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To gain a sound understanding of the dynamics and best responses to cases of children resisting contact with a parent, it is necessary to consider both the legal and psychological aspects of the situation. There is a small but important and growing body of empirically based psychological research about children resisting contact with parents, but there have been no published empirically based studies of the responses of the family justice system to such cases. This article is intended to begin to address this lacuna in the literature, reporting on a study of all reported Canadian cases between 1989 and 2008 that dealt with claims of “alienation” of children in the context of parental separation. The use of the concept of “alienation” in Canadian courts increased dramatically over these two decades, but this study reveals a complex and multifaceted set of cases with a range of responses depending on the judicial perceptions and the resources of the parents.

WHY IS ALIENATION A CONCERN FOR THE FAMILY JUSTICE SYSTEM?

The starting point in Canadian law for dealing with the relationship between a child and a noncustodial parent is the “maximum contact principle” of the Divorce Act:

16(10) . . . the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.¹

The maximum contact principle has two aspects. First, the courts should ensure there is as much contact with each parent as is “consistent” with the best interests of the child. Second, if one parent is thwarting contact with the other parent or alienating the child from the other parent, that is an important factor in deciding whether to award custody to the parent who will facilitate contact with the other parent (known as the “friendly parent principle”). The maximum contact principle reflects a significant body of social science literature which establishes that children in general have better outcomes after parental separation if they continue to have a close relationship with both parents;² however, in a high-conflict separation, frequent contact may be stressful for children.

Canadian judges sometimes assert that “access is the right of the child,”³ and this type of rhetoric may be useful for reminding parents that it is in their children’s interests to promote a relationship with the other parent. The use of “children’s rights” terminology can, however, be problematic in alienation cases as it may suggest to the child or the alienating parent that not seeing the other parent is a distinct possibility, and that it is the “right” of the child to decide whether it will happen.⁴ Children may genuinely believe that they are making an independent decision to reject a parent, and that it is their “right” to do

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so, even if, in reality, they are being influenced by an alienating parent. As a result of these concerns, in alienation cases it is more legally accurate to say that a custodial parent has a positive duty to encourage contact and support a relationship with the other parent.5

It is important for the justice system to take an early response to cases where a child is resisting contact with a parent. If there is “alienation,” the rejection of a parent as a result of negative influence of the aligned parent, earlier intervention is more likely to be successful, and can prevent the situation from becoming more serious. Further, alienating parents may escalate their behavior if they are not confronted with a clear judicial response. However, in responding to cases where there are problems with a relationship with one parent, the court should be satisfied that the child is truly alienated and not justifiably estranged from that parent. Further, there are cases in which a judge finds that there has been alienation, but concludes that any further attempt to enforce a relationship between the child and the rejected parent is more likely to harm rather than help the child.9 In more severe cases, the only viable remedy for alienation may be a change in custody, but this will only be appropriate if the rejected parent has the capacity to care for the child through what is likely to be a difficult transition period.

THE STUDY: METHODOLOGY

This study used the two major commercial Canadian databases of judicial decisions, WestlawCanada and Quicklaw,7 searching the terms “parental alienation,” “alienated child,” “alienated” or “alienating parent.”8 The study found 175 cases9 where the court made a finding about whether or not alienation occurred. The first reported case using the term “alienation” was in 1989. Although, of course, there were cases decided prior to 1989 which raised issues of inappropriate parental influence over a child’s relationship with the other parent10 these earlier cases are not included in the study, even though some of them could be characterized as cases of alienation.

The reported case law does not reflect the total number of cases in which alienation issues arise. Many rejected parents simply give up the struggle to maintain a relationship with a hostile child, either lacking the emotional energy and financial resources to seek to change the situation, or deciding that the child is better off not being “caught in the middle” of litigation. Further, if litigation is commenced, the parties are still likely to settle without a trial, even in those cases involving alienation. However, when alienation is claimed, cases are only likely to settle after considerable judicial involvement through case and settlement conferences, where judges encourage settlement, often suggesting how a judge at trial is likely to deal with the case. These settled cases are not reflected in the data presented here, although at least in some dimensions, such as the increase in alienation cases over time, they are similar to those that go to trial and are reported. While the cases that go to trial may in some ways be atypical of all separations, involving the most intransigent disputes, a study of the reported cases is valuable as it reveals how the courts deal with the most contentious cases, and gives a good indication of the approaches of judges who are encouraging the settlement of the less contentious cases.

