

Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts

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Richard Gardner, a child psychiatrist, coined the term “parental alienation syndrome” (PAS) in the 1980s.¹ PAS directs that where one parent coaches the child to alienate the other parent, custody, in severe cases, should be transferred to the alienated parent.² The court’s use of PAS is not innocuous. In child custody cases, a child’s upbringing and, in some instances, physical safety rest on the court’s decision.³

Despite wide criticism of PAS among Gardner’s peers in the psychology field,⁴ this theory has permeated the legal system, appearing primarily in custody judgments.⁵ However, legal and psychology experts have identified numerous hazards of using this theory.⁶ These dangers have come to fruition in Minnesota’s legal system: PAS has been used effectively by fathers to gain favorable

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1. Demosthenes Lorandos, *Parental Alienation Syndrome: Detractors and the Junk Science Vacuum*, in THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME 403 (Richard A. Gardner et al. eds., 2006); see also *infra* notes 14–17 and accompanying text.

2. Richard A. Gardner, *Introduction* to THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME, *supra* note 1, at 10 tbl.1.3 [hereinafter Gardner, *Introduction*]. In this Article, the parent who coaches the child in his or her campaign against the other parent is the “alienating parent” and the object of the child’s campaign is the “alienated parent.” In other materials, the alienated parent is sometimes referenced as the “victim parent,” but I reserve that term to refer to the victim parent in the domestic abuse context.

3. See, e.g., *Geske v. Marcolina*, 642 N.W.2d 62, 65 (Minn. Ct. App. 2002) (“Due to Marcolina’s abusive, intimidating and controlling behavior, his visitation rights were suspended in February 2000.”).

4. See *infra* Part II.C.

5. See *infra* Part III.B.

6. Barry Brody, *Criticism of PAS in Courts of Law: How to Deal with It and Why It Occurs*, in THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME, *supra* note 1, at 372–77.

custody judgments, while mothers have consistently been cast as alienating parents and deprived of custody of their children.⁷

Further complicating the issue is the domestic abuse context. Even Gardner noted that this theory should not be applied in domestic violence situations.⁸ Abuse would be a sufficient reason for the child to reject the abusive parent.⁹ Courts have not always abided by this caveat.¹⁰ However, strictly adhering to Gardner's domestic violence exception also poses problems because it is too narrow.¹¹ His exemption does not cover mothers in domestic violence situations who have difficulty proving the abuse in court, yet wish to protect their children from the abusive parent.¹²

This Article traces the implications of PAS for gender fairness in the Minnesota legal system, reaching the conclusion that mothers may be unfairly prevented from attaining custody of their children. To counteract misuse of PAS, judges must strictly adhere to statutory prohibitions and consciously work to eliminate current anti-mother gender bias. While courts accept that a parent's alcoholism harms children, the parallel assertion that domestic abuse harms children, directly or indirectly, has made less headway.¹³ Therefore, lawyers must educate judges about the harmful effects of domestic violence on children.

Part I of this Article presents PAS as Gardner intended it and explores its treatment in academia. Part II addresses the practical legal problems posed by PAS. Part III uses empirical data to demonstrate how PAS has contributed to gender bias in Minnesota courts.

7. See *infra* Part III.B.

8. Gardner, *Introduction*, *supra* note 2, at 5.

9. *Id.*

10. See, e.g., *Adolphson v. Yourzak*, No. A07-2291, 2008 WL 4628722, at *5 (Minn. Ct. App. Oct. 21, 2008) (despite the order for protection, "there did not appear to be a pattern of domestic abuse in the household and . . . there was no evidence that [the child] was affected by the incident that led to the [order for protection]").

11. See, e.g., *In re Welfare of A.J.C.*, 556 N.W.2d 616, 622 (Minn. Ct. App. 1996) (recognizing that other circumstances, including parental alcoholism, are also "detrimental to the physical, mental, and emotional welfare of the children").

12. See Leslie M. Drozd, *Rejection in Cases of Abuse or Alienation in Divorcing Families*, in *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* 406 (Robert M. Galatzer Levy et al. eds., 2d ed. 2009).

13. Compare *In re Welfare of A.J.C.*, 556 N.W.2d at 622 (arguing that a parent's alcoholism is a valid reason for transferring the custody of children to the nonalcoholic parent), with Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CALIF. L. REV. 757, 760-61 (1996) (arguing that the effects of domestic abuse on children have been given insufficient weight in proceedings where termination of parental rights is considered).

