

Parental Alienation—A Broader Perspective

This article proposes that New York courts should consider utilizing a second standard of law for proving parental alienation, in addition to the one suggested by a recent decision, resting on the principle of *parens patriae*, as follows: “Where a child refuses to have a relationship with a non-custodial parent, a court should thoroughly explore the specific reasons why not. The absence of any reasonable explanation shall raise a strong probability of parental alienation on the part of the custodial parent.”

By **Jordan E. Trager** | April 09, 2019 at 02:30 PM



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A recent decision published in the New York Law Journal, [*J.F. v. D.F.*](#), 61 Misc.3d 1226(A), 2018 N.Y.Slip. Op. 51829(U), by Judge Richard A. Dollinger, provided a

thorough analysis of the concept of “parental alienation” in the New York courts. This was followed by an article in the New York Law Journal titled “[Parental Alienation: What a Concept!](#)” by Timothy M. Tippins, who provided his analysis of the concept of “parental alienation” in the New York courts and analyzed Judge Dollinger’s decision.

These well known and respected legal scholars have attempted to more thoroughly understand the concept of parental alienation, to define it as a legal concept in the New York courts, and to establish uniform standards for proving it. Both authors expressed that greater analysis still needed to be done on this very important topic.

In *J.F. v. D.F.*, Judge Dollinger used an analogy similar to the elements of a crime (act, intent, causation and harm) to try to affix the standard of law necessary to prove parental alienation, namely “extreme and outrageous conduct, with the intent to cause severe alienation of a parent from a child, together with a causal connection between the alienating parent’s conduct and the child’s rejection of a parent, and severe parental alienation.”

It is proposed, for the reasons detailed in the following analysis, the New York courts should also consider utilizing a second standard of law for proving parental alienation, in addition to the one suggested by Judge Dollinger, resting on the principle of *parens patriae*, as follows: “Where a child refuses to have a relationship with a non-custodial parent, a court should thoroughly explore the specific reasons why not. The absence of any reasonable explanation shall raise a strong probability of parental alienation on the part of the custodial parent.”

Summary of Parental Alienation in the NY Courts

It has long been held in the New York courts: “Parental alienation of a child from the other parent is an act so inconsistent with the best interests of a child as to, per se, raise a strong probability that the offending party is unfit to act as custodial

parent.” *Doroski v. Ashton*, 99 A.D.3d 902 (2d Dept. 2012); *Bennett v. Schultz*, 110 A.D.3d 792 (2d Dept. 2013); *Avdic v. Avdic*, 125 A.D.3d 1534 (4th Dept. 2015); *Halioris v. Halioris*, 126 A.D.3d 973 (2d Dept. 2015).

One of the essential roles of the custodial parent is to demonstrate the capacity to encourage a meaningful relationship between a child and the non-custodial parent. It is well understood that a custodial parent who acts in the exact opposite way, who actively discourages such a relationship and continuously disparages the non-custodial parent may be deemed by the court to be unfit to be a custodial parent.

Understanding Parental Alienation as a Concept

In *Rethinking Parental Alienation and Redesigning Parent-Child Access Services for Children Who Resist or Refuse Visitation* (2001), Janet Johnston states that in parental alienation “a child expresses freely and persistently unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent that are significantly disproportionate to the child’s actual experience with that parent.”

Examples of parental alienation can involve a teenage child who previously had a healthy relationship with a non-custodial parent but now has an intense hatred of him or her but no reasonable explanation can be found, or a young child who previously had a healthy relationship with a non-custodial parent but is now deathly afraid of him or her without a reasonable explanation.

To properly understand the concept of parental alienation, we must first state the obvious point that it is natural for a child to want to have a relationship with both parents, absent a compelling reason why a child would not want to (i.e., physical, mental, psychological, and/or emotional abuse of a child, absence by a parent, etc.).

The second point which flows from the first is that, absent any reasonable explanation why a child would not want to have a relationship with a parent, parental alienation must be considered as a strong probability as to the underlying reason.

The third point is that parental alienation is not merely an act upon the targeted parent by the alienating parent, but rather, it is a form of child abuse. This point has been made by mental health professionals who study and analyze parental alienation and its impact on children who have been negatively affected and injured by parental alienation. See Amy J.L. Baker, "Parental Alienation is Emotional Abuse of Children", *Psychology Today* (June 28, 2011).

Parental Alienation Definition in Dollinger's Decision

In *J.F. v. D.F.*, Judge Dollinger attempts to set the standard for what constitutes parental alienation, primarily by looking at the alienating parent's active interference in the targeted parent's relationship with the child, with the end result being the alienated child refusing to have a relationship with the "rejected parent." His primary evidentiary focus was on the affirmative bad faith conduct of the parent, with the lack of the relationship between the other parent and the child being relegated to a secondary consequence which must also be proven.