HOW CASES HAVE CHANGED OVER TIME

There has been a very significant increase over time in the number of cases explicitly raising “alienation” issues in the Canadian courts. Although the increase has not been
smooth from year to year, it has clearly occurred over the course of two decades in this study. Between 1989 and 1998 there were 40 decisions with a finding about parental alienation, with the judge concluding that alienation occurred in 24 of those cases. Between 1999 and 2008, there was a very substantial increase in the number of cases raising a claim of parental alienation, with the courts finding alienation in 82 out of 135 cases. It is impossible to determine the extent to which the increase in reported use of the concept of “alienation” merely reflects greater awareness and use of the concept by parents, lawyers, and mental health professionals, and the extent to which there may be an actual increase in the occurrence of alienation, likely due to greater paternal involvement in post separation parenting. It is likely there are elements of both. It is notable that the rate of substantiation of alienation remained essentially unchanged, at 60 percent in 1989 to 1998, and 61 percent in 1999 to 2008, suggesting that the increase in cases does not reflect an increase in unsubstantiated claims being made.

In recent years, judges seem to have a more sophisticated understanding of the dynamics of these cases. Although courts continue to use the concept of “parental alienation,” starting in 2003 there were a number of reported cases where judges discussed whether this is a “syndrome,” generally accepting that mental health professionals, not the judiciary, must resolve this controversy.11

THE GENDER DIMENSIONS OF ALIENATION

Between 1989 and 2008 alienation was found by the court in 106 out of 175 cases raising the issue (61 percent). The mother was the alienating parent in 72 cases (68 percent), and the father was the alienating parent in 33 cases (31 percent). There was one case of split custody, with each parent having custody of one child, and the judge concluding that both parents had alienated the child in their care from the other parent. While mothers were significantly more often the alienating parent, mothers much more frequently have sole custody of children, or are the primary resident parent in joint legal custody cases.

In order to be alienated by one parent, a child must identify very closely with that parent. This close identification generally only occurs if the child is living primarily or exclusively with that parent. In this study, the alienating parent had sole custody of the child(ren) in 89 cases (84 percent), and joint custody in 14 cases (13 percent). Alienation was found by the court to be the result of the conduct and attitude of a parent who only had access rights in only 3 out of the 106 cases of parental alienation (3 percent). Thus, in terms of the cases
where alienation was found, differences in gender are reflective of custody and child care arrangements rather than a maternal predisposition to alienate children.

**Alienating Parent’s Degree Of Control**

- 84% Alienating Parent Had Custody
- 3% Alienating Parent Had Joint Custody
- 13% Alienating Parent Had Access

**CASES WHERE ALIENATION CLAIM WAS NOT SUBSTANTIATED**

It is important to consider not only those cases in which the court found alienation, but also those in which the claim was rejected, which amounts to a total of 69 cases in this study. In some cases the judge’s reasons for rejecting a claim of alienation are clear. However, judges often give vague or multiple reasons when rejecting a claim, so the classification of such decisions was not always an easy exercise. We developed and applied a classification scheme with the following categories, which broadly reflect the mental health literature:

- Justified estrangement due to abuse or violence;
- Justified estrangement due to significant parenting limitations;
- Child disengaged but not rejecting the other parent;
- Insufficient evidence to substantiate the claim of alienation.

The first two categories were the clearest in the case law, as they involved a judicial finding of abuse or violence, or were reflected in judicial commentary about inadequate parenting. These are also the cases that most clearly fit into the reasonably well-defined situation of “justified estrangement,” where there is a clear rejection of one parent by the child. It should, however, be appreciated that the classification of cases is based on the researchers’ assessment of the reasons of the judge, and very few cases used terminology like “justified estrangement” or “disengagement.”

In 29 of the 69 cases (42 percent) where the court did not find alienation, the case was classified as “justified estrangement” (the conduct or inadequate parenting of the rejected parent or of a new partner was the primary cause of the child’s rejection of the parent). In five of these cases, the court found that the estrangement was due to abusive behaviour by the rejected parent towards the child or partner; the father was the estranged parent in four of these cases and the mother was the estranged parent in one case. In 24 of the 69 cases (35 percent) where claims of alienation were rejected, the court focused on the parenting of the rejected parent. These included cases where the rejected parent displayed a lack of warmth or interest in the child, or showed insensitivity to the child’s needs. In some cases, the child’s rejection of the parent was due to the parent’s drug addiction or violent temper, or the animosity or temper of a step-parent. In a number of the “justified estrangement” cases, the child revealed that the parent who was claiming alienation was in fact trying to
control the child or turn the child against the other parent. Of these 24 estrangement cases, 13 involved rejection of the father and 11 rejection of the mother.

