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SECTION OF LITIGATION

No-Contact Orders in Parental Alienation Cases

It is critical to understand why family courts order temporary no-contact periods between the favored parent who has been found to have engaged in alienating behaviors and the child.

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Parental alienation is not new: The mental condition has been described in the legal cases since the early nineteenth century and in the scientific literature since the 1940s. *See, e.g.*, “Westmeath v. Westmeath: The Wars Between the Westmeaths, 1812–1857,” in Lawrence Stone, *Broken Lives: Separation and Divorce in England, 1660–1857*, at 284 (1993); David M. Levy, *Maternal Overprotection* 153 (1943). One of the most widely accepted definitions of the condition is a “mental condition in which a child—usually one whose parents are engaged in a high-conflict separation or divorce—allies himself or herself strongly with an alienating parent and rejects a relationship with the ‘target’ parent without legitimate justification.” D. Lorandos, W. Bernet & R. Sauber, “Overview of Parental Alienation,” in *Parental Alienation: The Handbook for Mental Health and Legal Professionals* 5 (Lorandos, Bernet & Sauber eds., Charles C. Thomas Ltd. 2013).

A photograph of a man with glasses and a beard, wearing a dark t-shirt, sitting at a desk in a modern office. He is looking at a large monitor displaying a colorful map. There is another monitor and a laptop on the desk. The background shows office shelves and a window. The Dell logo is in the top left corner.

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A Form of Emotional Abuse That Should Not Be Tolerated

In defining parental alienation, family courts have focused on behaviors manifested by an alienating parent and the signs of alienation in the affected child:

- In *Meadows v. Meadows*, the Michigan Court of Appeals focused on the behaviors of an alienating parent: “The process of one parent trying to undermine and destroy to varying degrees the relationship that the child has with the other parent.” *Meadows v. Meadows/Henderson*, 2010 WL 3814352 (Mich. Ct. App. 2010) (unpublished).
- In *McClain v. McClain*, the Tennessee Court of Appeals focused on the mental condition of the child: “The essential feature of parental alienation is that a child . . . allies himself or herself strongly with one parent (the preferred parent) and rejects a relationship with the other parent (the alienated parent) without legitimate justification.” *McClain v. McClain*, 539 S.W.3d 170, 182 (Tenn. Ct. App. 2017).
- In *J.F. v. D.F.*, the New York Supreme Court attempted to define parental alienation by borrowing a chapter from the elements of the tort of intentional infliction of emotional distress and defined the condition to require that

(1) the alleged alienating conduct, without any other legitimate justification, be directed by the favored parent, (2) with the intention of damaging the reputation of the other parent in the children’s eyes or which disregards a substantial possibility of causing such, (3) which proximately causes a diminished interest of the children in spending time with the non-favored parent and, (4) in fact, results in the children refusing to spend time with the targeted parent either in person, or via other forms of communication.

J.F. v. D.F., 61 Misc. 3d 1226(A), 2018 NY Slip Op. 51829(U) (N.Y. Sup. Ct. 2018).

Courts have also used terms other than parental alienation to criticize the very behaviors underlying the condition but have chosen to call it by another name. For instance, in *Martin v. Martin*, the Nebraska Supreme Court found a custodial parent to have used “passive aggressive techniques” in undercutting the non-custodial parent’s relationship with the children. *Martin v. Martin*, 294 Neb. 106 (Neb. 2016). While the words “parental alienation” were not used, the

Nebraska court's detailed discussion of the custodial parent's alienating behaviors and strategies left little room for doubt that the court was addressing the phenomenon of parental alienation.

Experts, too, have used different terms to describe these behaviors (*see* Lorandos, Bernet & Sauber, *supra*, at 8):

- For example, Dr. Stanley Clawar, a sociologist, and Brynne Rivlin, a social worker, use the terms “programming,” “brainwashing,” and “indoctrination” when describing the behaviors that cause parental alienation. Clawar & Rivlin, *Children Held Hostage: Dealing with Programmed and Brainwashed Children* (ABA Section of Family Law 2013). The authors explained that these behaviors

[h]inder the relationship of the child with the other parent due to jealousy or draw the child closer to the communicating parent due to loneliness or a desire to obtain an ally. These techniques may also be employed to control or distort information the child provides to a lawyer, judge, conciliator, relatives, friends, or others, as in abuse cases.