Judge Dollinger referred to parental alienation as "the alleged alienating conduct, without any other legitimate justification, [be] directed by the favored parent, with the intention of damaging the reputation of the other parent in the children's eyes which proximately causes a diminished interest of the children in spending time with the non-favored parent and, in fact, results in the children refusing to spend time with the targeted parent either in person, or via other forms of communication."

Several significant questions are raised by Judge Dollinger's definition of parental alienation. What "legitimate justification" could there possibly be for alienating a child

from another parent? What intention can there possibly be other than “the intention of damaging the reputation of the other parent”? It should not be necessary to show all of this in order to prove the existence of parental alienation.

Standard of Proof in Dollinger’s Decision

In *J.F. v. D.F.*, Judge Dollinger further made the effort to set a legal standard for proving parental alienation as one of “extreme and outrageous conduct.” Under the legal standard proposed, proving parental alienation may be difficult if not impossible under certain circumstances where the targeted parent has little or no relationship with the alienated child due to the conduct of the alienating parent, and where the conduct may not even be known to the targeted parent. Thus, in addition to recognizing the extreme and outrageous conduct of the custodial parent, a court should make a second level of analysis and pay special attention to the underpinning of the lack of a relationship by the alienated child with the targeted parent and seek to protect the best interests of the child under the doctrine of *parens patriae*.

The standard of proof proposed by Judge Dollinger goes beyond the well settled legal standard of “best interests of the child” needed to establish a change of custody. By creating a higher legal standard of proof which the targeted parent must first establish before a court will take remedial measures, this can lead to outcomes that are against the best interests of the child and may in fact be harmful.

Rather, a court should consider the strong probability of parental alienation if little or no relationship exists between the non-custodial parent and child, and no reasonable explanation exists for why this would be the case. To do otherwise would go against the court’s primary role as *parens patriae*, thus permitting the abuse against the alienated child to continue, in the form of ongoing parental alienation.

Tippins Article

In his analysis of Judge Dollinger's decision, Professor Tippins expressed concern that Judge Dollinger's definition of parental alienation would not include instances of severe disparagement, repeated interference with parenting time and other such instances where a custodial parent is attempting to achieve alienation of a non-custodial parent but fails to succeed despite his or her efforts. This type of behavior is also very damaging to a child's well being and is against the best interests of the child.

Specifically, Tippins was concerned with Judge Dollinger's finding that parental alienation requires that the alienating parent's conduct "results in the children refusing to spend time with the alienated parent." Professor Tippins expressed concern that "it seemingly disempowers the court from shielding the child from the alienating behavior until it is too late to salvage the relationship between the child and the targeted parent." Professor Tippins makes a good observation about what may be less than overt alienation but is very problematic. While this may be viewed as a lesser offense, this behavior is still dangerous to the child and should also warrant court intervention.

A Broader Perspective of Parental Alienation in NY Courts

How then should parental alienation be defined and recognized in New York courts?

It is clear that parental alienation should rest upon the following principles:

(1) It is natural for a child to want to have a relationship with both parents absent a compelling reason why the child would not want to.

(2) Absent any reasonable explanation why a child would not want to have a relationship with a parent, parental alienation must be considered as a strong probability as to the underlying reason.

(3) Parental alienation is not merely an act upon the targeted parent by the alienating parent, but rather, it is a form of child abuse.

Proving Parental Alienation in NY Courts Based on This Broader Perspective

Based upon this broader perspective, the second standard of proving parental alienation offered at the beginning of this article—showing that a child is refusing to have a relationship with a non-custodial parent without a reasonable explanation—should be utilized by the courts in New York in addition to the one proposed by Judge Dollinger.

By embracing this second standard of proof of parental alienation, the heavy burden suggested by Judge Dollinger is shifted away from the alienated parent, and the court, in its role of *parens patriae*, is required, *sua sponte*, to determine why a child is refusing to have a relationship with a non-custodial parent. If the explanations given by the child are disproportionate in nature to the child's actual experiences with the alienated parent, the burden of proof should then shift to the custodial parent to demonstrate why no such relationship exists, rather than the non-custodial parent needing to prove multiple instances of "extreme and outrageous conduct."

Remedies in Court

It is well settled that parental alienation requires a full hearing to determine its existence, as well as whether change of custody would be in the best interests of the child or if some other remedy is more appropriate. A child's willingness to have a relationship with the non-custodial parent may defeat a claim of parental alienation. Also, a non-custodial parent's own conduct or failure to make genuine efforts at reconciliation may defeat such a claim. Parental alienation may require rehabilitative therapy as a first step, before determining whether change of custody is appropriate.

Both Judge Dollinger's decision and Professor Tippins' analyses are highly important, not only as bodies of legal work to be studied, but also in bringing valuable attention to

parental alienation as a concept, and in their efforts to find more effective solutions in these kinds of cases in the New York courts.

If courts fully embrace their primary role as *parens patriae* in these most egregious types of cases, in line with the principles outlined here, they will be better able to render results that are truly in the best interests of the child, and will be better equipped to remedy the abuses suffered by children who are the ultimate victims.

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