In 14 of the 69 cases (20 percent) the court rejected the claim of “alienation,” with its connotation that the conduct of the “alienating parent” was responsible for the failure of the child to regularly see the noncustodial parent, and instead concluded that the lack of contact was a reflection of the child’s independent decision making. These cases typically involved the child’s interests changing as he or she grew older, with the child wanting to spend more time with peers or involved in various activities; sometimes, the child seemed to be reacting to the stress of a high conflict separation by aligning with one parent. In some of these cases, tension between the child and a stepparent or step-siblings was a factor. The father was the non-custodial parent losing contact with the child in 11 of these cases, while it was the mother in 3 of them.

In 26 of the 69 cases (38 percent) the court rejected the claim of “alienation” as the cause of the breakdown in the relationship between the rejected parent and child was not established, or it was not clear that the relationship had broken down. In some of these cases, the concern of the parent making the claim was the infrequency of visitation, rather than a complete breakdown in the parent–child relationship. These were classified as cases of “insufficient evidence to establish alienation.”

In 52 out of the 69 cases (75 percent) in which the court rejected a claim of “parental alienation,” it was the father who made an unsubstantiated claim against the mother, while mothers made unsubstantiated claims in only 17 cases (25 percent). Thus, fathers made three times as many unsubstantiated claims of alienation as mothers. This gender difference in the making of unfounded claims of alienation, however, largely reflects the fact that most founded and unfounded allegations were made by access parents, who were mainly fathers. In 140 out of the 175 cases (80 percent), it was the access parent who made an allegation of alienation (whether or not this allegation was substantiated); of these 140 cases, the access parent was the father in 105 cases (75 percent).

### Reasons Why PA Was Not Found

- 20%: Estrangement due to abuse or violence
- 35%: Estrangement due to poor parenting
- 38%: Child disengaging but not alienated
- 7%: Insufficient evidence of alienation

### THE ROLE OF MENTAL HEALTH EXPERTS IN RESOLVING ALIENATION CASES

In all Canadian jurisdictions, legislation or rules of court permit a judge to order an independent mental health professional to perform an assessment, investigation or home
study of the parties and submit a report to the court regarding custody or access issues. These orders 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. Canadian courts generally recognize the value of an independent or court-appointed expert in cases where alienation issues arise.

Expert opinion from an independent expert was provided in 149 of the 175 cases (85 percent) in this study, and in a further 3 cases (2 percent) the court ordered an assessment for later use. In 66 of the 175 cases, more than one court-appointed or independent expert was involved, and in 19 of these cases (28 percent), 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. In 132 of the cases, it was clear that the independent expert(s) expressed an opinion about alienation and in only 8 of those 132 (6 percent) did the judge take a different position than the expert(s). 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 eight cases where the opinions of all of the court-appointed experts were rejected, some were cases where the judge felt that circumstances had changed since the report was prepared, while others were cases where the judge simply disagreed with the conclusions of the expert(s).

The independent experts were most often psychologists (137). Social workers were the next largest group (55), while psychiatrists were involved in a relatively small number (12). In a number of cases (21), the expert was an unidentified “Dr.” (most likely a psychologist), and 19 involved other experts such as “counselors” or “family consultants.” In two cases, there was testimony from a therapist who had been counseling the child with the consent of both parents.

While independent experts are most common in high conflict cases involving allegations of alienation, in 32 of the 175 cases (18 percent) one or more privately retained mental health professionals were also called to testify: in 26 of these cases there was one privately-retained expert, while 5 cases involved two or more privately retained experts. In 29 of the 32 cases involving privately-retained experts, the experts testified to either critique or support the opinion of the court-appointed expert; the sole expert to testify was privately retained in only 3 cases. Mothers and fathers were equally likely to privately retain an expert, with mothers calling an expert in 18 cases and fathers calling an expert in 19 cases. The court preferred the opinion of the privately retained expert in only two of the cases where there was a difference in opinion between the court-appointed and privately retained expert about whether or not there was parental alienation.

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. Of course, in some cases the parties cannot afford an expert, and there may be delay in having an assessment completed. In some provinces, such as Ontario and Manitoba, the courts can order a government funded assessment by a social worker. There are many locales where it is difficult to find a qualified mental health professional to conduct an assessment, 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.
LAWYER FOR THE CHILD

The child(ren) had a lawyer in 24 out of the 175 cases. The Ontario Office of the Children’s Lawyer (OCL) has Canada’s most extensive program of child representation. Although there is some controversy about the role that a lawyer for the child(ren) should play if there is alienation, the Official Policy of the OCL calls for the lawyer to advocate for the child(ren)’s interests while also ensuring that the court has evidence of the child(ren)’s wishes, so in alienation cases it is not uncommon for the child’s lawyer to be advocating against the child’s stated preferences as the lawyer is convinced that the child’s views are not independent. The child(ren)’s wishes are often brought to court by a clinical investigator (or social worker) retained by the OCL. Of the 24 cases where the child(ren) had a lawyer, 15 were in Ontario; in that province, the child(ren) had a lawyer in 15 out of 53 cases (28 percent).

