

Recent Trends in Divorce and Custody Litigation

by Richard A. Gardner, MD

During the last six to seven years there has been a burgeoning of child custody litigation. This has been the result of two important changes in child custody determinations. The first relates to the appreciation that the "tender years presumption" (in which the mother, by virtue of being female, was automatically considered to be the preferable parent) was criticized by fathers as being basically sexist. And the courts agreed. Accordingly, fathers no longer passively accepted the fact that mothers would automatically be awarded custody and began litigating for custody of their children. The second factor, which is even more recent, relates to the increasing popularity of the joint custody concept. Designating one parent as the sole custodial parent and the other as the visitor came to be appreciated as inegalitarian and ego-debasing for the non-custodial parent. Although there is much to argue for the joint custody concept, it has proved to be useful mainly for those who can cooperate and communicate well and who are equally capable regarding parenting capacity. When these criteria are not satisfied parents will commonly litigate in order to win joint custody. As a result of these two developments the position of custodial mothers has become much more precarious. Whereas previously they could rely upon the tender years presumption and the sole custody concept to protect them from attempts on their husbands' part to gain custody, they now have no such reassurances. Fathers know this well and have been litigating at an ever-increasing rate. The psychological toll of this burgeoning litigation on both parents and children has been formidable.

Of the many types of psychological disturbance that can be brought about by such litigation, there is one that I focus on here. Although this syndrome certainly existed in the past, it is occurring with such increasing frequency at this point that it deserves a special name. The term I prefer to use is parental alienation syndrome. I have introduced this term to refer to a disturbance in which children are obsessed with deprecation and criticism of a parent -- denigration that is unjustified and/or exaggerated. The notion that such children are merely "brainwashed" is narrow. The term brainwashing implies that one parent is systematically and consciously programming the child to denigrate the other parent. The concept of the parental alienation syndrome includes the brainwashing component but is much more inclusive. It includes not only conscious but subconscious and unconscious factors within the parent that contribute to the child's alienation. Furthermore (and this is extremely important), it includes factors that arise within the child -- independent of the parental contributions -- that contribute to the development of the syndrome.

Typically, the child is obsessed with "hatred" of a parent. (The word *hatred* is placed in quotes because there are still many tender and loving feelings felt toward the allegedly despised parent that are not permitted expression.) These children speak of the hated parent with every vilification and profanity in their vocabulary, without embarrassment or guilt. The vilification of the parent often has the quality of a litany. After only minimal prompting by a lawyer, judge, probation officer, mental health professional, or other person involved in the litigation, the record

will be turned on and a command performance provided. Not only is there the rehearsed quality to the speech but one often hears phraseology that is identical to that used by the "loved" parent. (Again, the word *loved* is placed in quotations because hostility toward and fear of that parent may similarly be unexpressed.)

Even years after they have taken place, the child may justify the alienation with memories of minor altercations experienced in the relationship with the hated parent. These are usually trivial and are experiences that most children quickly forget: "He always used to speak very loud when he told me to brush my teeth"; "She used to say to me `Don't interrupt'"; and "He used to make a lot of noise when he chewed at the table." When these children are asked to give more compelling reasons for the hatred, they are unable to provide them. Frequently, the loved parent will agree with the child that these professed reasons justify the ongoing animosity.

The professions of hatred are most intense when the children and the loved parent are in the presence of the alienated one. However, when the child is alone with the allegedly hated parent, he or she may exhibit anything from hatred to neutrality to expressions of affection. Often, when these children are with the hated parent they will let their guard down and start to enjoy themselves. Then, almost as if they have realized that they are doing something "wrong," they will suddenly stiffen up and resume their expressions of withdrawal and animosity. Another maneuver commonly utilized by these children is to profess affection to one parent and to ask that parent to swear that he or she will not reveal the professions of love to the other parent. And the same statement is made to the other parent. In this way these children "cover their tracks" and avoid thereby the disclosure of their schemes. Such children may find family interviews with therapists extremely anxiety provoking, because of the fear that their manipulations and maneuvers will be divulged.

