressing alienation issues (Bala et al., 2010). The mother had to pay the costs in 22 of these cases, while the father had to pay the costs in 26. The number of cases in which costs were ultimately awarded is undoubtedly higher, as in many reported decisions the court invited future submissions about costs or indicated that

the issue of costs would be dealt with at a later stage of the proceedings.

Courts will not only award legal fees to alienated parents who have had to take legal action to enforce orders that give them a relationship with their children, but they may also award legal fees to a custodial parent who has been subject to unfounded claims of parental alienation. This occurred in the California case of *In re Marriage of Torres* where the father claimed that the mother had alienated the children from him and that he should be given custody. The trial court rejected his claim, ordered that the mother should continue to have custody, and awarded the mother $3,250 in attorney's fees, more than half the amount that she spent to defend against his claim. This decision was affirmed by the appellate court, which wrote:

> Viewing the record, we conclude the … trial court awarded [the mother] … attorney fees and costs based on sanctions against [the father] … In her responsive papers … [the mother] asked that the court … award her attorney fees "for this bad faith, ill-conceived and without basis" [application to vary custody] … The trial court found there were no facts to support [father's] … claim (p. 218) and expressly found … [father's] request for change of custody on the grounds of parental alienation to be "far-fetched." At the hearing, the court stated such a claim was "a very serious charge when there really isn't any evidence of it." The … [mother] had to hire an attorney, and the attorney had to deal with the far-fetched parental alienation complaints, requiring [the mother] … to incur a "significant amount" of attorney fees … the long history of the litigation [reveals] … approximately one dozen experts who were involved with the family, and pointed out that never once was there any allegation … of parental alienation …[76]

Joint Custody—Increasing Time in Care of Rejected Parent

Although the courts generally accept that joint custody should not be ordered unless there is a history of cooperation between the parents,[77] in some cases of alienation judges are prepared to make an order of joint custody or shared parental responsibility as a way to "send a message" to the custodial parent and child that further resistance to the child's relationship with the other parent may result in a reversal of custody. This approach is less intrusive than ordering a change in residence but signals to the alienating parent and third parties that they should respect the roles of both parents. In a study of reported Canadian cases in the 1989 to 2009 period (Bala et al., 2010), the court ordered joint custody 29 out of 168 cases (17%) where the court found parental alienation.

Further, ordering joint custody should help the rejected parent obtain access to health and education–related information, often withheld by alienating parents or by the professionals who mistakenly believe they are prohibited from providing information to noncustodial parents.[78] In *Cox v. Stephen*, the Ontario Court of Appeal affirmed a lower court decision that made such a joint custody order, commenting: "[the lower court judge] fashioned a remedy … that took appropriate account of the risk of alienation by awarding joint custody to [the father], yet protecting the child's sense of stability by not requiring him to leave his lifelong home and family."[79]

In another Ontario case, *Mikan v. Mikan*, the parties' 11-year-old daughter refused to see the father. The mother had armor-coated tinting placed on (p. 219) the windows of the matrimonial home, changed the locks, and installed a security apparatus and surveillance cameras. The court found that the father was not a threat to the safety of the child or mother, and concluded that the mother's conduct sent a clear but misguided message to the child that she should fear and reject her father. Justice Langdon observed that in light of her failure to support a relationship with the father, the mother "scarcely qualifies as a suitable sole custody parent" and that "prompt, decisive and perhaps radical steps" need to be taken to "put a stop to this alienation."[80] Accordingly, the court made an interim order of "week-about" joint custody, with an authorization for the father to use "reasonable force" to have the daughter comply,

including a direction for police assistance if requested.

In the Washington D.C. case of *Jordan v. Jordan*, the Domestic Relations Court concluded that the custodial mother had been alienating the couple's two daughters, aged 5 and 12 years, from their father. Although there had been a couple of incidents before separation in which the father had assaulted the mother, the court accepted that they were "situational" incidents and that there was no longer a risk of reoccurrence of domestic violence. The court concluded that it was appropriate to award joint physical and legal custody to both of the parents, with care to each parent in alternating weeks, and appointed a parenting coordinator. The Court of Appeal affirmed this decision and explained that the incidents of domestic violence did not preclude a joint custody order:

> And the court stated … that it had given due consideration to the "emotional damage that [the girls] are suffering, combined with the efforts that Mr. Jordan has taken to rectify the conduct that led to that inappropriate behavior on his part," apparently giving Mr. Jordan credit for his voluntary participation in individual therapy and his attempts to make amends with E.J. [the 12-year-old daughter.] Thus, the court's determination that joint custody was in the children's best interests obviously reflected its judgment that Mr. Jordan was not a danger, and that the emotional damage to the children due to parental alienation would be worse than the difficulties they would face in attempting to salvage their relationship with their father. The court essentially found that the children's emotional development would be significantly impaired if it did not award joint custody to Mr. Jordan.[81]

The 2009 New York case of *Burola v. Meek* involved a same-sex couple who had a daughter, born to one woman (conceived by artificial insemination) and adopted by the other. The couple separated when the girl was 9 years of age; they made an agreement that they were to share legal custody, with the primary residence with the biological mother and significant time with (p. 220) her adoptive mother. By the time the girl was 12, she was resisting contact with her adoptive mother, and unwilling to have overnight contact with her. The Family Court found that the biological mother had engaged in alienating conduct. The Court ordered an increase in the time the girl was to spend with the adoptive mother to strengthen the relationship with her, with alternating weeks in the physical care of each parent. The appeal court affirmed this decision, writing:

> Examples abound of petitioner [biological mother], either personally or through surrogates, engaging in such conduct and establish that she is either unable or unwilling to do what is needed and necessary to facilitate a parental relationship between respondent [adoptive mother] and their child, even though such a relationship is clearly in the child's best interests. For example, petitioner, despite her obvious love for the child, systematically engages in conduct that increases, rather than diminishes, the trauma and anxiety that the child routinely experiences whenever she leaves petitioner and is placed in respondent's care. She refuses to use respondent's name whenever she refers to the child and has encouraged the child to abandon respondent's surname as well. She routinely fails to keep respondent informed of the child's ongoing activities and has not kept her advised concerning important details involving the child's medical care.
>
> Here, Family Court concluded that respondent was able to provide a stable and suitable home environment for the child that would promote a healthy relationship between the child and her entire family. It noted that respondent allowed the child, when in her care, to maintain daily contact with petitioner, as well as other members of petitioner's extended family. Respondent also had photographs of petitioner and her family placed throughout her home so as to ease the adjustment that the child had to make when she had left petitioner's home and was placed in respondent's care. Petitioner … has not reciprocated in this effort and seems determined not to allow respondent to enjoy a normal relationship with the child. In that regard, petitioner will not allow respondent in her home and has promoted a belief in the child that respondent is not her mother. Petitioner has

> communicated with the child regarding ongoing court proceedings and appears to have suggested to the child that if respondent prevails, such a determination will adversely affect her. This evidence … supports Family Court's determination that the child would only enjoy a wholesome relationship with both of her parents—something that was clearly in her best interests—if her time with respondent was significantly increased.[82]

(p. 221) These cases illustrate the willingness of courts to increase the time a resistant child spends with a rejected parent in order to strengthen the parent–child relationship. While this may be effective and is less disruptive than awarding sole custody to the rejected parent, it is not likely to be successful in restoring a relationship if the alienation is severe and the child is unwilling to have relationship with that parent. In these circumstances, the alienating parent will still have ample opportunity to undermine efforts to restore the relationship with the rejected parent.

Custody Reversal: An Option for Severe Cases

The "Stark Dilemma"

The most dramatic judicial response to alienation is the transfer of custody from the alienating parent to the rejected parent, often with a temporary suspension of contact with the alienating parent. It is *one* option for severe cases of alienation, typically used only after other less intrusive interventions have been attempted and failed. It should never be lightly undertaken and has inherent risks. A variation in custody is sometimes referred to as a "last resort," but if courts wait too long to respond in this way, it may be ineffective. In the most severe cases, a timely decision to vary custody may be the only way to effectively address the alienation, and in some cases it will be the least detrimental alternative for the child. In other cases, however, despite severe alienation and the failure of other interventions, the court may conclude that a change in custody is not appropriate and recognize that there is no effective way for a court order to allow the reestablishment a child's relationship with a rejected parent.

Although some scholars, therapists, and advocates argue that the courts should *never* vary custody as a response to alienation, most judges, professionals, and commentators believe that the question is not whether there should ever be a custody reversal, but rather, in which circumstances it is the most appropriate remedy, and how it should be implemented. When asked which cases are severe enough to justify more extreme remedies like custody reversal, Toronto lawyer Philip Epstein stated:

> … when you have identified alienation, have taken a number of progressive steps to try to change the behavior, and where it becomes clear that these kinds of steps—increasingly punitive—are not going to have any effect. And then you start to think about custody reversal.[83]

Several important questions surface when considering for a specific case the option of reversing custody to the rejected parent, often while suspending, (p. 222) at least temporarily, the child's contact with the favored parent: Is the alienation emotionally abusive? How good are the parenting capacity and the emotional health of the alienating parent? Stated differently, which risk is greater: separation from an unhealthy or enmeshed relationship or remaining in that relationship? What are the parenting capacities of the rejected parent, and perhaps of a stepparent? What supports and resources are likely to be required to facilitate a successful custody change? In sum, is custody reversal likely to cause more harm than good; that is, do the short- or long-term benefits of placing the child with the once loved, now rejected parent outweigh the risks (trauma or harm) of temporarily separating the child from the alienating parent?

More general questions also arise in these severe cases, such as whether older children have sufficient maturity to make decisions about attending counseling or severing ties with a rejected parent, and most broadly, does custody

reversal work?

If an application is made to vary custody, the court must first be satisfied that a “material change of circumstances” has occurred since the original custody arrangement was made. Second, the court must determine that such action is in the “best interests” of the child(ren). It is usually necessary for the parent seeking the variation in custody to provide expert testimony to establish that the child has been alienated, and that any emotional distress to the child from the change is likely to be limited in duration. While the courts are reluctant to vary custody, as it can be very disruptive to children, this option is becoming an increasingly common judicial response to severe alienation. When such action is taken, it is because the alienating parent has proven resistant to less intrusive responses, and the judge has concluded that a change in custody is the only effective way to end the emotional harm caused by the alienating custodial parent.

Decisions to transfer custody in cases of alienation invariably recognize the immediate negative effect such a step is likely to have on the child(ren). However, a common theme is that this concern should be subordinated to the longer term objective of maintaining healthy relationships between the child(ren) and both parents. In the British Columbia case of *A.A. v. S.N.A.*, the trial judge recognized that he faced a “stark dilemma” in whether to leave the child with a “highly manipulative” and “intransigent” mother who would never permit her child to have any sort of relationship with her father, or to transfer custody to the father, who had little contact with the child for over a year. Despite the finding of alienation, Preston J. chose not to award custody to the father due to a concern that “the immediate effect of that change will be extremely traumatic.”[84] In reversing this decision and awarding custody to the father, the British Columbia Court of Appeal observed:

> the trial judge wrongly focused on the likely difficulties of a change in custody—which the only evidence on the subject indicates will be (p. 223) short-term and not “devastating”—and failed to give paramountcy to M.'s long-term interests. Instead, damage which is long-term and almost certain was preferred over what may be a risk, but a risk that seems necessary if M is to have a chance to develop normally in her adolescent years.[85]

The negative short-term and long-term effects of alienation, including intrusive parenting by the alienating parent, have been reasonably well documented (e.g., Baker, 2007a; Barber, 2002; Johnston, 2005a; Johnston, Roseby, & Kuehnle, 2009; Johnston, Walters, & Olesen, 2005c). While there is general recognition that a reversal of custody may be warranted in severe cases (Friedlander & Walters, 2010; Gardner, 1998a; Johnston & Goldman, 2010; Johnston et al., 2009; Sullivan & Kelly, 2001; Warshak, 2010b), debate continues with respect to identifying which cases are, in fact, severe enough to warrant this response.