CASES WITH NO EXPERT EVIDENCE

There was no expert evidence in 22 out of the 175 cases (13 percent). The court concluded that alienation had occurred in 9 of these 22 cases (41 percent), a lower substantiation rate than the cases where there was expert testimony (62 percent: 95/153). In six out of the nine cases 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. The involvement of a mental health professional or government agency is very important if alienation is to be established, though in 3 of 175 cases the court was satisfied that parental alienation occurred even without such evidence.

LEGAL RESPONSES TO ALIENATION IN THE CANADIAN COURTS

COURT-ORDERED THERAPEUTIC INTERVENTION OR COUNSELING

Judges are sometimes prepared to use mental health professionals to directly respond to alienation issues by ordering therapeutic intervention, with the expectation that this will allow the parents and children to resolve the emotional issues undermining the exercise of access.

Courts clearly have the jurisdiction, as an “incident” of custody or access, to order a parent to provide counseling for a child. Although there are Canadian appellate judgments that question the authority of judges to order counseling for parents absent their consent, some trial judges do so as part of a custody or access order, or as part of a sentence for contempt (usually for a breach of the terms of an access order).

In some cases, the judge orders therapeutic intervention with the explicit goal of reestablishing the child’s relationship with the rejected parent, while leaving the child(ren) in the custody of the parent who has alienated the child(ren); in some of these cases, the court will also make an implicit or explicit threat that custody may be varied if the child(ren)’s relationship with the rejected parent is not supported. These orders are consistent with the legal framework supporting “maximum” parent-child contact, as well as the judicial responsibility to ensure that access orders are respected.
Beyond the question of whether there is jurisdiction to order counseling for parents absent their consent, there are also important questions about the effectiveness of court-ordered therapy. In cases of less severe alienation, a judicial “push” towards therapy may have some positive effects and, if the parents consent, jurisdictional issues need not be resolved. Counseling is most likely to be effective when a judge persuades the parties of its value and of the importance for the child(ren) having a positive relationship with both parents; it is unlikely to be useful if parties seem resistant to counseling and are only attending to avoid contempt of court.

In some cases where therapy is ordered, there will be no further effort to enforce access if the therapy does not change the child(ren)’s attitude(s) towards the alienated parent. For example, in *D.A.L. (P) v. D.A.L.* the father filed a motion relating to interference with access because his nine year old daughter was refusing to contact him. The parties were embroiled in a seven year “fight” plagued by competing allegations of alienation versus estrangement. Numerous orders had been made concerning counseling, parental education and supervised access, but none had proved successful in “prompt[ing] the parties to put aside their fight and concentrate on [the daughter’s] best interests.” Although the evidence supported a finding that the mother engaged in alienating behavior, the judge found both parties responsible. In refusing access to the father, Ryan-Froslie J. concluded: “While this Court believes it is in [the daughter’s] best interest to have a relationship with her father, trying to ‘force’ such visitation is not a feasible solution. ‘Force’ is no doubt bound to fail, but given [her] age, ‘persuasion’ may still result in a positive outcome.” The method of “persuasion” utilized was six months of counseling for the daughter, where “memories of her father [were to] be addressed and her perceptions of him challenged.”

Court-ordered counseling or therapeutic intervention occurred in 47 of the 175 cases in this study (27 percent). These orders, made in the following manner, occurred both in cases where alienation was found and in cases where the court rejected the claim of alienation:

- for the children in 26 cases;
- for the entire family in 14 cases;
- for an alienating mother in 9 of the 72 cases in which the mother was found to have alienated the child(ren) (13 percent of the 72 cases);
- for an alienating father in 4 of the 33 cases in which the father was found to have alienated the child(ren) (12 percent of the 33 cases);
- for 2 mothers in the 17 cases where a mother made unsubstantiated allegations of alienation (12 percent of the 17 cases);
- for 3 fathers in the 56 cases where a father made unsubstantiated allegations of alienation (5 percent of the 56 cases).

There were no significant differences in the judicial orders made against fathers and mothers regarding the requirement of counseling or therapy.