Id. at 15.

- Dr. Richard Warshak, a clinical professor of psychiatry, has used the term “pathological alienation” that results from such alienating behaviors: [a] disturbance in which children, usually in the context of sharing a parent's negative attitudes, suffer unreasonable aversion to a person or persons with whom they formerly enjoyed normal relations or with whom they would normally develop affectionate relations. Warshak, “Social science and parental alienation: Examining the disputes and the evidence,” in *The International Handbook of Parental Alienation Syndrome: Conceptual, Clinical and Legal Considerations* 361 (R.A. Gardner, S.R. Sauber & D. Lorandos eds., 2006).

Regardless of the varying definitions of parental alienation, or even nomenclature, the consensus among the courts is that “there is no doubt that parental alienation exists.” *J.F. v. D.F.*, 61 Misc.3d 1226(A), 2018 N.Y. Slip Op. 51829(U). More importantly, courts agree that it “is a form of emotional abuse that should not be tolerated.” *McClain v. McClain*, 539 S.W.3d at 200. In the

end, the consensus among the courts, experts, and mental health professionals appears to be that parental alienation “refers to a child’s reluctance or refusal to have a relationship with a parent without a good reason.” W. Bernet, M. Wamboldt & W. Narrow, “Child Affected by Parental Relationship Distress,” 55 *J. Am. Acad. Child & Adolescent Psychiatry* 571, 575 (July 2016).

Temporary No-Contact Orders—Necessary and Warranted in Alienation Cases

Alienated children suffer from severe behavioral, emotional, and cognitive impairments. R. Warshak, “Severe Cases of Parental Alienation,” in *Parental Alienation: The Handbook for Mental Health and Legal Professionals* 5 (Lorandos, Bernet & Sauber eds., Charles C. Thomas Ltd. 2013). Specialized reunification programs (which are radically different from “therapy”) are designed to repair the damaged relationship between alienated parents and the children. They often require a temporary no-contact period between the favored parent and the children, together with the parent’s compliance with some conditions before the resumption of regular contact. Resumption of contact is dependent on the favored parent’s willingness and demonstrated ability to modify his or her alienating behaviors—behaviors that would no doubt sabotage the gains made during the reunification program in an absence of a no-contact order. Also, “optimal timing” to resume regular contact would depend on a number of factors, “such as the favored parent’s ability to modify behaviors that create difficulties for the children, the children’s vulnerability to feeling pressured to realign with a parent, the duration of the alienation or estrangement prior to the Workshop, and the favored parent’s past conduct and compliance with court orders.” Warshak (2010), *supra*, at note 95.

In cases of severe parental alienation, experienced and knowledgeable clinicians recommend “a period of 3-6 months before regular contacts resume” between a formerly favored parent and the child “to allow a child to consolidate gains and work through the numerous issues that arise in living with the rejected parent free from the influence of the favored parent.” *Id.* While the regular (unsupervised) contact is held off for a limited period, therapeutically monitored contacts between a formerly favored parent and child may occur sooner. *Id.*

It is critical to understand why family courts order temporary no-contact periods between the favored parent who has been found to have engaged in alienating behaviors and the child.