There may also be differing opinions about the capacity of a rejected parent to assume the care of an alienated child, one who, at least initially, may be quite resistant to the change. It is important to recognize that while a custody reversal may be necessary, it may not in itself be enough to resolve the parent–child contact problem. As Elizabeth McCarty of the Ontario Office of the Children's Lawyer, stated:

> There are cases where a change in custody may be necessary. However, the change in custody doesn't simply “fix” the problem. It addresses some concerns but can raise others as well. You still need to have other services in place to assist the family and, most importantly, the children. Someone needs to monitor the children's reaction to the change, their coping mechanisms, and the parent's ability to respond to the child's reactions.[86]

In speaking about custody reversal as a solution, psychologist Leslie Drozd stated:

> We all need to try every other remedy possible prior to [changing custody], which would include legal remedies

> as well as therapy. But if you have an absolutely noncompliant parent who continues to engage in some sort of sabotaging or alienating behavior, I think that there may not be much of a choice other than to switch custody. But I don't think you do the switching of the custody just by having one parent pick up the child. I think that probably … that is where programs like Richard Warshak's program or the Rachel (p. 224) Foundation probably come in, where they can help in that transition from the custodial parent to the other parent. There is no doubt that there are going to be short-term problems, even if you have those outside treatment programs that are used to help out with that. I think you can ameliorate some of the short-term trauma by using programs like those, and therefore, I don't think you just willy-nilly switch custody, which I think happens more than it should. I think the responsibility lies with all of those people or parts of the system for not having properly assessed these families and/or treated them prior to that. And now to look for what is a relatively simplistic "solution." I think it's just too simplistic an answer in most instances. I do think that there are instances in which it is absolutely appropriate, but I don't think the number is huge.[87]

This comment emphasizes the importance of considering *how* a transfer in custody is to occur, as well as the question of *whether* it is to occur.

Perspectives Against and For the Option of Court-Ordered Custody Reversal

Bruch (2001) and Wallerstein et al. (2000) maintain that children who are rejecting or strongly resisting a parent are likely to eventually "come around," and further argue that there is no evidence that ordering contact or expensive treatment is effective in restoring a relationship with a rejected parent.[88] Indeed, these writers and others have questioned the benefits to children involved in high-conflict parental separation of having relationships with both parents. These writers argue that enforced parenting time, court-ordered treatment, and custody reversal are counterproductive, as such measures only reinforce the child's hatred for the rejected parent, adding further stress to the already vulnerable child. Further concerns include that a custody reversal may place the child at risk for running away or self-destructive behavior (Jaffe, Ashbourne, & Mamo, 2010; Johnston et al., 2009). Opponents to custody reversal argue that an abrupt, even if temporary, separation from a primary attachment figure (referred to by some as a "parentectomy"), even when, or especially when, the attachment is enmeshed or pathological, places the child at greater risk than losing contact with a rejected parent (Garber, 2004a; Jaffe et al., 2010).

(p. 225) In discussing whether a separation from the favored parent is potentially traumatic for a child, psychologist Robert Marvin also emphasizes the importance of the child's relationship to the primary attachment figure:

> If you have a high-conflict divorce, and one parent is incredibly afraid of what is going to happen to the child when he or she is with the nonfavored parent, and especially in situations where there is some justification for that, we need to focus on what is in the child's best interests, both in the short and long term, and the first priority should be about protecting the primary attachment. There is going to be a risk that the favored parent's fear will disorganize his or her parenting, which will impact their ability to sensitively receive and interpret and respond to the child's signals and needs.[89]

The prominent American psychologist, Joan Kelly, expresses a different view about the importance of attachment in alienation cases:

> There are clinicians and judges who say, no we can't take this child away from this parent because they have this really close relationship. Let's assume that the rejected parent is not neglectful or not a poor parent because you are considering transferring custody to that parent. Leaving the child with a parent with serious psychological problems who is fostering an alienation, and whose child's allegations exactly mirror that parent's (they use the

> same language, same words) … this child is not being served by staying with the parent who has psychological problems who has difficulty separating from their child or adolescent who may benefit by change of custody. We focus too much on "this child won't survive the change of custody"—most of them do apparently—and not enough time on really evaluating this as an option.[90]

Quebec psychologist and researcher Francine Cyr also suggests the need to balance the emotional effect of a change in custody with the effect of staying with an alienating, and often compromised, parent:

> I think [that custody reversal] … could be traumatic, but we have a moral decision to make here. In order to not traumatize children, are we going to collude with an emotionally sick parent who is damaging these children by depriving them of … at least a good enough parent … are we going to collude with that in order to not traumatize these poor children because they are so attached to this very ill parent who is making them emotionally unhealthy by stopping them from developing normally, as they should be? (p. 226) When a child's development is compromised like here, there is an obligation to protect the child from being damaged by taking action. Removing the child from the toxic or damaging environment to stop emotional abuse seems indicated in these severe cases. I heard a lot of my colleagues who are experts in these cases where there was a reversal of custody, and it proved to be extremely useful in the long run.[91]

Some mental health professionals and lawyers are extremely cautious about custody reversal and are likely to argue that alienating conduct in any specific case is not sufficiently emotionally abusive to warrant this response or that the apparent alienating parental behavior arises out of an intention, misguided or not, to protect the child. Concerns are expressed about custody reversal being a punitive action against a well-meaning and protective, albeit misguided, parent. Other legal and mental health professionals are more likely in specific cases to maintain that custody reversal may be justified, not as a punitive measure, but rather to protect a child from the unrelenting emotional abuse by the alienating parent, even when parents may not be conscious of their attempts to turn the child against other parent (just as termination of parental custody is appropriate in child protection cases that raise serious abuse or neglect issues).[92] In these cases, there is clear psychopathology in the favored parent, and the child is demonstrating significant social, behavioral, emotional, or academic problems, not only difficulties in terms of his or her relationship with the rejected parent. Further, while this may not be evident initially and before a comprehensive custody evaluation, typically significant problems are evident in the child's relationship with the favored parent relating to age-appropriate autonomy, boundaries (Johnston et al., 2009), and infantilization, parentification, or adultification (Garber, 2011).

A custody reversal is appropriate in cases where the concerns are not only about the alienated child not having a relationship with the rejected parent, and often the entire extended family, but also about the alienating parent's intrusive and overprotective parenting and the emotional exploitation, indoctrination, induction of fear and hatred (the teaching of prejudice), and, in some cases, paranoia, in children.

Important distinctions need to be made between the *strength* and *quality* of an attachment; a strong bond with an alienating parent is not necessarily a healthy attachment. In fact, strong bonds may be indicative of unhealthy attachments, as can occur between an abusive parent and his or her fearful child, or with an overprotective or intrusive parent and his or her parentified or placating child (Garber, 2004a). Writers also note that attachment is only one element of the parent–child relationship (Arredondo & Edwards, 2000; Byrne, (p. 227) O'Connor, Marvin, & Whelan, 2005; Lamb, 2012; Pruett, Cowan, Cowan, & Diamond, 2012) and a child's adjustment. Other factors that are predictive of a child's adjustment include the parent's own attachment style arising out of his or her own parent–child relationships, the parent's ability to meet the child's instrumental needs, parenting capacity and style

(authoritarian, authoritative, or permissive), and role modeling. Consequently, many factors, not only the quality or strength of the attachment with the aligned parent, must be considered when making evaluator's recommendations or judicial determinations in child custody disputes (Birnbaum, Fidler, & Kavassalis, 2008).

Proponents of custody reversal may, in specific cases, conclude that in the more severe cases, an alienating parent's parenting is not only compromised but emotionally abusive, and consequently, the risks associated with not separating the child from the aligned parent are greater than any potential risks of changing custody, provided that the rejected parent is an at least adequate parent and the child once had a reasonably good relationship with that parent. While opponents of custody reversal generally acknowledge that it is preferable for a child to have good relationships with both parents and their extended families, they are likely to argue that despite alienating conduct by the “primary” caregiver, severing ties with a rejected “nonprimary” parent and the extended family is preferable to separating the child from the alienating primary parent.

Opponents of custody reversal tend to assume that in severe alienation cases, children will be traumatized or go into crisis if separated from the alienating parent. American advocate for abused women, Joan Meier, for example, stated that “[a child] need[s] a primary secure attachment and that losing that is the most destructive thing short of abuse that can be done to a child. Now, I understand the alienation people are saying, an alienating parent is not a secure attachment, but they are claiming it, there is no evidence of that.”[93]

Moreover, there are no good longitudinal studies that use random assignment to compare outcomes for alienated children who were separated from their favored parent and placed with their previously loved parent, and those who are left in the care of the alienating parent. However, preliminary research from retrospective studies and clinical anecdotes reported by many seasoned clinicians suggest that for at least some children, a separation from the favored parent is liberating because the child is able to resume what was a positive relationship with the parent he or she has not been free to love in the presence of the favored parent. Amy Baker's research (supported by that of Clawar & Rivlin, 1991), indicating that many of the adults in her study, who as children had expressly rejected a parent (in her study almost always the father), reported secretly wishing that someone “called their bluff” as children and insisted they have a relationship with the parent they claimed to fear or hate, is an important consideration when making these extremely difficult decisions.

(p. 228) Further, many of the experts interviewed for this book, both legal and mental health professionals, note that they have repeatedly observed that once out of the orbit of the preferred parent, an alienated child can transform very well, sometimes very quickly, from staunchly resisting the rejected parent, to being able to show and receive love from that parent. This transformation is sometimes followed by an equally swift shift back to the alienated position as soon as the child returns to the favored parent, or even before a return in anticipation of the reunion. The child's need and ability to vacillate between denying and accepting parts of him or herself so quickly and visibly suggests a compromised adjustment and development of self.

Mental health professionals, especially custody evaluators, and the courts need to carefully consider what poses the greatest risk to a *particular* child in a *particular* set of family circumstances, considering the likely short- *and* long-term detrimental effects of living in a distorted reality where the child is not free to be emotionally autonomous. In some cases, the least detrimental long-term option is to place the child with the parent more likely to promote overall healthy psychological development and adjustment, including but not limited to a healthy relationship with the other parent. For others, the reverse is the case. It is important to recognize that a healthy relationship with a parent is not without challenges or complaints; there is no perfect parent–child relationship. Rather, a functional relationship will include the child's ability to accept and integrate both good and bad qualities of the parent, coupled with flexible

thinking, the capacity for multiple perspective taking, good communication and problem solving skills, and so on, all of which are indices of mature interpersonal skills and relationships.

Ethical issues related to coercion, children's rights, and civil liberties are also important and debated considerations. As previously mentioned, these concerns are relevant not only to custody reversal, but to all of the interventions typically recommended and used in alienation cases, such as family-focused therapy, parenting coordination, and some parent education programs. The issue may be less about coercion per se and more about the nature and degree of the coercion, and further, determining for which cases it is appropriate. One needs to ask not only about the ethical issues of intervening when children protest, but also about the ethical issues when intervention is not provided to protect children from alienating abusive parenting (Warshak, 2010a). Warshak elaborates on the ethical issues and notes that it will be up to the individual professional to determine "where they stand when it comes to the ethics of recommending or providing services to children who are referred against their will."

When to heed and not heed a child's wishes about custody arrangements is another area of considerable discussion and debate. For example, Bruch (2001) and Wallerstein and Tanke (2006) emphasize the importance of respecting a child's wishes not to see a parent. Some writers vociferously object to the court's involvement in mandating treatment, parenting time enforcement, and (p. 229) custody reversal (see also Faller, 1997; Walker et al., 2004a, 2004b), though most of those who oppose custody reversal do not adequately address the studies of young adults who report a longing to have had more time with their noncustodial fathers (see for example, Ahrons & Tanner, 2003; Fabricius, 2003; Fabricius & Hall, 2000; Hetherington & Kelly, 2002; Laumann-Billings & Emery, 2000; Parkinson, Cashmore, & Single, 2005; Parkinson & Smyth, 2004; Schwartz & Finley, 2009).