The hatred of the parent often extends to include that parent's complete extended family. Cousins, aunts, uncles, and grandparents, with whom the child previously may have had loving relationships, are now viewed as similarly obnoxious. Greeting cards are not reciprocated. Presents sent to the child's home are refused, remain unopened, or even destroyed (generally in the presence of the loved parent). When the hated parent's relatives call on the telephone, the child will respond with angry vilifications or quickly hang up on the caller. (These responses are more likely to occur if the loved parent is within hearing distance of the conversation.) With regard to the hatred of the relatives, the child is even less capable of providing justifications for the animosity. The rage of these children is so great that they become completely oblivious to the deprivations they are causing themselves. Again, the loved parent is typically unconcerned with the untoward psychological effects on the child of the rejection of these relatives.

Another symptom of the parental alienation syndrome is the complete lack of ambivalence. All human relationships are ambivalent, and parent-child relationships are no exception. The hated parent is viewed as "all bad" and the loved parent is "all good." The hated parent may have been greatly dedicated to the child's upbringing, and a deep bond may have been created over many years. The hated parent may produce photos that demonstrate clearly a joyful and deep relationship in which there was significant affection, tenderness, and mutual pleasure. But all these experiences appear to have been obliterated from the child's memory. When these children are shown photos of enjoyable events with the hated parent, they usually rationalize the

experiences as having been forgotten, nonexistent, or feigned: "I really hated being with him then; I just smiled in the picture because he made me. He said he'd hit me if I didn't smile." This element of complete lack of ambivalence is a typical manifestation of the parental alienation syndrome and should make one dubious about the depth of the professed animosity.

The child may exhibit a guiltless disregard for the feelings of the hated parent. There will be a complete absence of gratitude for gifts, support payments and other manifestations of the hated parent's continued involvement and affection. Often these children will want to be certain the alienated parent continues to provide support payments but at the same time adamantly refuse to visit. Commonly they will say that they *never* want to see the hated parent again, or not until their late teens or early twenties. To such a child I might say: "So you want your father to continue paying for all your food, clothing, rent, and education -- even private high school and college -- and yet you still don't want to see him at all, ever again. Is that right?" Such a child might respond: "That's right. He doesn't deserve to see me. He's mean and paying all that money is a good punishment for him."

Those who have never seen such children may consider this description a caricature. Those who have seen them will recognize the description immediately, although some children may not manifest all the symptoms. The parental alienation syndrome is becoming increasingly common and there is good reason to predict that it will become even more common in the immediate future if custody conflicts become even more prevalent.

At this point I will discuss the pathogenesis of this disorder, with particular emphasis on three contributing factors: parental "brainwashing," situational factors, and the child's own contributions. By brainwashing I refer to an active and conscious attempt on a parent's part to deliberately bring about the alienation of the child from the other parent. Often the brainwashing is overt and obvious. The loved parent embarks upon an unrelenting campaign of denigration that may last for years. A mother, for example, whose divorce was the result of marital problems that contributed to her husband's seeking the affection of another woman, may continually vilify the father to her children with such terms as "adulterer," "philanderer," and "abandoner." Similarly, she may refer to the father's new woman friend as a "slut," "whore," and "home-breaker." No attention is given to the problems in the marriage, especially such a mother's problem(s) that may have contributed to the new involvement.

At times the criticisms may even be delusional, but the child is brought to believe entirely the validity of the accusations. The child may thereby come to view the non-custodial parent as the incarnation of all the evil that has ever existed on earth. Often the infrequency of visits or lack of contact with the hated parent facilitates the child's accepting completely the loved parent's criticisms. There is little or no opportunity to correct the distortions by actual experiences.