**CHANGE IN CUSTODY**

The most dramatic judicial response to alienation is the transfer of custody from the alienating parent to the rejected parent. 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 in order to establish that the child has been alienated and that any emotional trauma to the child from the change will be limited in duration. While the courts are reluctant to vary custody, as it can be very disruptive to children, in this study, when a court found that alienation had occurred, the most common response was to vary custody. When such action was taken, it was almost always in cases of severe alienation, where the alienating parent was resistant to various mental health and legal interventions, and the judge concluded that a change in custody was the only effective way to end the emotional harm caused by the alienating custodial parent.

A number of recent Canadian appellate decisions have affirmed a transfer of custody from an alienating parent. For example, in *J.W. v. D.W.*, 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 assessor 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, he concluded that this was “one of those rare and exceptional cases where drastic action [was] required to meet the best interests of the children,” and he transferred custody to the father. He remarked that it was “unfortunate for the parents that things have gotten so bad that the court is left with such limited options.” To limit the possibility of the alienating parent undermining the new custodial arrangement, the judge denied the mother access to the boys for 4 weeks after the change in custody, and also retained jurisdiction to deal with access thereafter.

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 *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 “intransient” 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. refused to award custody to the father due to a concern that “the immediate effect of that change will be extremely traumatic.” 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 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.

There are cases where judges refused to transfer custody, notwithstanding clear evidence of significant alienation. Generally, these cases involve either older children who are severely alienated and who are likely to disrupt any new arrangement, or a rejected parent who may be unsuitable as the primary caregiver. Of the 33 cases where the father was found to be the alienator, there was a change in custody in 19 cases (58 percent). Of the 72 cases where the mother was found to be the alienator, there was a change in custody in 52 cases (72 percent). The difference in the change of custody rates between fathers and mother is not statistically significant.

In 52 out of the 106 cases (49 percent) where alienation was found, the court awarded sole custody to the alienated parent, and in 1 case custody was transferred to a foster parent.
In the 52 cases where the alienated parent was given sole custody, the alienated parent was the mother in 16 cases (31 percent) and the father in 36 cases (69 percent), closely reflecting the gender differences in rates of perpetuating alienation.

**SUSPENSION OF ACCESS**

There were 23 cases where the courts suspended access, or declined to order access to the child(ren). In 12 of these cases, the court declined to order access to a parent who had made an unsubstantiated claim of alienation; these included cases of justified estrangement where there were concerns about the safety or welfare of the child in the care of that parent.

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. The court withheld access in 12 cases where parental alienation was found. In 9 of those 12 cases, custody was transferred to the previously rejected parent, and the alienating parent lost both custody and access. Thus, in 9 out of the 72 cases (13 percent) where there was a change in custody, there was also a suspension of visitation.

In one case the court found that the access parent had been alienating the child from the custodial parent, and left the child with the custodial parent while terminating access to the alienating parent. In two cases the court accepted that alienation had occurred, but declined to order access to the rejected parent as the court felt that the child (who was left in the custody of the alienating parent) was old enough to decide about their contact with the alienated parent.

**JOINT CUSTODY**

Canadian courts generally accept that joint custody should not be ordered in contested cases unless there is evidence of a history of cooperation between the parents. In some cases of alienation, however, judges may make an order of joint custody to "send a message" to the custodial parent and child about the importance of the other parent in the child’s life and as an indication that further resistance to the child’s relationship with the other parent may result in a reversal of custody. This approach minimizes the instability in the child’s life but signals to the alienating parent and third parties that they should respect the roles of both parents. In Cox v. Stephen, the Ontario Court of Appeal affirmed a lower court decision making 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." Joint custody was awarded to the alienated parent in 17 out of the 106 cases where the court found parental alienation. The alienating parent was the mother in 14 of the 17 cases (82 percent) while the father was the alienating parent in 3 cases (18 percent).

**SUPERVISION OF ACCESS**

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, judges need to determine whether it is in the best interests of the child(ren)
to “force” reunification. This involves weighing potential benefits and disadvantages, including any possible trauma that may result if the child(ren) fear the rejected parent, even if that fear is not reasonable. One option in these cases is to order a period of supervised access. Such an arrangement may work to address any fears expressed by the child(ren) and the aligned parent.

However, supervised access with a rejected parent is only appropriate where 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 a custodial parent, supervising access visits may suggest to a child that these misperceptions are legitimate, thus increasing their fear and resistance to contact. In Okatan v. Yagiz, the trial judge refused to extend an earlier order directing supervised access between a father and his seven-year-old daughter. Though the father was found to have “shown some incredible lapses in judgment in speaking to his daughter,” 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.