Proponents of custody reversal in severe cases of alienation note that children's feelings and ideas are indeed important to consider, but they should not be determinative. As discussed more fully in Chapter 8, a child's views and preferences must be independent to be given weight. Children should always have a feeling of "being heard" when decisions are being made about their lives, but it should also be made clear to them that they do not have the responsibility for making decisions (Warshak, 2003b). Warshak stated:

> Naturally, older children are more likely to have the intellectual capacity to understand long-term consequences, but at the same time older children are quite vulnerable to external influence. Teenagers are notorious for allowing others to influence their ideas and behavior. So I think what is important to look at is whether the preference being expressed is in the child's best interests or not, and I don't think that the courts should abdicate that responsibility merely because the child has reached a certain age.[94]

The need for ultimate adult responsibility applies not only to children, but also to adolescents whose brains and executive functioning (e.g., coordinating information, judgment, planning, weighing alternatives, analysis, cognitive flexibility, problem solving, etc.), are still developing rapidly in important ways. The adolescent brain is in effect "under construction," hence the greater risk-taking behavior, poor judgment, and problems with impulse control often observed in adolescence. To make fully informed decisions, one has to be able to anticipate and understand the future consequences of different options. It is not until the early 20s that the brain completes the maturation process. By law, younger adolescents are not permitted to vote, consume alcohol, drive, obtain tattoos, or not attend school. Typically, parents do not permit their children and adolescents to refuse to go to school or receive medical treatment. Logically then, proponents of custody reversal maintain that alienated children should not be permitted to make a life-altering decision, such as severing ties with one parent or their grandparents and other relatives. Rather, custodial parents should "require," not force, their children to work toward resolving the conflicts with the other parent and resuming contact, unless there is a determination that such contact is not in the child's (p. 230) best interests.[95]

However, as discussed in Chapter 8, as children grow older, both legal theory and practical constraints require that more weight be given to their views, even if they are not making decisions that will promote their long-term well-being.

Another important consideration is the efficacy of treatment with severe cases. Qualitative case studies and experienced clinicians supporting recommendations and orders to reverse custody maintain that therapy, as the primary intervention, simply does not work in severe and even in some moderate alienation cases (Clawar & Rivlin, 1991; Dunne & Hedrick, 1994; Gardner 2001a; Kopetski, 1998a, 1998b, 2006; Lampel, 1996; Lowenstein, 2006; Lund, 1995; Rand, 1997b; Rand et al., 2005). This is not unexpected given that by definition, severe cases involve significant parental psychopathology or personality disorders, which may include paranoia, severe mental illness, disordered thinking, lack of insight capacity, or even sociopathy of the alienating parent. When therapy is indicated, in the less severe cases, it requires a competent mental health professional, specifically trained in high-conflict separation and divorce and alienation; otherwise, the therapy may actually increase the problems with contact enforcement (Rand, 1997b), resulting in the alienated child and favored parent further entrenching their distorted views (Fidler et al., 2008).

The option of custody reversal is one that the courts are prepared to seriously consider in alienation cases. In a Canadian study of reported decisions between 1989 and 2009 (Bala et al., 2010), the court awarded sole custody to the alienated parent, in 69 out of the 168 cases (41%) where alienation was found.[96] In one case, custody was transferred to a foster parent to facilitate eventual transition to the care of the alienated parent. In a study of reported Australian court decisions where alienation was found by the court, the judge ordered a change in residence in 19 out of 36 cases (53%) (Bala, 2012).

Research on Enforced Parenting Time and Custody Reversal

To date, there has been little well-controlled research on outcomes, either positive or negative, of ordering parenting time or reversing custody in alienation cases. It is important to recognize that this lack of research on the effect of these interventions to remedy alienation exists in a context of a growing body (p. 231) of research about the long-term harmful effects of alienating parental conduct on children, but only very limited research on effects (or outcomes) of *any type* of judicial decision making related to court interventions in custody and contact cases in general. There is actually more literature and research on the effects of custody reversal on children in alienation cases than on most other interventions that are ordered in these cases, such as family-focused or reunification therapy, parenting coordination, a finding of contempt of court, or, perhaps most significantly, a judicial decision not to deal with alienation because of a concern about the potential trauma of a change in custody or the limitations of the rejected parent.

Experienced clinicians and those reporting on their qualitative research using case studies have reported on the benefits of changing custody or enforced parenting time in severe alienation cases (Clawar & Rivlin, 1991; Dunne & Hedrick, 1994; Gardner 2001b; Lampel, 1996; Rand et al., 2005; Warshak, 2010a). For example, Clawar & Rivlin (1991) reported an improvement in 90% of cases in children's relationships with rejected parents and in other areas of their functioning in 400 cases where an increase in the child's contact with the parent was court ordered, with half of these orders made over the objection of the children. They further reported that children interviewed after the imposed parenting time expressed relief, saying they could not have reestablished the relationship on their own, indicating the need to be able to save face and lay blame for seeing the parent on someone else. In their case analysis of 26 alienation cases, 16 of these meeting Gardner's eight criteria for severe alienation, Dunne and Hedrick (1994) reported that alienation was eliminated in 4 of the 26 children, for 3 of whom the court ordered a custody

reversal and restricted contact with the alienating parent. In the remaining 22 cases, where there was no change in custody, improvements in the relationship with the rejected parent did not occur, even with therapy.

Gardner (2001b) conducted a qualitative follow-up of 99 children from 52 families whom he had previously "diagnosed" with PAS. He concluded:

> The court chose to either restrict the children's access to the alienator or change custody in 22 of the children. There was a significant reduction or even elimination of PAS symptomatology in all 22 of these cases. This represents a 100 percent success rate. The court chose not to transfer custody or reduce access to the alienator in 77 cases. In these cases there was an increase in PAS symptomatology in 70 (90.9 percent). In only 7 cases (9.1 per cent) of the non-transferred was there spontaneous improvement. Custodial change and/or reduction of the alienator's access to the children was found to be associated with a reduction in PAS symptomatology. (Gardner, 2001b, p. 39)

He reported a spontaneous reconciliation in only four cases, and no reduction in PAS symptoms in the seven children for whom contact with the (p. 232) rejected parent was not increased. However, in all of the 22 instances in which custody was changed or the alienating parent's contact was restricted, PAS was eliminated or reduced. Limitations to Gardner's follow-up include that the same individual who formulated the hypotheses and diagnoses (Gardner) also conducted the follow-up interviews, and only the rejected parents and not the children or the alienating parents were interviewed. While Gardner's development and use of the "parental alienation *syndrome*" (PAS) is controversial, this study remains one of the few pieces of longitudinal research on the effects of different types of judicial response to alienation, and the findings have been replicated in other studies.

Rand et al. (2005) reported similar findings on the value of custody reversal in their follow-up study of the 45 children from 25 families Kopetski had studied for over 20 years starting in 1976. A range of moderate to severe PAS characterized these cases. Alienation was interrupted by judicial action for 20 children from 12 families where there was enforced parenting time or a change of custody. For those in the treatment group, where there were orders for therapy with the objective of gradually increased parenting time, alienation remained uninterrupted and in some cases became worse. Those who were subject to court orders maintained better relationships with both parents unless the alienating parent was too disturbed; this group included children subject to both court-enforced contact and custody reversal, and consequently, it remains unclear the extent to which each of these factors was successful in alleviating the alienation. These follow-up results, however, are consistent with other previously mentioned studies reporting on various interventions.

Clearly, it would be desirable to have well-designed research, including longitudinal, randomly assigned designs, comparing children who change custody with those who do not. Conducting such research, however, is very difficult, and results would not be known for many years. Custody reversal (or not reversing custody) in an alienation case can only be the result of a judicial decision, and a judicial determination (or prediction) that this will be in the best interests of the particular child whose case is being decided. The judicial involvement would confound any research results.

Aggregate data derived from quantitative studies can provide a framework for using evidence to guide practice and to help determine what may or may not work in specific cases. Awareness of the current literature provides indicators of the potential consequences of case-based decisions. Despite the limitations of existing research, judges and policymakers need to make decisions. Further, an integrated approach using the best available evidence to guide practice is required in child custody determinations since decisions for a child should be based on the circumstances of the specific case and professional wisdom and should not be based solely on aggregate data. Consequently, a careful investigation and risk–benefit analysis of each case is required, as would be the case even if better research

were available.

(p. 233) The need for decision making in the face of uncertainty was specifically acknowledged by Chief Judge Peter Boshier of the New Zealand Family Court in an interview:

> I think that you have to be extremely careful in changing care … but this is a challenge that judges have to be prepared to take. A judge shouldn't, I think, be risk averse and not reverse primary care in a case just because there are possible risks. In the one case that I have just done where the child seemed to be suicidal, reinforces my view that judges should follow their instinct. Based on reasonable psychological evidence, everything seemed to point to me that the risks that I was taking were proper, manageable risks. Since the child was moved [3 months before this report], the child is flourishing. All sorts of disorders that the child seemed to have had started to disappear … I acknowledge the risks, but I don't think that we should get too obsessed with the fact that separating from a parent that has an unhealthy, close dependency relationship with a child will necessarily ruin a child.[97]

This pragmatic judicial approach recognizes that just as there may be risks to a child in reversing custody, there are risks in leaving the child with an emotionally disturbed, alienating parent.

Proponents and, with few exceptions, opponents of custody reversal agree that it is preferable for children to have good relationships with both parents. In addition, they agree that it is preferable to identify alienation cases early and implement interventions such as education, coaching, counseling, and court monitoring to prevent the escalation of parent–child contact problems and the need for custody reversal. Competent assessment in the early stages will assist to differentiate the mild and moderate cases from the more severe ones. Education and counseling are more appropriate for the less severe cases. A more extreme intervention may be necessary for the more severe cases, and even for some of those where education and counseling have yet to be attempted. With few exceptions, most commentators agree that in the severest of cases, which are a minority and may present as such at the outset or later after various efforts to intervene have failed, custody reversal may be the least detrimental alternative for the child. Recognizing that these cases are unlikely to settle, an evaluator's recommendations and subsequent court decisions can make a difference between interrupted and completed alienation in more severe cases.

Judicial Decisions Changing Custody in Alienation Cases

Courts now are prepared to order a reversal of custody as a response to alienation. This will generally only be done if there is evidence from a custody (p. 234) evaluator or other mental health expert that there has been alienation, that the alienated parent is capable of caring for the child, and that the benefits of the change in custody outweigh any emotional distress that the child may experience from such a change in living arrangements. Although the courts recognize that a change in custody may be very disruptive to the children involved, and accordingly are cautious about this, judges are increasingly aware that in severe alienation cases this may be the only effective way of dealing with the emotional and psychological harm caused by an alienating parent (Epstein, 2007). This recognition of the need for custody reversal in some alienation cases was shared by the judges from the United States, Canada, New Zealand, Australia, and Israel who were interviewed for this book.

In speaking about progressive judicial remedies, Toronto lawyer Philip Epstein stated:

> [As an initial response to alienation] there should be very, very specific orders for access. These may also be coupled with therapy or counseling. And the judge should closely monitor to see whether the access occurred and what occurred during the access. There should be reporting back on a regular occasion, and the order

> needs to be very multidirectional; it directs how the parties communicate, how the pickup and drop-off work, and thus the order leaves no opportunity for disagreement and argument. And if the access order is breached, the judge should cite for contempt, suspend the sentence for contempt, and give parties another chance to comply. The judge should bend over backwards to make very specific orders and encourage compliance. But if compliance cannot be achieved at an early stage in an alienation case with relatively young children, the judge should consider custody reversal.[98]

One of the first cases in Canada to reverse custody in response to a custodial parent undermining children's relationship with the other parent was the 1991 Quebec case of *P.S.-M v. LJ-A.C*.[99] The judge, in transferring custody of the two youngest children from their alienating father to the rejected mother, also ordered that there was to be no contact with the father and two older children for a period of 6 months. Justice Gomery found that this case represented an extreme example of parental alienation. “Hatred,” he stated, “is not an emotion that comes naturally to a child. It has to be taught. The person who taught [these] … children to hate [their mother] is their father. They would be better off if he were removed totally as an influence upon their development until they are able to withstand and reject his negative attitudes.”[100]

The 1999 New York Family Court case of *J.F. v. L.F*. provides another early illustration of judicial willingness to transfer custody to respond to severe (p. 235) alienation.[101] The parties were married, had two children, and separated when the children were 2 and 4 years of age. In the initial proceedings, the court awarded joint legal custody with primary residence to mother and unsupervised contact with the father at specified times. The separation was acrimonious, and the order included a provision that the police were to assist in “procuring” the father's contact, if required. The court also warned the parties that there was the prospect of an award of sole custody if there was an “interference with the parental rights” of the other party. The mother did not comply with the terms of the contact order; the father obtained court orders finding the mother in contempt and suspending child support for this.