A mother may complain so bitterly about her financial restrictions that she will lead the children to believe that they may actually go without food, clothing, and shelter, that they may very well freeze and/or starve to death. I have seen extremely wealthy and extravagant women utilize this maneuver -- to the extent that their children have come to believe that because of their father's stinginess they are ever on the verge of starvation. There are mothers who, when talking to the children about their husbands having left the home, will make such statements as, "Your father's

abandoned us." In most cases the father has left the mother and has not lost any affection for the children. Clumping the children together with herself (by using the word "us" rather than "me") promulgates the notion that they too have been rejected.

There are parents who are quite creative in their brainwashing maneuvers. A father calls the home to speak to his son. The mother answers the telephone in the son's room. The father simply asks if he can speak with his son. The mother (with the boy right next to her) says: "I'm glad he can't hear what you're saying right now" or "If he heard what you just said, I'm sure he would never speak with you again." When the father finally speaks with the boy and explains that he had said absolutely nothing that was critical, the boy may be incredulous. The result is that the father becomes very fearful of calling his son, lest he again be trapped in this way. The father then is accused by the mother of showing no interest in his boy. A related maneuver is for the mother to say to the calling father (again when the boy is within earshot of the mother and the father has made an innocuous statement): "That's your opinion. In my opinion he's a *very fine boy*." The implication here is that the father has made some scathing criticism and that the mother is defending the child.

These attempts to denigrate a parent are conscious and deliberate. There are, however, other ways of programming children that can be equally if not more effective but which do not involve the parent actually recognizing what is going on. In this way the parent can profess innocence of brainwashing propensities. A parent may profess being a strong subscriber to the common advice: "Never criticize the other parent to the child." A mother may use this advice with comments such as: "There are things I could say about your father that would make your hair stand on end, but I'm not the kind of a person who criticizes a parent to his children." Such a comment engenders far more fear, distrust, and even hatred than would the presentation of an actual list of the father's alleged defects. The parent who expresses neutrality regarding visitation is essentially communicating criticism of the non-custodial parent. The healthy parent appreciates how vital is the children's ongoing involvement with the non-custodial parent and does not accept inconsequential and frivolous reasons for not visiting. The "neutrality" essentially communicates to the child the message that the non-custodial parent cannot provide enough affection, attention, and other desirable input to make a missed visitation a loss of any consequence.

Related to the neutrality maneuver is the one in which the parent repeatedly insists that *the child* be the one to make the decision regarding visitation. Such a child generally knows that the parent basically does not want the visitation and so the child then professes the strong opinion that he or she does not wish to visit. Such a mother might say after a child refuses: "I respect your strength in standing up for your rights. If we have to go to court to defend you we'll do it. I'm not going to let him push you around. You have your right to say no and you can count on my full support."

A common way in which a parent will contribute to the alienation is to view as "harassment" the attempts on the part of the hated parent to make contact with the children. The alienated parent expresses interest by telephone calls, attempts at visitation, the sending of presents, etc. These are termed "harassment" and the children themselves come to view such overtures similarly. In frustration the parent increases efforts in these areas, thereby increasing the likelihood that the

attempts will be viewed as nuisances. A related maneuver involves a mother's saying to a calling father (with the child within earshot): "If you keep up this pressure to see him we're going to have one of those teenage suicides on our hands." If this is said enough times the child then learns that this is a good way to avoid seeing his father. The next step is for the child to threaten suicide if the father attempts to visit, to which the mother can then say to the father: "He keeps saying that he'll kill himself if he has to visit you."

Often situational factors are conducive to the development of the disorder. Most parents in the custody conflict know that time is on the side of the custodial parent. They appreciate that the longer the child remains with a particular parent, the greater the likelihood the child will fear and resist moving to the home of the other. One way for a child to deal with this fear is to denigrate the non-custodial parent with criticisms that justify the child's remaining in the custodial home. For example, a mother dies and the maternal grandparents take over care of the child. Although at first the father may welcome their involvement, there are many cases on record of the maternal grandparents then litigating for custody of the child. The child may then develop formidable resentments against the father in order to ensure that he or she will remain with the grandparents, the people whom the child has come to view as preferable parents.