There are also cases where the access parent engages in alienating conduct, for example by consistently denigrating the custodial parent. In such an instance, supervision may be ordered to prevent the alienating parent from engaging in such conduct during visits. Even if this conduct is not affecting the child(ren)’s attitudes towards the target parent, it can be distressing to the child(ren). In some of these cases it may be appropriate to have access by the alienating parent supervised by an agency or professional, as there will likely be concerns that a relative or family member would be unwilling to control this type of insidious but often subtle behavior.

In this study, the court awarded only supervised access for the alienating parent in 15 out of the 106 cases (14 percent) where parental alienation was found.

**COSTS**

One way for a judge to encourage parents to behave in a child-focused fashion, or at least to comply with explicit orders, is to order that a parent acting unreasonably or using the courts improperly will pay all or a significant portion of the legal fees and other litigation expenses of the other parent. 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.

In this study, costs were awarded in 33 out of the 175 cases (19 percent). The mother had to pay the costs in 14 of these cases (42 percent), while the father had to pay the costs in 19 (58 percent). The number of cases in which costs were ultimately awarded is undoubtedly higher, as in many cases 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.
CONTEMPT OF COURT

All family courts in Canada have the authority to find a party who wilfully disregards an access order to be in contempt of court. Although a contempt proceeding for violation of an access order is a civil process, it must be proven beyond a reasonable doubt that there was a wilful violation of the access order, because a finding of contempt of court may result in imprisonment. Family court judges often exercise restraint when an application is made to find a parent in contempt for failing to comply with an access order, particularly in regard to 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. More importantly, there is often a concern about the effect of a contempt sanction on the welfare of the child(ren) involved. As Veit J. said in an access enforcement proceeding: “Children are better off if their parents are not in jail or paying fines.”45

In some cases, the judge concludes that the aforementioned concerns are outweighed by the need to maintain the integrity of the administration of justice, and imposes a sanction for contempt. In McMillan v. McMillan,46 the court noted that the father had to bring four separate contempt motions to enforce an access order and re-establish 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 that is wilfully, deliberately and repeatedly breached many years after such compassions can reasonably be expected to extend, is an entirely different matter.47

In light of the custodial mother’s repeated defiance of the access order, Quinn J. held that this was an appropriate case to impress upon her, and upon other parents involved in the judicial process, that “court orders are to be obeyed.”48 In determining 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”49 of five days in jail. Imprisonment occurs very rarely in alienation cases,50 as the alienating parent who is jailed may become self-portrayed as a martyr-like figure, thereby further villainizing the alienated parent in the eyes of the children.

Often, the defense offered during contempt proceedings in alienation cases is that it is the child(ren) and not the parent refusing contact. Some courts have responded to this argument by articulating a positive obligation for the custodial parent to encourage the child(ren) to attend for access visits. For example, in Cooper, the custodial mother was found in contempt for having “wilfully and deliberately sabotaged”51 telephone access 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 The sentence included an order to secure counseling for the children, and to pay a fine of $10,000.
It is an increasingly common (and effective) practice for the sentencing judge to, in effect, give an ultimatum to the defiant parent, and provide that parent a specified time within which to "purge" his or her contempt by complying with the original order.54 Where there is a finding of contempt, costs are commonly awarded to the claimant.55 In some provinces, including Ontario, the court may also order a party in contempt to pay a penalty to the other party, in addition to costs.56 In this study, there were only two cases in which the court imposed a fine on an alienating parent.

POLICE ENFORCEMENT

In every Canadian jurisdiction except British Columbia, Nova Scotia, and Quebec, legislation specifies that a judge may include a provision in a custody or access order directing the police to apprehend and deliver the child(ren) to the person entitled to access.57 Even where legislation does not explicitly authorize a "police enforcement clause," superior court judges have included them on the basis of their inherent parens patriae power to promote the best interests of the child. However, an order for police involvement "...is an order of last resort... to be made sparingly and in the most exceptional circumstances."58 Because calling the police is a very intrusive step, many parents are reluctant to take it. Further, the police may be reluctant to become involved in a "civil matter" that might require them to physically remove a child from his or her home. As well as being very unpleasant for police officers, such involvement may cause children extreme distress, possibly "alienating them further from rejected parents who are viewed as the reason for such precautions."59

Police Enforcement clauses were included in 18 of the 175 cases (10 percent) in this study. These orders were made in 15 out of the 106 cases where alienation was found (14 percent), as well as in 3 cases where alienation was not found but there were concerns about access enforcement.