When the children were 11 and 13 years old, the father brought an application awarding him sole custody, introducing expert evidence to establish that the mother had alienated the children from him, as well as evidence of such maternal conduct as telling the children that the father was “disowning them” by requesting a religious annulment from her to allow him to remarry within his faith, making the children return to their father's home mementos of trips and presents that the father gave to them, and creating unfounded fears in the children before a vacation trip with their father to Europe. More generally, she did nothing to support the children's relationship with their father.

The judge had the opportunity to meet with the children alone and observed:

> They are both highly intelligent and articulate and, in many ways, engaging and charming. They also show a resilience and ability to adapt to situations. Yet, particularly when discussing their father and his family, they present themselves at times in a surreal way with a pseudo-maturity which is unnatural and, even, strange. They seem like “little adults.” This court finds that they live a somewhat sheltered, cloistered existence with their mother, emotionally and socially. They do not have friends to their home on a regular basis, and they do not go to other children's homes with any frequency. They do not have friends in their mother's neighborhood.
>
> The loving way in which the children perceive their mother, and the way in which they uncritically describe her as being perfect, stands in stark contrast to their descriptions of their father. Their opinions about their father are unrealistic, misshapen and cruel. They speak about and to him in a way which seems, at times, to be malicious in its quality. Nothing in the father's behavior warranted that treatment …
>
> Their negative view of their father is out of all proportion to reality. The children, by their conduct, have

demonstrated that they do not wish to visit with their father.[102]

(p. 236) The mother's position was that she had not contributed in any way to the children's negative views of their father, that she had encouraged them to have a good relationship with him, and that the poor relationship was due to the father's lack of concern, inattention, insensitivity, and poor parenting. The court rejected her evidence and concluded:

the mother's interference with the relationship between the children and the father is not an outright denial of visitation by making the children physically unavailable at the appointed time. Rather, the mother's interference here "involves a more subtle and insidious form of interference, a form of interference which, in many respects, has the potential for greater and more permanent damage to the emotional psyche of a young child than other forms of interference; namely, the psychological poisoning of a young person's mind to turn him or her away from the noncustodial parent."

… if the children were to be left with the mother "the children would have no relationship with their father given the mother's constant and consistent single-minded teaching of the children that their father is dangerous. She has demonstrated that she is unable and unwilling to support the father's visitation."

In the instant case, the children do not want to visit with their father. With the passage of time, these children have become "staunch corroborators" of their mother's ill opinion of the father. They call their father names, they make fun of his personal appearance, they treat him as though he were incompetent, and they speak of and treat his wife similarly.[103]

After reviewing the evidence, the judge concluded that a variation in custody was necessary to promote the children's well-being:

The children in this case have always resided with the mother. This court is mindful that although stability is an important consideration and has been found to be in children's best interests, it cannot be the decisive factor. "That a change in custody may prove temporarily disruptive to the children is not determinative, for all changes in custody are disruptive." In this case, the children's emotional stability will benefit from a change of custody, despite the fact that they have always resided with their mother …

This court is faced with unanimous conclusions on the part of the three forensic evaluators … that these children have been alienated from their father by their mother. Where the opinions diverge is whether or not to change custody. This court accepts and adopts the reports and testimony of the mental health professionals to the extent that they indicate that the mother alienated the children (p. 237) from the father. She psychologically poisoned their minds, despite her love for and devotion to them. The court finds that the children will have no relationship with the father if left in the custody of their mother. The court finds, further, that they will continue to be psychologically damaged if they remain living with the mother. She is apparently unwilling or unable to control her behaviors.

The court has struggled mightily with this decision, balancing the short-term consequences to the children of a change of custody, including foreseeable emotional upset and possible trauma, against the long-term consequences of allowing physical custody to remain with the mother, which likely will result in the children having pathological personality traits which would interfere with their ability to establish whole relationships not only with their father but also with peers, future spouses or significant others, with extended family members, with employers and co-workers, and with the risk of their passing down a jaundiced and paranoid view of life to their

> own children. The mother has “poisoned” their childhood. The poison must be purged to restore them to a healthy state. This court seeks to restore normalcy to their lives and give them a chance to have a better childhood and a healthy adolescence and adulthood.[104]

The court ordered the transfer of sole custody of the two children to the father, a suspension of the children's contact with their mother, until otherwise recommended by the children's therapist, and that the father was to expeditiously enroll the children in therapy with a therapist experienced in treating families with parental interference or alienation.

There are a number of appeal cases that have affirmed trial decisions to transfer of custody from an alienating parent. For example, in 2005 in *J.W. v. D.W.*,[105] the Nova Scotia Court of Appeal affirmed a trial judge's finding that the mother had “demonized” the father to the children, and that they were emotionally abused. The boys told the custody evaluator that they wished to stay with their mother, and the trial judge expected that they would suffer “some immediate trauma and grief” as a result of the custody variation. Nevertheless, the judge concluded that this was “one of those rare and exceptional cases where drastic action [was] required to meet the best interests of the children,”[106] and transferred custody to the father. He remarked that it was (p. 238) “unfortunate for the parents that things have gotten so bad that the court is left with such limited options.”[107] To limit the possibility of the alienating parent undermining the new custodial arrangement, the judge denied the mother contact with the boys for 4 weeks after the change in custody and also retained jurisdiction to deal with parenting time thereafter.

In 2006 in *Rogerson v. Tessaro*,[108] the Ontario Court of Appeal upheld a lower court's decision to transfer custody of twin boys, aged 5 years at the time of trial, to their father based on evidence that the mother was persistently attempting to undermine the relationship between the children and father. The court acknowledged that the remedy of changing custody was a “drastic one,” but it approved the trial judge's structuring of the order as it was gradual, and thus likely to “cause as little disruption as possible for the children.”[109]

A change of custody in alienation cases is often accompanied by suspended or restricted contact, at least initially, with an alienating parent, because restoring the relationship with the rejected parent and reeducating the child require separation from the source of influence (Baker, 2006; Gardner, 1999, 2001b; Rand, 1997b; Rand & Warshak, 2008). The order should include precise specification of the parenting time for the alienating parent after the moratorium, which in some cases may be supervised. Interestingly, many alienation cases at supervised visitation centers involve alienating parents and their children. In other cases, where the alienating parent continues to pose a threat to the emotional well-being of the child, the least detrimental option for the child may be an indefinite suspension of contact. In cases that require monitoring, it is highly desirable for the same judge to remain seized of the case.

In the 2008 Ontario case of *J.K.L. v. N.C.S.*,[110] the alienation of the parties’ 13-year-old son from his mother was the result of the father's conduct and attitudes. Justice Turnbull quoted from the reasons of the judge who made a finding of contempt in an earlier proceeding in the same case, who had observed:

> … contact with even a flawed parent … is better for a child than no contact at all. To cut off contact is a devastating thing for a child and can have serious long-term consequences.”[111]

Justice Turnbull took a different view of the situation, concluding that this was a blatant and severe case of alienation, where the alienating father had been in breach of many court orders. The 13-year-old boy, who had previously testified against the mother at a criminal hearing (where she was found not guilty of assault of the father), was refusing all contact with her. The court (p. 239) relied heavily on a comprehensive court-ordered evaluation as well as expert testimony from a local psychiatrist, and from an alienation expert, Dr. Richard Warshak. The court ordered a reversal of custody to the mother, whose contact for the previous few years was limited to observing her son

occasionally at his sport events. As the sole custody parent, the mother then had the responsibility for making all health care decisions. The judge suggested that the mother might want to take the boy to an intensive alienation-directed program, like that operated by Dr. Warshak, since the court heard evidence about that program, but the court indicated that this decision was to be made by the custodial mother. A restraining order was put in place, and the father was to have no contact with his son for the next 4 months. The order also included terms for the police to enforce the court's order that the immediate transfer of custody occur at the court house in the absence of the father, and for the judge to remain seized of the matter with a return to court in 4 months.

As this case illustrates, if there is severe alienation and a custody reversal is being contemplated, those involved, including lawyers, mental health professionals, judges, and rejected parents, need to carefully plan for the transition. Factors to consider in planning include the age and attitude of the children, the attitude of the alienating parent, whether any travel is involved, and, of course, the resources available to support the transition. In some cases, for example, where contact with the alienating parent is to continue, it may be appropriate for the court to simply set a date in the near future when a change in residence is to occur; even in these cases, judicial monitoring and counseling support for all concerned will be helpful.

In the most severe cases where a child has been refusing all contact with the rejected parent and there is a prospect that the child might run away (inevitably with at least the tacit support and often with the covert aid of the alienating parent), there must be more planning and detailed judicial control over the transition process. The alienating parent may be required to bring the child along with possessions and clothing to the courthouse or another place within hours, or at most a day or so, of the judgment being rendered. Perhaps a person other than the alienating parent should bring the child to the transition location, and the initial meeting with the rejected parent should be supervised. It may be advisable that prior to the date on which judgment is to be rendered the alienating parent be ordered to bring the children to the courthouse on that date, in the event that a custody transition is ordered; plans then need to be made for their supervision at the courthouse, for telling the children what the judge has ordered, and supporting their transition. In some cases, a child's lawyer or therapist may be engaged to tell the child about the decision. As discussed in Chapter 8, in some cases the judge will want to meet the children to explain the decision. Children should always be permitted to say good-bye to the favored parent, but in severe cases, this may need to be supervised. Even if contact with an alienating parent is being suspended, children should be reassured that this (p. 240) is not intended to be permanent and that once certain requirements are in place they will see that parent again.

It will be very important for the rejected parent and advisors involved to plan for the possible use of support services, as children's attitudes and behavior at the time of the transition and immediately following may be difficult to handle. In severe cases where children refuse contact and threaten to run away or harm themselves or someone else, a transitional support program such as Family Bridges, discussed in Chapter 7, may help the family safely adjust to the court orders. In other cases, transfer to a transitional site may be indicated before the rejected parent and child are united for further intervention (Gardner, 1998b, 2001b; Gottlieb, 2006). Here the child is separated from both parents for a short time—generally a few days—before reintegrating with the rejected parent. While the child is at the transition site, supervised visits with the rejected parent should be undertaken. Sites vary in degree of control required, ranging from placement with a friend or relative to being placed in a foster home or treatment center.

If contact with the alienating parent has been suspended, after the child has spent some time living with the previously rejected parent and reestablished a relationship, a gradual reintroduction with alienating parent should be considered. Preferably, that parent will have had some counseling to gain insight into his or her behavior and its effects on the children, and demonstrated some behavior change. Initial contacts should be carefully monitored to ensure that the parental alienating behavior does not resume.

Judicial Decisions Against Custody Reversal Despite Severe Alienation

In some cases, the courts conclude that despite severe alienating behavior by the custodial parent and the child's resulting rejection of a parent, the child should not be removed from the care of the alienating parent as, on balance, it is not in the best interests of the child. Even if the courts conclude that there has been severe alienation that will continue without a change in custody, they may decide not to vary custody, as the rejected parent may lack the capacity to adequately care for the child. In some cases, a court is faced with a difficult situation in which an older child is steadfastly refusing contact with one parent, and the court is concerned that the child will "vote with his feet," regardless of what order is made. It must also be appreciated that a reversal of custody is only a viable option if requested by the rejected parent, who has the emotional energy and resources to deal with a transition process that may be challenging.