In one case I was involved with, two girls developed this disorder after their mother, with whom they were living, met a man who lived in Colorado. The mother then decided to move there with the two girls. The father brought the mother to court in an attempt to restrain her from moving out of the state with the children. Whereas previously there had been a good relationship with their father, the girls gradually developed increasing hatred of him as their mother became progressively embroiled in the litigation. It was clear that the disorder would not have arisen had the mother not met a man who lived in Colorado, a man whom she wished to marry.

We are now observing another phenomenon that is contributing to the development of the parental alienation syndrome: the widespread attention being given to the sexual abuse of children by parents. Heretofore, the general consensus among those who worked with sexually-abused children was that it was extremely rare for a child to fabricate sexual abuse. This is no longer the case. The child's accusation of a parent's sexual abuse can now be a powerful weapon in the alienation campaign. A vengeful parent may exaggerate a nonexistent or inconsequential sexual contact and build up a case for sexual abuse -- even to the point of reporting the alleged child abuser to investigatory authorities and taking legal action. And the child, in order to ingratiate him or herself with the litigious parent, may go along with the scheme. The argument that was previously given to support the position that false accusations of sexual abuse by children are extremely rare was that sexual encounters with adults were basically outside the child's scheme of things. Accordingly, having no specific experience with sex abuse, the child was not likely to describe in detail sexual encounters with adults. This is no longer the situation. We are living at a time when sex abuse is discussed on television, in newspapers, magazines, and even in school prevention programs. Hardly a child now is not literally bombarded with information about the details of sexual abuse. Accordingly, it is no longer true that the child does not possess the information to make a credible accusation. Children who are looking for excuses for vilification and/or ammunition for alienation now have a wealth of information for the creation of their sexual scenarios. And there are even situations in which there has been no

particular sexual abuse indoctrination or prompting by the parent; the child him or herself originates the complaint.

It is important for mental health professionals who are evaluating children who allege sex abuse to inquire as to whether the parents are involved in a custody conflict. If so, they should consider the possibility that the allegation has been fabricated. I am not claiming that bona fide sex abuse does not take place in families in which there is a custody conflict; I am only stating that the possibility of fabrication is increased in this situation. One of the ways of differentiating between the child who is fabricating and the one who has genuinely been abused is to observe closely the way in which the child makes the accusation. Children who have genuinely been abused are often fearful of revealing the facts. Often they have been warned by the abuser that there will be terrible consequences if the sexual encounters are divulged. They tend to be anxious, tense, timid, and shy. They may fear encounters with other adults who are of the same sex as the abuser, fearing similar such exploitation and threats. The child who fabricates sex abuse, however, presents with an entirely different picture. Most often these children are quite comfortable with their accusations and have prepared little speeches, which they freely provide to attorneys, mental health professionals, judges and anyone else who will listen. Their litany should be a clue to the fact that they are fabricating. Another way of finding out whether the child is telling the truth is to place the child and the accused parent in the same room. The adversary system does not allow itself this important method for obtaining information that could be useful to it in determining "the truth." When the accused and the accuser are in the same room together, with the opportunity for an "eyeball-to-eyeball confrontation," there is a much greater likelihood that the two individuals will be honest with one another. After all, they were both allegedly there. They know better than anyone else the details of the alleged encounter and each one is likely to pick up the other's fabrications in the most sensitive way. Of course, the younger the child, the less the likelihood he or she will be able to engage effectively in such confrontations, but they can still be useful. Lastly, mothers of these children relish the accusation and deny conflicting evidence. Mothers of children who are genuinely abused commonly deny the abuse or react with horror and grief.