CONCLUSION

This study of Canadian cases reveals that alienation is a complex problem that courts are facing with increasing frequency. While there are gender differences in both rates of alienating children (mothers are more likely to do this) and making unsubstantiated claims of alienation (fathers are more likely to make such claims), this reflects the fact that alienation is most commonly perpetrated by the parent with custody or primary care of the children. If alienation is found, the most common judicial response is to vary the custody regime. There is no evidence of gender bias in judicial responses to these cases.

There is a clear need for more psychological research on alienation, its nature and effects, and which types of intervention are most appropriate for different types of cases, including the long-term effects of variation of custody. Although there is certainly a need for more research, it must be appreciated that judges, lawyers, clinicians, and policy makers must do the best that they can for children with the existing state of knowledge.

Almost all of the published research in this area has been conducted in the United States. Although one would suspect that there are similar patterns of parental behavior and child reactions in other countries (or at least modern, secular industrialized countries), it will also be important for researchers in other jurisdictions to study these questions, with a view
toward ascertaining whether legal, institutional or cultural factors affect the nature and responses to alienation. Perhaps more importantly, even within countries like Canada and the United States, there is great racial, ethnic, religious, and cultural diversity between families and significant variation in local laws and institutions, that should be taken into account in future research.

NOTES

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1. Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, s. 16(10). This principle is also found in some provincial statutes (which govern disputes between parents who were not married or are not getting divorced), and in those provinces where it is not explicitly mentioned in the statute, it is reflected in case law interpreting the concept of the “best interests of the child”; see Cavenanh v. Johnn, [2008] O.J. No. 5027 (Ont. S. C. J.).


4. The concept of “rights” for children is complex. It is correctly said that a child has the “right” to an education, as recognized in both legislation and the United Nations Convention on the Rights of the Child. This means that parents and the state have a duty to see that a child is educated. Until a statutorily specified age (16 to 18 years depending on the province), a child does not have the right to not attend school (or have some alternative form of education).

5. See Ayotte v. Bishop, [1996] 1 O.T.C. 75 (Gen. Div.). See also Drivas v. Gille, [1993] 86 Man. R. (2d) 26, para. 15 (Q.B.). Judge Mercier states: “All custody/access orders must be viewed and acted upon by parents in a positive manner towards each other and the children. Disparaging comments by either parent about the other are clearly not in the best interests of children and cannot be tolerated by the court. The behavior of parents in undermining such orders can and should be grounds for contempt.”


7. Westlaw Canada (Thomson) and Quicklaw (LexisNexis) are the two main commercial law report databases in Canada. Most cases appear on both databases, but Quicklaw has a larger set of cases. The Westlaw database, however, has a somewhat better family law collection, reflecting the role of two of Canada’s leading family law scholars in the management of that database: the late Prof. Jay McLeod and now the prominent Toronto lawyer, Philip Epstein. There are 175 cases in this study; 146 were found on both Quicklaw and Westlaw, 6 were found only on Quicklaw and 23 were found only on Westlaw. Some cases result in short unreported, oral judgements, which do not appear in any database. There is also a free Canadian legal database, which is considerably smaller and has more limited search functions (www.canlii.org).

8. The actual search also included the truncated term alienat* and searched where parent or child were within 10 words of alienat*.

9. A total of 623 cases were located. In 448 cases the term “alienation” (or its truncated form) was mentioned within 10 words of parent or child, but the court did not reach a conclusion about whether alienation occurred; these cases were excluded from the study. Many of these excluded cases did not actually deal with custody or access issues—some of them were criminal prosecutions, and many dealt primarily with child support or other financial matters; a number dealt with procedural issues.

10. See, e.g., Powley v. Wagner, (1987) 62 Sask. R. 222, 225, MacLeod J. (Q.B.). Judge MacLeod described a six-year-old child as having an “intense aversion to her father” due to the influence of the mother, who was determined that her former husband “shall reap his due punishment.” Judge MacLeod concluded that “forced access,” while the mother remained “aloof, at best, and hostile, at worst,” would not be in the child’s best interests.

12. See, e.g., Alberta Rules of Court, Alta. Reg. 390/68, s. 218. See, e.g., Children’s Law Reform Act, R.S.O. 1990, c. 12, s. 30; Courts of Justice Act, R.S.O. 1990, c. C.43, s. 112.


15. In Ontario, government paid “clinical investigators” from the Office of the Children’s Lawyer conduct investigations in some custody and access cases; they invariably involve social worker training and are included in this category in this study.

16. In Ontario, the court may make a request under the Courts of Justice Act, supra note 12, for the OCL to have a social work professional conduct a “clinical investigation” and prepare a report for use by the court. These reports are prepared without charge to the parties, but the OCL has the discretion as to whether or not it will act on the request. In Manitoba, the court can order an assessment to be paid for by the government under The Court of Queen’s Bench Act, C.C.S.M. 1988–89, c.280, s. 49.