In the Nova Scotia case of *Corkum v. Corkum*,[112] the court had to decide the appropriate custodial arrangements for a 14-year-old girl who was unwilling to see her father. The father had had little contact with his daughter in the (p. 241) preceding 3 years, and in the 2 years immediately prior had no contact with her despite several findings of contempt against the mother. A custody evaluator found that although the child was thriving academically and socially in the care of her alienating mother, her emotional and psychological needs were not being adequately met in the mother's home. The expert concluded that if the child continued to remain with her mother, she was at risk of mental health difficulties and continued emotional harm. It was recommended that she be placed in the care of the child welfare authorities, who declined to intervene, leaving the trial judge to decide between placing the girl with a father of whom she was terrified (without good reason), or leaving her with a mother who was causing her emotional harm. In making the decision, the judge stated:

> I cannot find that it is [the child]'s best interest to take her from a place she feels safe and put her with someone which will cause her great fear and anxiety. She is fourteen years old and I doubt she would go or stay if I made such an order. The option proposed by [a mental health clinic where the girl had received treatment that she should be] allowed to feel safe in a neutral place while she received counseling to deal with her mother's mental health and to reunite her with her father. This is the option that I find would be in [the child]'s best interest. However, it is not available to me [because the child welfare authorities declined to be involved].[113]

The judge ordered that the parents have joint legal custody of the child with primary residence to remain with the mother but all legal decision-making authority resting in the hands of the father. The mother could obtain emergency medical treatment for the child, but all other consents were to be signed by the father. The child was to have counseling, and the father's parenting time was to be as recommended by the counselor in the interim. Lastly, the court ordered the parties to return to court in 6 months, sending a clear message to the mother that the progress was to be monitored.

Similarly, in the Ontario case of *Korwin v. Potworowski*,[114] the court reluctantly concluded it had no alternative but to allow a 13-year-old to remain with his mother, despite finding she would not promote the relationship between the child and his father. In allowing the 13-year-old boy to remain with his mother, Justice Gauthier stated: "There is no means of forcing this thirteen-year-old boy to remain in his father's home, short of locking him up. He is now of an age where, even if he may be too immature to appreciate what is best for him, he cannot be physically forced to remain where he does not want to be."[115] The two younger children were placed in their father's custody with parenting time granted to their mother. The judge had envisioned a situation where the children would be together every weekend, but left the oldest boy's (p. 242) contact subject to his wishes, given that parenting time to a child of that age and in that situation is virtually unenforceable.

In the New York appellate decision of *Lew v. Sobel*, the court affirmed the decision of the trial judge that custody was not to be varied, despite the mother's violation of the provisions of the court-ordered visitation and her alienating behavior. Relying on the evidence of the independent custody evaluator, the court concluded:

> A change of custody should be made only if the totality of the circumstances warrants a change that is in the best interests of the child … While one parent's alienation of a child from the other parent is an act inconsistent with the best interests of the child … here, the children's bond to the alienating parent is so strong that a change of custody would be harmful to the children without extraordinary efforts by both parents and extensive therapeutic, psychological intervention.[116]

However, in accordance with New York law, the court ordered a reduction in child support until the mother could establish that she was in compliance with the previously ordered parenting time regime, and required her to pay 75% of the costs of the therapeutic contact facilitator, the Law Guardian, and the forensic evaluator employed during the course of the proceedings.

The Saga of Re S: A Cautionary Tale on the Need for Timely Judicial Decision

While it would be wrong to place too much weight on any single case, consideration of the English case of *Re S* is instructive as an illustration of the financial and emotional costs of failing to have a clear and timely response to a severe alienation case, as well as providing an interesting example of interaction of controversies within the mental health profession and the courts about alienation. The judge with the most involvement in the case characterized it as one in which “a wholly deserving father left my court in tears having been driven to abandon his battle to implement” the court order for a change in residence.

The child, S, was born in 1998. His parents were both professionals (his mother, a psychologist) who separated before his birth. For the first 7 years of the boy's life, he resided with his mother but had a good relationship with his father, who had remarried and had two more children. The mother had considerable anger toward the father, but when he was young, the boy had overnight parenting time with the father's family and traveled with them on vacations. However, by the time he was 8, the boy was refusing all contact. During the next 4 years, “immense energy and resources were invested in trying to reinstate a meaningful relationship between father and son.”

(p. 243) Initially, in response to the boy's resistance to contact with his father, the mother and father agreed to use voluntary therapeutic interventions to restore the relationship. After more than a year of trying, these therapeutic efforts failed to restore the contact. The father commenced court proceedings to secure contact when the boy was 9 years old. There was judicial case management with numerous court appearances. By the time of the trial, the boy was 11 years of age; a number of mental health professionals were involved, though most had little experience with alienation. The trial judge, HHJ Bellamy, concluded that the boy had been “profoundly alienated” by his mother and decided that the care of the boy should be transferred to his father, a decision affirmed by the English Court of Appeal.[117] Litigation then commenced over how the transfer of custody should be arranged. A psychiatrist with considerable experience with alienation cases recommended an immediate transfer, if necessary involving the court staff and the use of force. The boy, who had legal representation, continued to say he wanted to live with his mother and asserted that he would feel like a “criminal” if force were used to make him live with his father. Child protection authorities had become involved in the case and preferred use of transitional foster care and counseling to provide a “stepping stone” for a change in residence.

The psychiatrist testified that further therapy at that stage would be “fruitless” and recommended against the use of

foster care, opining:

> The delay allows a period when attitudes can become entrenched, behaving badly, and further risk of harm occurring … at the end after the work and negotiation there will still be the same situation where we have to force him to live with his father. Even if he is willing to go into foster care, which is a good thing because it avoids a scene at the time, the bad thing is that we are not dealing immediately with what is ultimately necessary, that is, to make him to go live with his father.[118]

The trial judge ordered that there was to be a change in residence within a week, stating that the time had "come to grasp the nettle."[119] The judge hoped that the mother would take the boy to live with his father, but if not, ordered that court staff should transport the boy to this father. Before the change in residence occurred, the mother appealed, and the Court of Appeal ordered the use of foster care and counseling to ease the transition rather than an immediate change in residence.[120] The boy was placed in foster care but was allowed telephone contact with his mother. When his father came to the foster home, supervised by a therapist, the boy refused to speak to his father and sat with (p. 244) his head in his lap and his hands over his ears. These contacts lasted as long as 3 hours, during which time the boy also refused to eat or drink. Intensive therapy sessions were tried, including sessions with both parents present. The last reunification therapist involved concluded that after 24 hours of sessions spread over 13 weeks, there had been "tiny progress," and suggested that after another 6 to 12 months of therapy it might be possible for the boy to have unsupervised contact with his father. As well as having therapy aimed at reunifying the boy with his father, the child protection authorities arranged for mental health counseling, during which it was concluded that the boy was showing "numerous clinical symptoms of depressive illness" and starting to express suicidal ideation.

The final reported court decision in this saga records the history and the father's agreement for his son to reside with his mother and to have no direct contact with him.[121] The order included provision for a final supervised meeting for the boy and his father and held out the faint hope that the continued involvement of the child protection agency over the next year might achieve some degree of reconciliation between the boy and his father. In this decision, HHJ Bellamy recognized that "alienation is now a mainstream concept," though acknowledging the uncertainty in the research literature about the most effective response. The judge commented:

> I am bound to say that, for my part, I am in no doubt that in determining any high conflict case involving an alienated child it is essential that the court has the benefit of professional evidence from an expert who has personal experience of working with alienated children.[122]

It should be noted that while there are reports of cases where transitional foster care has been used to effect a successful transfer from an alienating parent to a rejected parent,[123] there is no research to support the "stepping stone" foster care approach that the English Court of Appeal tried, and the clinical literature does not support the relatively long period of transitional foster care. While the child protection agency planned for 3 months or more of transitional foster care, that agency admitted that it lacked expertise in dealing with alienation cases.

Although HHJ Bellamy correctly emphasized that "one size does not fit all" in alienation cases (or any other cases involving children), this case suggests that in severe alienation cases, there is real value in "grasping the nettle," and either ordering an immediate transfer of custody, or abandoning legal efforts to enforce contact. For a severely alienated child who is in or approaching (p. 245) adolescence, any significant period in therapy or "stepping stone" foster care is only likely to lead to an entrenchment of the child's resistance and a deterioration in the child's mental health, with an escalating risk of physical self-harm as the "transition" continues. Severe alienation cases require judicial continuity and management of the case by a judge who has experience in dealing with high-conflict family cases, and decisive legal action; any appeals should be expedited, or alternatively there should not be a stay of the

order pending an appeal. Delay can both undermine the effectiveness of any legal intervention tried and negatively affect the child's well-being while the uncertainty and litigation continue.

Suspension of Contact with the Alienating Parent

As discussed in the preceding section, when there is a change in custody, the court may determine that there must also be a suspension of contact with the alienating parent, at least for a period of time, to prevent undermining of the relationship with the rejected parent.

In a study of reported Canadian alienation cases between 1998 and 2009, the court withheld access in 17 cases where parental alienation was found. In 14 of those 17 cases, custody was transferred to the previously rejected parent, and the alienating parent lost both custody and contact. Thus, in 14 out of the 83 cases (17%), where there was a change in custody, there was also a suspension of contact (Bala et al., 2010). In 12 of the 95 cases (13%) in the 1989 to 2009 period where the court found that there had been an unsubstantiated claim of alienation, the court declined to order parenting time to the rejected parent. These included cases of justified rejection where there were concerns about the safety or welfare of the child in the care of that parent.

Deciding Not to Enforce Contact Despite Alienation

In some cases, children are very resistant to any efforts to change their attitudes toward seeing an alienated parent, whether by counseling or by using judicial sanctions imposed on a custodial parent to enforce contact. In some cases, the child's resistance is a reaction to a high level of conflict between the parents and reflects a desire to avoid a loyalty conflict. In other cases, however, the child's contact refusal may be the result of alienating conduct by the custodial parent and occurs despite the absence of fault on the part of the noncustodial parent. It can be very difficult for the noncustodial parent to come to terms with this type of rejection, but in some of these cases, the rejected parent may decide to give up the effort to seek to enforce contact rights. The decision may reflect the emotional or financial exhaustion of the rejected parent, or an assessment that not to seek to enforce an access order is better for the child.

(p. 246) In some cases a judge may decide that it is not appropriate to order or enforce access,[124] or may make comments suggesting that continuing efforts to enforce contact may not be in the child's best interests,[125] despite (or because of) the alienating conduct of the custodial parent. In *El-Murr v. Kiameh*,[126] Katarynch J. decided not to take steps to require a 10-year-old boy to see his father after 4 years without contact, commenting:

> Perhaps this boy is best served at this time in his life by being left in peace. He has been given opportunity to open himself to a reunion with his father. He has declined the opportunity … There is no benefit for the father at this time—just a faint hope. It is cruel to keep alive hope that is faint, when there is no indication on the evidence that this child is likely to open himself to his father in the near future.
>
> Whatever the benefit, it is no more than a potential. At this point in this child's life, his actuality is that he has moved on to establish a father-and-son relationship with his stepfather. From his perspective, he does not need any other father-and-son relationship.