When contact resumes, it usually occurs first during sessions with a professional who can monitor its impact on the child who is going through (or has just been through) a reunification program. Such precautions are necessary because research demonstrates that it is very hard for alienating parents to change their behaviors. If contact is restored prematurely or without proper safeguards, the children become “re-alienated,” reverting to their old behaviors and back to rejecting the target parent. *Id.* at 69. The pathology of parental alienation is so severe that some alienators “chose to go for months “without seeing [their] children or working towards meeting conditions for renewal of contact.” *Id.* Some refuse to cooperate with court orders and want “no contact with [the] children because [they] take their [the children’s] reconciliation with [the target parent] as a personal rejection.” *Id.* One “chose to cut off all contact with [the child] and said that when the boy turns 18 he could choose to renew contact.” *Id.*

Repairing the Damaged Relationship Between the Alienated Child and the Targeted Parent

Once a court determines a child has been alienated, it must make a decision as to what legal and mental health interventions are mandated in the best interests of the child. In making this decision, courts often face what British Columbia Justice Bruce Preston termed “a stark dilemma.” *A.A. v. S.N.A.*, [2007] BCSC 594 (Can.).

More than 10 years ago, Justice Preston wrestled with this dilemma:

The probable future damage to M. by leaving her in her mother’s care must be balanced against the danger to her of forcible removal from the strongest parental connections she has . . . I conclude that the forcible removal of M. from her mother’s and her grandmother’s care has a high likelihood of failure, either because M. will psychologically buckle under the enormous strain or because she will successfully resist re-integration with her father.

Id. at 84–87.

Nonetheless, the Court of Appeals weighed in on the other side of this “stark dilemma,” disagreed, and found that the obligation of the court to make the order it determines to be in

the best interests of the child “cannot be ousted by the insistence of an intransigent parent who is ‘blind’ to her child’s interests. . . . The status quo is so detrimental to M. that a change must be made in this case.” *A.A. v. S.N.A.*, [2007] B.C.J. No. 1475; 2007 B.C.C.A. 364; 160 A.C.W.S. (3d) 500, at 8.

In contrast to Justice Preston’s “stark dilemma,” family courts around the country, recognizing the severe psychological toll wreaked by parental alienation on the children, are increasingly open to providing aggressive but necessary intervention:

- In February 2020, an Indiana family court found that a father had engaged in severe parental alienation and domestic and family abuse. Given that the child was over 16 years of age, the court recognized that time was of essence in reuniting the child with the mother, the targeted parent. The court provided immediate and effective intervention: It gave the mother sole legal and primary custody, ordered the mother and the child to participate in a specialized reunification program that is designed for the alienation dynamic, ordered a 90-day no-contact period between the father and the child, and ordered the father to cooperate and comply with the recommendations of the reunification counselors. *In re the Marriage of Wright and Wright*, No. 53C08-1804-DC-000203 (Monroe Cty. Cir. Ct. VIII, Ind. Feb. 6, 2020).
- In 2017, the Tennessee Court of Appeals affirmed a ruling where the trial court, upon finding severe parental alienation, ordered no contact between the minor child and the alienating parent (the father) “for at least 90 days” beginning with a reunification program. *McClain v. McClain*, 539 S.W.3d at 183. In addition, the alienating parent’s future parenting time with the child was conditioned on the parent’s compliance with the rules and recommendations of the reunification program counselor and the aftercare professional. *Id.* As the court found, the seemingly harsh but temporary no-contact period was a necessary step not only to give the child a realistic hope at reunification but also to protect the child from continued alienating behaviors. The court reasoned that the traditional therapy, counseling, education, and parenting coordination had yielded zero results and made a bad case worse:

That’s what we’ve been doing for nigh on 16 years. We’ve been working on this and working on it and we’ve been to counselors and therapists and doctors and courts

and more counselors and different therapists and more doctors and court. It's a merry-go-round upon which we have all been for many, many years and it did not work. I have no reason to believe it's ever going to work in the future."

Id. at 210.

The court realized that the temporary, 90-day no-contact period, together with a specialized reunification program, was "most likely to result in a change in the pattern of parental alienation and therefore in the best interest of the children." *Id.* at 211. Such a measure was necessary to facilitate reunification of alienated parents with alienated children and to "reduce the potential for sabotage." *Id.* at 213.