And there are factors that originate within the child. Of course, a parent may use the child's contribution to promulgate the alienation and "get mileage out of" this factor, but it is a contribution that originates from psychopathological factors within the child. An important contributing element stems from the child's fear of alienating the preferred parent. The hated parent is only ostensibly hated; there is still much love. But the loved parent is feared much more than loved. Generally, the fear is that of losing the love of the preferred parent. In the usual situation it is the father who has left the home. He has thereby provided for himself the reputation of being the rejecter and the abandoner. No matter how justified his leaving the home, the children will generally view him as an abandoner. Having already been abandoned by one parent the children are not going to risk abandonment by the second. Accordingly, they fear expressing resentment to the remaining parent (usually the mother) and will often take her position in any conflict with the father.

One boy repeatedly observed his father beating his mother -- sometimes mercilessly. In order to protect himself from similar maltreatment, the boy professed deep affection for this father and hatred of his mother. His professions of love stemmed from fear rather than from genuine

feelings of affection. Another factor that may be operative in such situations is the child's model of what a loving relationship should be. Love is viewed as manifesting itself by hostile interaction. Father demonstrates his "affection" for mother here by beating her. In order to be sure of obtaining this "love" the child opts to live with the hostile parent.

Another factor is the child's appreciation that the custodial parent will tolerate much more hostility than the non-custodial and can be relied upon to remain loyal to the child, whereas the non-custodial provides no such reassurance. Hostilities from many sources, both related and unrelated to the divorce, then may become vented on the custodial parent. And anger toward the departed parent can become displaced onto the custodial parent, a much safer target -- a target from which significant retaliation is not feared.

The most important element in the treatment of these children is immediate transfer to the home of the so-called hated parent. Therapy alone, while living in the home of the so-called loved parent, is likely to prove futile. While still in that home the child is going to be exposed continually to the bombardment of denigration and the other subtle influences that are contributing to the perpetuation of the syndrome. It is only via removal from the home that there is any chance of interruption of this pathological process. Often I will recommend a month or so of absolutely no contact with the "loved parent," with the exception of short telephone calls a few times a week. And even here, I recommend that the new custodial parent be permitted to monitor and even listen into the telephone calls to ensure that the programming process is not continued. In this period of decompression and debriefing the child will have the opportunity to reestablish the relationship with the alienated parent without significant contamination of the process by the brainwashing parent. Following this initial period I generally recommend slow and judicious contact with the brainwashing parent, monitored to prevent a recurrence of the disorder. Of course, psychotherapy can be useful at that time as well, but it must involve both parents and the child in the same room together. The treatment of the mother, however, is not likely to succeed unless she can work through her ongoing animosity toward the father. Often a central element in her rage is the fact that he is reestablished in a new relationship and she is not. Her jealousy is a contributing factor to her program of wreaking vengeance on her former husband by attempting to deprive him of his children, his most treasured possessions. Another factor that contributes is the mother's desire to keep a relationship going with her former husband. The tumultuous hostility guarantees ongoing involvement, accusation and counter-accusation, attack and counterattack, etc. To the degree that one can help her "pick up the pieces of her life" and form new involvements and interests, to that degree one is likely to reduce the rage.

In addition to joint custody's role in increasing the frequency of child custody litigation, the term itself has also resulted in certain legal problems that have prolonged divorce/ custody litigation, added to its expense and caused further grief and psychological stress, the benefits of the concept notwithstanding. One problem is that the term is variously defined, not only in different states but by attorneys, mental health professionals, and clients. As a result, an element of confusion has been introduced -- confusion that has resulted in unnecessary prolongation of litigation and time wasted on irrelevancies. The result has been further expense and psychological trauma to clients, most often avoidable.