In the 2010 English case of *Re Children B*,[127] the father engaged in contested proceedings stretching over 4 years concerning his two sons, aged 8 and 9 years by the conclusion of the proceedings. The court characterized this as “a very sad case in which an entirely deserving father has been alienated from these two boys and a substantial responsibility for that alienation must lie with their mother.” Three independent experts testified, providing evidence

that the mother is “unable to contain her strong emotions, highly critical of the father and paternal family [and the] children have been exposed to all these feelings and they have been adversely affected in their emotional development.” One expert testified that the children were “parentified: acting like adults in control of the mother.” Nevertheless, the experts concluded that a transfer of residence to the father would be “too risky in terms of the children's development” because the mother was the children's sole attachment figure. Meetings with father and children supervised by the experts had not gone well. The trial judge ordered that the children continue to reside with the mother and have only “indirect contact” with the father, such as with letters through the Office of the Law Guardian. There was also an order for the children to receive (p. 247) counseling to repair their relationship with their father. However, 6 months after the decision the mother had failed to comply with the order, and there was no practical way to enforce this order. In affirming the decision to leave the children in the care of their mother with no effective steps to secure a relationship with their father, Thorpe LJ wrote:

> It is an extremely sad case where any judge at trial must have almost shrunk from his role in a situation which offered so little opportunity for judicial intervention, so little hope for the future. The judge was choosing between very poor alternatives, and that is a tragic situation not just for the family but for the judge who has to carry out his role, and this court has very limited powers of principled intervention.[128]

The appeal judge referred to the order for counseling as offering “slender” hope for the father.

If a court determines that a child's rejection of a parent is due to alienation (and not justified rejection), it may nevertheless conclude that it would be contrary to a child's best interests to force a child to have a relationship with the parent; in these situations, it may be appropriate for the noncustodial parent to have a “final” meeting with the child, even if the child seems reluctant to attend. That meeting might be attended by a mental health professional or the child's lawyer, with the intent of allowing the parent to tell the child why the legal process is being discontinued, and to express the hope that a relationship may be resumed at some point in the future.[129] These sentiments may also be put in a letter to the child. In some cases, the judge might also consider it appropriate to meet with the child or write the child a letter (copying the parents and lawyers involved in the case) to explain the decision. The noncustodial parent may also be permitted to continue to correspond with the child and send gifts at special occasions, which the custodial parent should be required to share with the child. Leaving the lines of communication open in whatever manner possible, such as occasional letters, cards, gifts, e-mail or use of social media, and so on, will demonstrate the parent did not abandon the children and may permit positive memories that may pave the way for a future reconciliation, a better alternative than providing no trail of resolution for the grown child (Baker, 2005b; Cartwright 2006).

While a decision not to enforce parenting time may relieve the child of the immediate pressure of being caught between two parents, the child may well still feel abandoned under such circumstances, notwithstanding any stated (p. 248) wishes and protestations of hate and rejection. In some cases, children do resume a relationship with a rejected noncustodial parent after a long period without contact, though sometimes only in adulthood. In other cases a relationship may never be reestablished.

Financial Penalties

As discussed above, in most jurisdictions the courts may order a party to a family case who has caused unnecessary legal proceedings to pay compensation for all, or a portion, of the legal fees and other litigation expenses incurred by the other party. Thus, a parent in contempt of a contact or parenting time order may be required to reimburse the parent enforcing the order, or a parent who makes an unfounded allegation of alienation may be required to pay the

legal fees of a parent who has been justified in withholding contact due to abuse or who has made reasonable efforts to comply with the order.

In some American states, in cases where a custodial parent is willfully violating a visitation order, the courts may also suspend child or spousal support, as a means of sanctioning the alienating parent and encouraging compliance. When the courts suspend the payment of support, they stipulate that when parenting time is restored, support will resume. New York is one state where courts may suspend support obligations in alienation cases: an example of the judicial approach to this issue in that jurisdiction is the statement in *Usack v. Usack*:

> While alteration of … [father's] child support obligations may be an imperfect remedy with which to address … [custodial mother's] harmful, unfair conduct, there is no proof that suspending [the father's support] obligations temporarily would result in the children becoming public charges. Accordingly, … [the father's] support obligations are suspended pending further court order upon a showing that … [the mother] has made good faith efforts to actively encourage and restore [the father's] … relationship with the children. …[130]

In most jurisdictions, however, courts follow a traditional approach and refuse to link contact denial to support enforcement.[131] Even in jurisdictions that follow this approach, in cases of clear alienation by the custodial parent, a few judges have been prepared to threaten suspension of child or spousal support if the problems continue or actually make such an order,[132] especially (p. 249) where the custodial parent has sufficient resources that the child would not suffer harm.[133]

In some jurisdictions the law may allow for orders to be made to requires parents to provide financial support for young adult children who are continuing their education. In some cases in these jurisdictions,[134] the courts may be more willing to consider unjustified rejection of a payer parent as a reason for terminating child support; in these cases the payer is usually paying support to allow the child to pursue postsecondary education, and the child may be refusing to even tell the parent about the progress of his or her studies. Even in cases involving adult children who are refusing to communicate with a parent who is paying support, there is a reluctance to penalize the child, and it is more common for judges to threaten termination in an attempt to pressure the children to become more engaged with the rejected parent, for example, by at least requiring the child to provide the payer reports on his or her academic progress than to actually terminate the support.[135]

Case Management—The Need for Judicial Control

Almost all of the experts, and all of the judges, interviewed for this book, were strong supporters of judicial case management. They recognize the importance of early, effective judicial control for cases where alienation is an issue by a single judge who can get to know the parties and their situation and set clear limits for the parents. Justice Philip Marcus of the Israeli Family Court, for example, commented on the value of judicial continuity for cases where alienation is an issue:

> It is exceptionally important to know the parties. As I say, in many cases I know the parties better than their lawyers do. In particular, litigants with personality disorders will fire their lawyers frequently, so that a lawyer will come into the case not knowing the background and the client's personal problems. I may have been dealing with the family for several years, so that I have learned what each litigant is like.[136]

Ontario Superior Court Justice, George Czutrin observed:

> I think that we should try to identify these cases, whatever we are calling them, as early as possible … I really do

> believe very strongly that there should be one judge who absolutely manages the case. And then … look for a new approach to managing and bringing the (p. 250) matter to conclusion in a timely manner. We may need to consider/study a team management approach involving other professionals.[137]

In response to the argument that the judge may "get it wrong," Toronto lawyer Philip Epstein said:

> The judge is supposed to be the case manager, not to be the trial judge. So the judge is supposed to move it along, and if the judge can't resolve it, then at least some other judge would try it. So there is always a risk that the judge will get it wrong, and there is always a risk that the judge will get it wrong at trial. But, you know, judges do the best they can with the evidence they have. And the idea that one judge might get it wrong and therefore we should try a host of other judges is ludicrous.
>
> Further, without case management, you are more likely to have a number of judges getting it wrong because of inadequate information, compounded if they are not specialist judges.[138]

Case management—one knowledgeable family law judge for one family—is especially valuable for cases where alienation is alleged (Martinson, 2010). Judicial continuity allows the judge to gain an appreciation of the complex nature of the case and to set clear expectations for the parents (and in some cases, the children). Although contempt of court orders, reversal of custody, and temporary suspension of contact with an alienating parent are important weapons in the judicial arsenal for dealing with alienation, their use is clearly not optimal. The primary judicial role, in all but the most intractable cases, should be educational—an authoritative figure making clear to both parents how their behavior is negatively affecting their children. The exhortations of a judge—setting out clear expectations and consequences for failures to comply—can move many parents and children, who may also be interviewed by the judge, to alter their behaviors, especially if combined with directions for educational or therapeutic interventions (Brownstone, 2008; Darnall & Steinberg, 2008a). Only the most personality-disordered or psychotic parents are likely to defy a judge who has set out clear expectations and consequences. When this defiance occurs, it may be necessary to resort to remedies more suitable for the severe cases of alienation.

Judicial continuity and short adjournments (or conditional adjournments if the parenting time ordered does not occur) are especially valuable in cases where there are parent–child contact problems and noncompliance with previous orders (Bala, Fidler, et al., 2007; Epstein, 2002). Judicial exhortations and threats, in particular, are more likely to be effective when the parents know that they will have to return to the judge who has had the opportunity to get to know them and their issues. While there will always be exceptions, (p. 251) many (but not all) alienating parents will heed the advice and warnings of the judge who has control over their case (Bala & Bailey, 2004).

In some jurisdictions, having effective case management will require some administrative restructuring in the court system, but case management not only promotes the interests of children; it should also result in more efficient use of resources in the justice system, with less judicial time spent on high-conflict cases and fewer lengthy trials (Bala, Birnbaum, & Martinson, 2011). Even where there is no case management system, a judge may rule that he or she "remains seized of the matter" (responsible for the case) to address future problems (Bala et al., 2011.) This may be especially useful in a contempt proceeding in order to enable judicial monitoring of a parent's willingness and ability to comply with the existing order (Epstein, 2002).

Child Protection Agency Involvement

Child protection agencies are increasingly being involved in high-conflict separations. In some cases the agency is involved because there have been repeated allegations by one parent that the other parent is abusing the child; often

in alienation cases these are unfounded allegations of child sexual abuse.

In almost every jurisdiction, child protection legislation specifies that emotional abuse is a form of child abuse that must be reported to child protection authorities. This includes emotional abuse, if sufficiently severe, arising from parental conflict. Judges and other professionals may be obliged to report severe alienation cases to child protection authorities for investigation.

While involvement of child protection authorities can be intrusive for children and parents alike, in some cases the agency can provide a needed independent source of evidence for the court about the validity of allegations of alienation, abuse, or domestic violence. When parents have limited resources, a child protection agency may also provide counseling and support services for the children and parents that may otherwise be unavailable. The child protection agency may also be able to provide foster care for an alienated child; usually this is expected to be "transitional," but in some cases it may need to be long term, if the alienating parent is offering an emotionally toxic home and the rejected parent is unable to provide adequate care.

Although child protection agencies can have a positive role in alienation cases, at present too few child protection workers have the necessary education, training, and experience to deal with them effectively. As a result, there continue to be cases where the courts have been critical of insensitive and inappropriate involvement by agency workers in alienation cases, for example, if they are too quick to "blindly accept" the allegations of abuse from an alienating parent and erroneously conclude that the child's rejection of a parent is justified.[139]

(p. 252) While it would be desirable for child protection agencies to have more involvement in severe alienation cases as these almost inevitably involve "emotional abuse," these agencies have heavy caseloads and limited resources, and in many jurisdictions give low priority to these cases. Although in some places judges dealing with family cases have the jurisdiction to order the local child protection agency to provide services in an alienation case, in most jurisdictions judges lack the legal authority to mandate agency involvement.[140]

The Importance of Timely Legal Intervention

The literature and all of the interviews conducted for this book consistently stress the value of prevention and early identification by the courts, followed by appropriate judicial, educational, and clinical intervention in cases involving parent–child contact problems. A majority of researchers now reject the view advanced by a few commentators in the past (see Bruch, 2001; Faller, 1997; Wallerstein & Blakeslee, 1989) that rejection of a parent—especially for the older child—is a "normal" part of divorce and that it is best to leave well enough alone, as the child will "come around." An important consideration is that it may not be known in the early stages which seemingly mild or justified contact resistance or refusal may develop into more severe alienation.

Most writers agree that alienating parental behavior and strategies are a form of emotional abuse that should be addressed. The results of research on the long-term negative effects of alienation of a child from a parent are sobering (Baker, 2005a, 2005b, 2006a). Janet Johnston writes that "alienating behavior by parents is a malignant form of emotional abuse of children that needs to be corrected, whether a parent agrees or not" (Johnston, 2005a, p. 770). She and other researchers point to the growing body of literature documenting the negative effects of psychological control and intrusive parenting on children (see, for example, Barber, 2002).