Separating Children from an Alienating Parent Found to Not Be Traumatic

Research demonstrates that alienation abates when children are required to spend time with the parent they claim to hate or fear. R. Warshak, "Ten Parental Alienation Fallacies That Compromise Decisions in Court and in Therapy," 46 *Prof. Psychol.: Res. & Practice* 235–49 (Aug. 2015). Despite this, lawyers, guardians ad litem, lawyer-guardians ad litem, children's counselors, and other professionals predict dire consequences to children if the court fails to endorse their strong and strident preferences to avoid a parent. Usually, such predictions "are vulnerable to reliability challenges because the experts cite undocumented anecdotes, irrelevant research, and discredited interpretations of attachment theory." *Id.* In dealing with such predictions, a court should consider the following: (1) No peer-reviewed study has documented harm to severely alienated children from the reversal of custody; (2) no study has reported that adults, who as children complied with expectations to repair a damaged relationship with a parent, later regretted having been obliged to do so; and (3) studies of adults who were allowed to disown a parent find that they regretted that decision and reported long-term problems with guilt and depression that they attributed to having been allowed to reject one of their parents. *Id.* (citing A.J.L. Baker, "The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study," 33 *Am. J. Fam. Therapy* 289–302 (July 2005)).

Professionals who attempt to persuade courts not to separate children from an alienating parent (or oppose a temporary no-contact order between the alienating parent and the children) generally cite attachment theory to support their predictions of "trauma" or

psychological damage to children. Such arguments are flawed, misleading, and “rooted in research with children who experienced prolonged institutional care as a result of being orphaned or separated from their families for other—often severely traumatic—reasons.” *Id.* (citing P.S. Ludolph & M.D. Dale, “Attachment in Child Custody: An Additive Factor, Not a Determinative One,” 46 *Fam. L. Q.* 1–40 (Spring 2012)). A consensus of leading authorities on attachment and divorce shows that this theory does not support generalizing the negative outcomes of traumatized children who lose both parents to a case involving parental alienation, where children leave one parent’s home to spend time with their other parent, under a court order. *Id.*

Further, attorneys for targeted parents should challenge these experts to unpack their evocative jargon if they attempt to dissuade a court from intervening in an alienation case by using terms like “trauma” and “attachment.” *Id.* When these experts predict that the child will be “traumatized,” what they usually mean is that the child will be “unsettled.” *Id.* (citing J.A. Zervopoulos, *How to Examine Mental Health Experts* (ABA 2013)). Such pessimistic predictions not only lack empirical support but are willfully blind to the well-documented benefits of removing a child from an alienating parent whose behavior is considered psychologically abusive. Clawar & Rivlin, *supra*.

Effective interventions provide experiences that help uncover the positive bond between the child and the targeted parent. “These experiences can help [the children] to create a new narrative about their lives, one that is more cohesive, more hopeful, and allows them to begin to see themselves in a new place.” *Id.* (citing C.L. Norton, “Reinventing the Wheel: From Talk Therapy to Innovative Interventions,” in *Innovative Interventions in Child and Adolescent Mental Health 2* (C.L. Norton ed., Routledge 2011)).

In *Martin v. Martin*, the Michigan Court of Appeals acknowledged how alienation behaviors are alarming and psychologically abusive:

[T]hese are not minor disputes over contempt and parenting time. These are matters that could have a significant effect on the child’s life, including on her long-term mental and emotional health: having to maintain the perception of hatred and contempt toward her father—which she may or may not share with her mother—will undoubtedly affect her mental and emotional health as well as her long-term relationship with her father.

Martin v. Martin, No. 349261, slip op. at 9 (Mich. Ct. App. 2020).

Given the significant damage to children who remain alienated from a parent, removing the child from an alienating parent's custody and entering a temporary no-contact order between the two is ultimately "far less harsh or extreme than a decision that consigns a child to lose a parent and extended family under the toxic influence of the other parent who failed to recognize and support the child's need for two parents." Warshak, "Ten Parental Alienation Fallacies" (2015), *supra*, at 244.

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