Often, the conflicts are semantic ones. The parties involved in discussing a potential joint custody arrangement may each have a different concept of the meaning of the term -- a situation that will predictably cause confusion and waste of time. Or attorneys will haggle over the definition of the term and/or whether a particular client's custodial arrangement warrants the designation. In such conflicts the parties become sidetracked into issues that may be basically irrelevant to the decision. Furthermore, what has traditionally been called sole custody may be given the name of joint custody because of the belief that such designation will protect the unfavored party from feelings of lowered self-worth. Such utilization of the term may introduce an element of further confusion, especially in those who are reviewing the court rulings and possibly even using such rulings as established precedents. Sometimes joint custody is essentially no custody, and what was designed to provide children with a flexible visitation program ends with their being in a no-man's land, equally available as weapons and/or spies to both of their warring parents. Lastly, there are parents who fight for joint custody. If people are indeed litigating for joint custody, they are generally not candidates for it.

I believe that these problems could be obviated in a relatively simple way. The semantic problem could be eliminated by strictly avoiding the utilization of commonly used terms: joint custody, sole custody, alternating custody, shared custody, divided custody, split custody, etc. Rather, I would recommend that all arrangements be subsumed under a general rubric such as: *residential and decision-making arrangements*. We want to decide where the children should be at any particular time and what powers the parent with whom they are shall have. All of the aforementioned terms are attempts to define a particular arrangement for the children's residence, visitation, and parental decision-making powers. The use of this general term (or one like it) would enable us to avoid the time and energy wasted in arguing over which type of custodial arrangement would be most applicable to a particular family. Rather, we should focus on the substantive considerations that are relevant to the particular family.

Judges, lawyers, and mental health professionals who assist them in attempting to resolve custody disputes must first determine whether the parents are equally capable of parenting and whether they are equally available to assume parental obligations. They should ascertain whether the parents have demonstrated the capacity to cooperate well with one another and to communicate successfully. When these questions have been answered, then attention should be directed to the question of whether or not the individuals need a court-imposed residential/visitation schedule or whether they can be relied upon to utilize successfully a non-scheduled arrangement. Generally, people who are equally capable as parents and who can communicate and cooperate can be trusted to utilize successfully a non-scheduled arrangement for visitation and place of residence. Those who cannot may need a court-imposed schedule.

The next question relates to decision-making powers. Are both individuals relatively equal with regard to decision-making capacity? If not generally equal, are there sonic areas in which one parent should be given priority? To simply designate one parent as the only one to make primary decisions may not lit in well with the reality of the situation. Of course, considerations of cooperation and communication must also be attended to when deciding about decision-making powers.

When all of the aforementioned questions have been answered a suitable program should be formulated. Attempts to compare it to one of the traditional arrangements is not only a waste of time, but may be detrimental in that it may complicate the whole process.

One further recent development in the custody/divorce area has been the growth of mediation. This is without question a welcome change. An important reason for the resistance on the part of many members of the legal profession has been the obvious fact that one lawyer serving as a mediator is going to make far less money than two lawyers involved in protracted litigation. However, when mental health professionals and others began actively involving themselves in divorce mediation many lawyers became more receptive to the concept. Many plans are emerging, but the one that seems to satisfy most parties is the arrangement in which the mediator (usually a lawyer and/or a mental health professional) draws up a memorandum of agreement. This is then reviewed by independent attorneys who represent each party. These attorneys, however, are committed to work closely with the mediator to resolve any differences. They fully recognize the terrible drawbacks of adversary litigation as a first step toward settling divorce/custody disputes. Many of these independent attorneys are mediators themselves. If the five parties are successful in resolving differences, the couple merely goes to court for a non-contested divorce, each represented by an attorney. Mediation is growing rapidly, and there is good reason to believe that it will become the most common way of dealing with divorce disputes within the next ten years. In fact, I predict by the end of the century people will look back upon the mid-to-late 20th century as a period of national insanity, a time when people automatically entered into adversary litigation when they divorced. Mediation is indeed the hope of the future for divorcing parents and there is every reason to believe that this hope will be realized. Although it is not without its problems, there is every reason to believe that its benefits will far outweigh its disadvantages.

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