A child's negative attitudes toward a rejected parent and resistance to contact may become more serious as legal proceedings drag on. While it is important to try less intrusive interventions, including voluntary responses, before more intrusive interventions are attempted, if there are not fairly quick changes in attitudes and responses to the less

intrusive responses, there needs to be a timely decision to either have a more intrusive response or abandon the ineffective efforts. While therapy for children and their parents can be an effective response to alienation in some cases, it can take 9 months to 2 years to build sustainable relationships. However, the clinical literature and experience of seasoned practitioners indicate that if signs of some progress are not (p. 253) evident within a reasonable length of time, in the range of 3 to 6 months, it is unlikely that more therapy will have a positive effect. Moreover, inappropriate or unrelenting, ineffective therapeutic interventions can actually entrench a child's negative attitudes toward a rejected parent. Although judicial responses like imprisonment for contempt or a reversal of custody may be viewed as a “last resort,” delaying invoking these for years in the face of intransigent behavior by an alienating parent only allows the situation to worsen. Similarly, while a judicial decision that there is no effective means to enforce contact is deeply frustrating to an unjustifiably rejected parent, needless delay of this decision merely increases the frustration and expense and prolongs the period in which the child experiences the emotional stress of the legal process.

Conclusion: The Law as a Blunt but Necessary Instrument

Alienation is a complex problem that the family courts are facing with increasing frequency. These cases present unique challenges for legal and mental health professionals. Judges in particular are placed in a difficult position, often faced with conflicting testimony and allegations, competing theories underlying the phenomenon, conflicting expert evidence, a limited range of resources and possible judicial approaches to managing the problem, and ultimately, the dilemma of trying to promote the best interests of the child while upholding the administration of justice.

In some instances, early cooperation between parents, lawyers, and mental health professionals may avoid judicial intervention completely, a result that is clearly in the interests of all parties and their children. In some milder alienation cases, referral to group or individual parent education, if available, will suffice to help parents understand the effects of their conduct and attitudes on their children. A lawyer may also influence parental behavior by providing information and advice to their client. While lawyers representing alienating parents may face an unreceptive audience, a clear description of the negative consequences of alienation for children may have the effect of curtailing damaging parental conduct.[141] Similarly, a lawyer for a rejected parent may need to (p. 254) provide information and give advice about different kinds of strained relationships, pointing out that not all are the result of parental alienating behaviors. Drawing on social science literature, lawyers can provide parents with information about the negative effects of parental conflict and alienating conduct on their children's emotional well-being.

Where alienation is claimed, independent evidence tendered through a court-ordered evaluation by an independent mental health professional is generally necessary if the court and the parents are to understand the context in which events are taking place. Although the final determination of how to respond to cases involving alienation ultimately lies with the judge, lawyers play an important role in providing the court with clear evidence of the issues demanding intervention, as well as in supporting an approach that will best reflect the needs of the child. A custody evaluation should inform any therapeutic intervention that may follow.[142]

It is important for judges to take control of these cases to the greatest extent possible, to limit the possibility of manipulation and delay of the court process by the parents or lawyers, and to ensure that there is a firm and timely response to violations of court orders. These are cases for which judicial case management is especially appropriate.

Although, in general, diversion of family law cases from the courts and nonadversarial approaches are to be strongly supported, judges should be prepared to be involved and take firm approaches when the circumstances warrant. Having an effective, early legal response to parents who are alienating their children from their former partners,

wittingly or not, will both tend to encourage compliance with court orders and promote the interests of children. If there is no effective legal response to violation of court orders, custodial parents may feel encouraged to thwart them, dispiriting the rejected parent and emotionally harming the children. Having case management for high-conflict cases can help to reduce the possibility of parents manipulating the court. If judges make more detailed and explicit orders, this can also reduce the temptation of parents to manipulate the courts.

In the immediate postseparation period, when feelings of anger, betrayal, and distrust between the parents are likely to be at their highest, there is often value in giving separating parents a little time to gain perspective on their situation and "cool down" before trying to negotiate a settlement. However, there are different considerations where there are allegations of abuse or alienation, especially if resistance to contact develops after a period in which postseparation parenting time has been going reasonably well. A significant concern in alienation cases is that prolonged periods of no contact or litigation without remedial efforts being applied will likely serve to only further entrench the alienation, inappropriately empowering both the alienating parent and the alienated child.

(p. 255) Family law lawyers and judges who ordinarily contemplate "cooling-off" periods in family cases must be aware that in these types of high-conflict cases, skilled and early intervention is usually required. Indeed, in one severe alienation case, the judge stated:

> … [P]rompt, decisive and perhaps radical steps must be taken to put a stop to this alienation. Those steps are to be put in place immediately …[143]

Alienation cases need to be understood and treated differently than most other types of family disputes. Delaying intervention for many months after the child has become alienated to allow for voluntary counseling, mediation, or a custody evaluation is likely to make court-ordered response more difficult or impossible. Mental health professionals, lawyers, and judges need to be cognizant that their decisions not only need to address the immediate problem in the case before them, but also need to consider the long-term interests of children who have a right to have a healthy relationship with both parents.

These cases must be carefully assessed and responded to on an individual basis, premised on the promotion of the interests of children, and the recognition that they are the ones who suffer the most. It must be recognized that in many high-conflict separation cases, the courts are really left to make a choice about the least detrimental alternative, but this does not make their role any less important. (p. 256)

Notes:

(1) [1994] 1 FLR 729, at 735, emphasis added.

(2) 17 AD 3d 736 (3d Dept., 2005).

(3) 77 Ohio St.3d 415 (1997).

(4) See, e.g., *Children's Law Reform Act*, R.S.O. 1990, c.12, s. 30; and *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 112.

(5) See *Stewart v. Stewart,* [2006] O.J. 5135 (O.S.C.J.).

(6) See, e.g., *In The Matter of E (Children)*, [2010] EWCA Civ 1159.

(7) The statistical data for 1989–2008 on the Canadian study discussed here were reported in Bala et al. (2010),

which provides a detailed description of the methodology for the study. That paper was updated to include 2009 data by one of the authors of this book (Bala).

(8) For examples of cases where the court disagreed with the expert, see *Hooper v. Hooper,* [2003] B.C.J. 1201(B.C.S.C.); *Jefferson v. Jefferson,* 2000 N.B.J.11 (Q.B., Fam. Div.); *Klassen v. Napper,* 2002 M.J. 19 (Q.B.).

(9) *L.B.L. v. S.B.*, 2010 CarswellNB 474 (Q.B.).

(10) See, e.g., *Elwan v. Al-Tahar*, [2009] O.J. 1775 (Sup. Ct.)

(11) *Wade v. Wade,* Cook County Domestic Relations Court, Case No 07 D11714, March 11, 2011, Judge Renee Goldfarb.

(12) [2001], O.J. No. 308 (S.C.J.).

(13) Ibid. at para. 37.

(14) Interview, April 12, 2010.

(15) Interview, May 10, 2010.

(16) Interview, June 29, 2010.

(17) Almost all of the interviewees for this book explicitly referred to both the strengths and limitations of the justice system for responding to alienation, and of the need to use alternatives, where appropriate. The recognition of the potential harms of resorting to the justice system was very clearly expressed by all of the judges interviewed.

(18) Interview, May 24, 2010.

(19) See sharp criticisms presented by Bruch (2001), Faller (1997), and Walker et al. (2004a), who, in addition to objecting to court-ordered treatment and the appointment of parenting coordinators and case managers, denounce orders enforcing parenting time.

(20) For a more thorough discussion of parenting plans for high-conflict families, see Birnbaum, Fidler, & Kavassalis, 2008). These plans need to address many issues, including: principles of good parenting, rules of engagement, and direction to keep children out of parental conflict; detailed parenting time schedules for both regular and holiday periods; precise start and stop times for parenting times; the location of transitions; who transports the children, and in which direction; parental behavior during transitions; who cares for the children when they become ill in the morning before school and during school; rules about parental communication and information exchange; rules about traveling out of jurisdiction; provisions for how day-to-day (e.g., extracurricular activities, information exchanges, disposition of clothing and belongings, etc.) and major (health/medical, education, religion) child-related decisions are made; parent–child telephone and e-mail contact; procedures for making temporary changes to the schedule, and so on.

(21) For an example of counseling being ordered as part of a sentence for contempt, see *Starzycka v. Wronski*, 2005 ONCJ 329, 27 R.F.L. (6th) 159 at para. 17, a case characterized by Wolder J. as “one of the most persistent acts of contempt that this court has ever experienced,” where custody was ultimately switched from the alienating mother to the father.

(22) *Kozachok v. Mangaw*, 2007 CarswellOnt 1069 (Ont. C.J.), at para. 22–24.

(23) *McAlister v. Jenkins*, 2008 CarswellOnt 4266 at para. 188.

(24) *McAlister v. Jenkins*, 2008 CarswellOnt 4266 at para. 188.

(25) *L.(J.K) v. S.(N.C.)(*2008), 54 R.F.L. (6th) 74 (Ont. Sup. Ct.).

(26) *L.(J.K) v. S.(N.C.)(*2008), 54 R.F.L. (6th) 74 (Ont. Sup. Ct.), at para. 192–195.

(27) *Sickinger v. Sickinger*, [2009] O.J. No. 2306, 69 R.F.L. (6th) 299 (Ont. Sup. Ct,), per Greer J, aff'd [2009] O.J. 5178, 75 R.F.L. (6th) 1 (Ont. C.A.).

(28) As discussed in Chapters 2 and 7 of this book, one of the themes of the authors' interviews with leading experts is that inappropriate therapeutic intervention can exacerbate the alienation of a child, as the therapist may support the child's decision to reject a parent.

(29) See, e.g., *Droit de la famille 083035*, 2008 QCCS 5680; and *Droit de la famille 10936*, 2010 QCCS 1745.

(30) The change in 2008 was the coming into force of Section 11 of the *Children Act 1989* (as inserted by the *Children and Adoption Act 2006*).

(31) [2004] EWCA Civ 597, [2004] 2 FLR 710, at paras. 21 & 22.

(32) [2009] O.J. 5032 (Ont. Sup. Ct), at paras. 79–81. Emphasis added.

(33) Interview, July 14, 2010.

([1]) This may include a term that there will not be any unauthorized involvement of new therapists.

(34) See Association of Family and Conciliation Courts (AFCC), *Guidelines for Court-Involved Therapy* (2010), and the AFCC Task Force on Parenting Coordination (2003), and Parenting coordination: Implementation issues, *Family Court Review* (2003)*, 41,* 533–564. Also see Fidler and Epstein (2008) and *Guidelines for Parenting Coordination* developed by the AFCC Task Force on Parenting Coordination, May, 2005, which can be found at: http://www.afccnet.org.

(35) Frequently, therapists not familiar with high-conflict and custody-litigating families may be of the mistaken view that only individual therapy for the child (or one or both of the parents) is indicated.

(36) Interview, June 14, 2010.

(37) Roles involving decision making or arbitrating commonly fall under the title of parenting coordinator or mediator/arbitrator (Association of Family and Conciliation Courts, 2005; Baris et al., 2000; Boyan & Termini, 2004; Coates, 2003; Coates, Deutsch, Starnes, Sullivan, & Sydlik, 2004; Garrity & Baris, 1994) and are subject to the jurisdiction's legislation or family law rules relevant to family arbitration. Coates et al. (2004) define parenting coordination as an intervention for high-conflict families in which the coordinator helps the parents implement their parenting plan, most typically one that has already been determined by agreement of the parties or the court. Parenting coordinators are usually retained for a term that lasts between 18 and 24 months. While some jurisdictions have legislation that allows a court to order parenting coordination with the arbitration component, more commonly, any arbitration requires the consent of the parties. A complete discussion of parenting coordination is beyond the scope of this book. For further information, see Kirkland (2008) and Shear (2008).

(38) See, e.g., *Jordan v. Jordan*, 14 A.3d 1136 (DC 2011).

(39) See, e.g., *Jordan v. Jordan*, 14 A.3d 1136 (DC 2011).

(40) See *M.(C.A.) v. M.(D.),* 2003 CarswellOnt 3606 (Ont. C.A.); and *Hunter v. Hunter*, 2008 CarswellBC 656 (B.C. S.C.).

(41) [2005] O.J. No. 5569 (O.C.J.).

(42) Ibid at para. 29.

(43) *Pettenuzzo-Deschene v. Deschene,* [2007] O.J. No. 3062, 40 R.F.L. (6th) 381 (Ont. Sup. Ct.).