18. The difference is not quite large enough to be statistically significant: comparative error of 21.9 percent and difference of 21.2 percent.


20. See, e.g., Kramer v. Kramer, [2003] CanLII 64318 para. 38, Henderson J., (O.S.C.), wherein Judge Henderson observed that the court has the “inherent authority to order that a party attend at, and participate in, family counseling if such an order has no adverse effect on the welfare of the children.” See, e.g., Kozachok v. Mangaw, [2007] O.J. 713 para. 25, (O.C.J.), where Jones J. relied on the Ontario Children’s Law Reform Act, R.S.O.1990, c. C-1, s. 28 to order both parents to attend counseling as an “incident” of exercising custody or access rights. See also Andrade v El Kadiu, [2009] O.J. 2432 (Sup. Ct.) wherein Mackinnon J. ordered educational counseling for an access father who had engaged in alienating conduct as a condition of his exercising access.

21. Legal responses to contempt are discussed more fully below.

22. See, e.g., C.A.G. v. S.C., [2005] M.J.372 para. 23, 28., (Q.B. Fam. Div.) (A motion for contempt was brought by the mother against the custodial father because of his refusal to allow their two children to see her. Douglas J. 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,” and held him in contempt. The father was ordered to complete a parental education course structured “to educate parents about the damage done to children by continuing levels of conflict and animosity between parents.” The children were required to “attend at and receive therapeutic counselling 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.”).


24. Id. para. 9.

25. Id. para. 9, 13.

26. Id. para. 9, 14.

27. See, e.g., Starzycka v. Wronsiki, [2005] O.J. 5569 (O.C.J.). Wolder J. characterized this case as “one of the most persistent acts of contempt that this court has ever experienced,” (para. 17) and ultimately switched custody from the alienating mother to the father.

28. 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 (where the New Brunswick Court of Appeal accepted the trial judge’s determination that the custodial mother had been “waging marital warfare” which resulted in a denial of access 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) (para.9). Similarly, in Rogerson v. Tessaro, [2006] O.J. 1825 para. 3, 7–8 (C.A.), the Ontario Court of Appeal affirmed a lower court’s decision, Rogerson v. Tessaro, [2005] O.J. 6281 para. 66 (S.C.), to transfer the primary residence of the children, based on evidence that an “otherwise good parent” was incapable of supporting a relationship between her ex-husband and their five-year-old twin boys. Both the Court of Appeal and the trial court concluded that the mother’s persistent attempts to alienate the children from their father, including moving the night before the trial and threatening to do so each time the father moved closer, carried long-term implications that were clearly contrary to the children’s best interests. In comparison, the father was described as a person who “appreciated the importance of facilitating a relationship between the mother and the children” and had “done more than many parents do”, including taking parenting classes and participating fully in his children’s lives despite the “obstacles in his path”. While the Court of Appeal recognized that changing
custody was “dramatic,” the Court of Appeal approved the trial judge’s gradual transition in order to “cause as little disruption as possible for the children.”

30. Id. para. 62.
32. 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.).
33. 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.
36. For a case where a judge ordered a variation of custody on an interim motion to prevent children from becoming further alienated by the time of trial, see Pettenazzo-Descenhene v. Deschene, [2007] O.J. No. 3062 (S.C.J.).
37. 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 ten-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.
39. Ibid. at para. 61.
40. Ibid. at para. 59, 62.
42. 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). See also Andrade v. El Kadari, [2009] O.J. 2432 (Ont. Sup. Ct.) per J. Mackinnon J.
47. Id. at 145–6.
48. Id. at 145.
49. Id. at 147.
50. McMillan did not involve an allegation of alienation and is not included in the survey. None of the alienation cases in this study resulted in a sentence of imprisonment.
52. Id.
53. Id. (where the mother was found in contempt as a result of conduct that “encouraged the child to refuse the access visits.” The court ordered that she attend therapy as part of the sentence).
55. See, e.g., Moudry v. Moudry supra note 54; Starzycka v. Wronski, supra note 27; Cooper v. Cooper, supra note 43.
57. See, e.g., Children’s Law Reform Act, R.S.O., 1990 ch. 12, s. 36.
59. Matthew J. Sullivan & Joan B. Kelly, Legal and Psychological Management of Cases With an Alienated Child. 39 Fam. Ct. Rev. 299, 307 (2001). See also R.L.H. v. G.L.R., 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.