(44) *Paton v. Shymkiw* (1996), 114 Man. R.(2d) 303, at 308 (Q.B. Fam. Div.).

(45) Veit J, in *Salloum v. Salloum* (1994), 154 A. R. 65 (Q.B.), para. 10.

(46) *CPL v. CH-W, ML-W, EL-W (by their Guardian ad litem,)* [2010] EWCA Civ 1253.

(47) *CPL v. CH-W, ML-W, EL-W (by their Guardian ad litem)* [2010] EWCA Civ 1253, at para. 96.

(48) *CPL v. CH-W, ML-W, EL-W (by their Guardian ad litem)* [2010] EWCA Civ 1253, at para. 108.

(49) *Cooper v. Cooper*, [2004] O.J. 5096, 2004 CarswellOnt 5255 (S.C.J.).

(50) Ibid. at para. 57.

(51) Ibid. at para. 42, Snowie J.

(52) Ibid.

(53) Ibid. at para. 42–43.

(54) C.A.G. v. S.C., 2005 MBQB 224, 20 R.F.L. (6th) 270 at para. 23.

(55) C.A.G. v. S.C., 2005 MBQB 224, 20 R.F.L. (6th) 270.

(56) C.A.G. v. S.C., 2005 MBQB 224 at para. 28.

(57) See *C.A.G. v. S.C.*, [2005] M.J. 372 (Q.B.).

(58) *Poitras v. Bucsis*, 2003 CarswellBC 443, [2003] B.C.J. 460 (B.C.S.C.)

(59) *McMillan v. McMillan* [1999] O.J. 285, 44 O.R. (3d) 139 (Ct. J. (Gen. Div.)).

(60) Ibid. at para. 25.

(61) Ibid. at para. 24.

(62) Ibid. at para. 29.

(63) *56 AD 3d 963, 869 NYS 2d 227 (3rd Dept. 2008).*

(64) See, e.g., *Moudry v. Moudry*, [2005] O.J. 2655 (S.C.).

(65) See, e.g., *Children's Law Reform Act*, R.S.O., 1990 ch. C 12 s. 36.

(66) *Allen v. Grenier*, [1997] O.J. 1198, 145 D.L.R. (4th) 286 (Gen. Div.).

(67) See *R.L.H. v. G.L.B*., 2002 ABQB 302 at para. 47: "While I understand counsel's position on not wanting to involve a seven-and-a-half-year-old child with police authorities over the question of access, I believe that the police enforcement clause is the only way that this [father] will live up to the obligations he has under this Court Order to produce the child." The judge hoped that the threat of police enforcement would help ensure compliance by the custodial parent, without the actual need for such enforcement.

(68) [2009] FMCAfam 228, at para. 52.

(69) See, e.g., *B.R. v. E.K*., [2007] O.J. 278 (S.C.J) at para. 9, where Wein J. ordered a 5-month period of supervised access because the 10-year-old girl had a "genuine reluctance" to visit with the father and had not seen him for several years after an inconclusive investigation of alleged sexual abuse.

(70) *Okatan v. Yagiz*, [2004] O.J. 2797 (S.C.J.).

(71) Ibid. at para. 61.

(72) Ibid. at para. 59, 62.

(73) See, e.g., *A.J.C. v. R.C*., [2003] B.C.J. 1150 (S.C.).

(74) See, e.g., *Sportack v. Sportack* [2007] O.J. No. 313 (S.C.J.) (where supervised access was ordered for a father who was insensitive to the needs of his children and frequently made unfounded allegations of abuse against the custodial mother).

(75) See, e.g*., Cooper v. Cooper,* [2004] O.J. 5096 (S.C.J.) and *Chadha v. Chadha*, [2006] O.J. 3744 (C.J.).

(76) Cal: Court of Appeals, 2nd Appellate Dist., 8th Div. 2010.

(77) See *Roy v. Roy* (2006), 27 R.F.L. (6th) 44 (Ont. C.A.); and *Lawson v. Lawson* (2006), 81 O.R. (3d) 321(C.A.).

(78) Complicating this further, it is not uncommon on the basis of privacy legislation for an alienated adolescent to refuse to allow the rejected parent medical or educational information.

(79) [2003] O.J. 371 at para. 3, 47 R.F.L. (5th) 1 (C.A.) and *Zacconi v. Mahdavi*, [2010] O.J. 2513, 2010 ONSC 3294.

(80) *Mikan v. Mikan*, [2004] O.J. No.740 (Sup. Ct.) at paras. 21–22.

(81) *See*, e.g., *Jordan v. Jordan,* 14 A.3d 1136 (DC 2011), 1995.

(82) *Burola v. Meek*, 64 AD 3d 962, 882 N.Y.S.2d 560 (3d Dept., 2009).

(83) Interview, August 15, 2010.

(84) *A.A. v. S.N.A*., [2007] B.C.J. 870 para. 75, 77, 84–85, (C.A.) Preston J.

(85) *A.A. v. S.N.A.,* [2007] B.C.J. 1474 (C.A.) para. 27. The courts ultimately decided that the variation in custody would only be effective if all contact with the mother was suspended for a year; see *A.A. v. S.N.A.,* [2009] B.C.J. 558 (B.C.S.C.).

(86) Interview, July 15, 2010.

(87) Interview, June 23, 2010.

(88) To support her claim, Bruch cites a newspaper report and telephone conversation with Judith Wallerstein on her follow-up of 25 young adults (Wallerstein et al., 2000). Also, see Warshak (2003a, and endnote 29 in 2010b) for a citation of Wallerstein's work that supports an alternative position.

(89) Interview, April 20, 2010.

(90) Interview, April 21, 2010.

(91) Interview, May 27, 2010.

(92) This view is supported by the majority of our key informants during interviews, including judges, lawyers, and mental health professionals.

(93) Interview, April, 21, 2010.

(94) Interview, April 15, 2010.

(95) See, e.g., *S.V. v. C.T.I*., [2009] O.J. 816, per Reilly J. where the judge makes the important distinction between a parent “forcing” and “requiring” certain behavior from a child, including such conduct as attending school and visiting with a noncustodial parent.

(96) In one case involving split custody, the judge found that both parents alienated the child in their custody from the other parent; there was no variation of custody in that case.

(97) Interview, May 24, 2010.

(98) Interview, August 15, 2010.

(99) Unreported, [1991], SCM 500–12-184613895 (Que. Sup.Ct.).

(100) Unreported, [1991], SCM 500–12-184613895 (Que. Sup.Ct.) at p. 21.

(101) 181 Misc.2d 722,694 N.Y.S.2d 592 (1999).

(102) 181 Misc.2d 722, at 725 694 N.Y.S.2d 592 (1999).

(103) 181 Misc.2d 722, at 729–30, 694 N.Y.S.2d 592 (1999).

(104) 181 Misc.2d 722, at 730–31, 694 N.Y.S.2d 592 (1999).

(105) *J.W. v. D.W*., [2005] N.S.J. 8 para. 64 (S.C. Fam. Div.), aff'd [2005] NSCA 102. See also *C.M.B.E v. D.J.E.,* [2006] N.B.J. 364 (C.A.), where the New Brunswick Court of Appeal, at para. 9, accepted the trial judge's determination that the custodial mother had been “waging marital warfare,” which resulted in a denial of parenting

time to the father, and accepted that this was “sufficient to trigger a fresh inquiry into the issue of custody” and to justify transferring custody to the father.

(106) J.*W. v. D.W.,* [2005] N.S.J. 8 (S.C.) aff'd. [2005] N.S.J. 275 (C.A) at para. 64.

(107) Ibid. para. 62.

(108) [2006] O.J. 1825 (C.A.).

(109) Ibid., at para. 8.

(110) 2008 CarswellOnt 2903 (S.C.J.)

(111) Ibid. at para 64.

(112) 2005 CarswellNS 235 (N.S.S.C.)

(113) Ibid. at para. 19.

(114) (2006), 31 R.F.L. (6th) 164 (Ont. S.C.J.).

(115) Ibid. at para. 145.

(116) 46 A.D.3d 893, 849 N.Y.S.2d 586 (2007).

(117) *Re S (Transfer of Residence),* [2010] 1 FLR 1785, affirmed *Re S (A Child),* [2010] EWCA Civ 219.

(118) *Re S (Transfer of Residence),* [2010] 1 FLR 1785, at para. 34.

(119) *Re S (A Child)*, [2010] EWHC B2 Fam.

(120) *Re S (A Child)* [2010] EWCA Civ 325.

(121) *Re S*,[2010] EWHC B19 Fam.

(122) *Re S*,[2010] EWHC B19 Fam, at para. 59.

(123) See, e.g., *Re M (Intractable Contact Dispute),*[2003] 2 FLR 636. In that case, the order for interim foster care was actually made before a final determination had been made about whether there would be a change in residence.

(124) See, e.g., *Bailey v. Bailey* [1996] O.J. No. 4891; *Roda v. Roda* [2000] O.J. No. 3786 (S.C.J.).

(125) See, e.g., *P. (J.E.) v. W. (H.J.)*(1987), 11 R.F.L. (3d) 136 (Sask. Q.B (Sask. Q.B.) where a 6-year-old girl had an aversion toward her father because of the mother's hostility to him. The mother was opposed to parenting time, despite mediation efforts. The court refused to order contact, at least until “the child is considerably older.”

(126) [2006] O.J. 1521 (Ont. Ct. J.).

(127) [2010] EWCA1045.

(128) [2010] EWCA1045, at para. 8.

(129) See Warshak, (2003a), at 282; and Sullivan & Kelly (2001), at 311.

(130) 17 AD 3d 736 (NY: App. Div., 3rd Dept. 2005).

(131) *Lee v. Lee* (1990), 29 R.F.L. (3d) 417 (B.C.C.A.).163.

(132) See, e.g., *Ungerer v. Ungerer,* [1998] B.C.J. 698 at para. 42, 158 D.L.R. (4th) (C.A.) where the wife's alienating conduct was considered "sufficiently egregious to disentitle her to continued [spousal] support." See also *Bruni v. Bruni,* 2010 ONSC 6568 where Quinn J. terminated spousal support in response to the mother's alienating conduct.

(133) *Welstead v. Bainbridge* (1994), 2 R.F.L. (4th) 419 (Ont. Ct. J. (Prov. Div.)); see also James G. McLeod, "Annotation to *Lee v. Lee*" (1990), 29 R.F.L. (3d) 417.

(134) See, e.g., *Lampron v. Lampron* (2006), 29 R.F.L. (6th) 307 (Ont. Sup. Ct.); *Webb v. Stropple*, 2006 BCSC 294; and *Moore-Orlowski v. Johnston*, 2006 SKQB 279, 27 R.F.L. (6th) 396.

(135) *Morgan v. Morgan,* 2006 SKQB 76; and *Caterini v. Zaccaria,* 2010 ONSC 6473.

(136) Interview, June 2, 2010.

(137) Interview, April 19, 2010.

(138) Interview, August 15, 2010.

(139) See, e.g., *W.C. v. C.E.,* 2010 ONSC 3575.

(140) For a rare example of an Ontario case where a Superior Court judge concluded that he had the "inherent authority" to require a child protection agency to provide services in an alienation case in order to address emotional abuse concerns, see *Fiorito v. Wiggins,* 2011 ONSC 1868, per Harper J.

(141) For example, the *Rules of Professional Conduct* of Ontario's Law Society state that counsel for parents have an obligation to advise those clients about the effect of their conduct on their children, with the Commentary to Rule 4.01 providing:

In adversary proceedings that will likely affect the health, welfare, or security of a child, a lawyer should advise the client to take into account the best interests of the child, where this can be done without prejudicing the legitimate interests of the client.

See also Waldron and Joanis (1996), p. 130.

(142) Johnston (2005a), p. 757, and Baker (2005b).

(143) *Mikan v. Mikan* [2004] O.J. 740 (Ont. Sup. Ct.).