I. PAS and Domestic Violence in the Academic Context

Before presenting arguments on both sides of the PAS debate, I will present PAS in its purest form, as Gardner conceived it when he coined the term.

A. PAS and Parental Alienation

Gardner introduced PAS “to refer to a disturbance in which children are obsessed with deprecation and criticism of a parent—denigration that is unjustified and/or exaggerated.”¹⁴ PAS “is a disorder that arises primarily in the context of child custody disputes. Its primary manifestation is the child’s campaign of denigration against a parent, a campaign that has no justification.”¹⁵ To be defensible, the child’s rejection must be “a reasonable response to the alienated parent’s behavior”¹⁶ If there is a reason for this conduct, such as “[w]hen true parental abuse and/or neglect is present,” then “the parental alienation syndrome diagnosis is not applicable.”¹⁷

PAS is not facially gender-biased.¹⁸ The syndrome’s symptoms and characteristics are not directed at either fathers or mothers.¹⁹ The eight fundamental symptoms are:

1. A campaign of denigration.
2. Weak, frivolous, and absurd rationalizations for the deprecation.
3. Lack of ambivalence.
4. The “independent-thinker” phenomenon.
5. Reflexive support of the alienating parent in the parental conflict.
6. Absence of guilt over cruelty to and/or exploitation of the alienated parent.
7. Presence of borrowed scenarios.

14. Lorandos, *supra* note 1, at 403 (quoting Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, 29 ACAD. F. 3, 3–7 (1985), available at <http://www.fact.on.ca/Info/pas/gardnr85.htm>).

15. Richard A. Gardner, *The Judiciary’s Role in the Etiology, Symptom Development, and Treatment of the Parental Alienation Syndrome (PAS)*, 21 AM. J. FORENSIC PSYCHOL. 39, 40 (2003) [hereinafter Gardner, *Judiciary’s Role*].

16. Richard A. Warshak, *Social Science and Parental Alienation: Examining the Disputes and the Evidence*, in THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME, *supra* note 1, at 355.

17. Gardner, *Judiciary’s Role*, *supra* note 15, at 40.

18. See Leona M. Kopetski, *Commentary: Parental Alienation Syndrome*, in THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME, *supra* note 1, at 382.

19. *Id.*

8. Spread of the animosity to the extended family and friends of the alienated parent.²⁰

In severe cases of PAS, Gardner recommended that custody be transferred from the alienating to the alienated parent.²¹

Some works interchange PAS and “parental alienation” (PA), which leads to confusion and misleads readers to believe there are more inconsistencies among authors’ treatment of this subject than truly exist.²² Gardner viewed the terms as significantly different.²³ In his paradigm, PA is the umbrella term for “any situation in which a child can be alienated from a parent,” examples of which include “parental physical abuse, verbal abuse, emotional abuse, mental abuse, sexual abuse, abandonment, . . . neglect[, rebellion, and cult programming].”²⁴ PAS is “one subtype of parental alienation,” occurring when the alienation is “caused by a parent systematically programming the children against the other parent who has been a good, loving parent.”²⁵

The distinction between PAS and PA has implications for child custody. PAS requires identification of the particular parent responsible for the alienation.²⁶ In contrast, PA lacks this specificity and does not compel an allocation of fault.²⁷ A parent’s responsibility for PAS or PA, depending on how the court construes these terms, can be used as a black mark against the alienating parent.²⁸ The most serious potential ramification of PAS designation is the “alienating” parent’s loss of custody.²⁹

20. Barbara Bevando Sobal, *Parental Alienation Syndrome and International Child Abduction: A Multigenerational Syndrome*, in THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME, *supra* note 1, at 434. Sobal explains “lack of ambivalence” thus: while “[a]ll human relationships are ambivalent. . . . the concept of mixed feelings has no place in PAS children’s lives. The victimized parent is all bad, and the indoctrinating parent is all good.” *Id.* at 435. The independent-thinker phenomenon refers to the fact that “[m]any PAS children profoundly profess that their decision to reject the targeted parent is their own.” *Id.* By “presence of borrowed scenarios,” Sobal means that there is a “rehearsed quality to PAS children’s litanies,” and that PAS children use particular statements or expressions borrowed from the programming parent. *Id.*

21. Gardner, *Introduction*, *supra* note 2, at 10 tbl.1.3.

22. *See id.* at 7.

23. *Id.* at 6.

24. *Id.*

25. *Id.*

26. *Id.* at 7.

27. *Id.*

28. *See id.* (explaining how “attorney[s] representing an alienating parent” prefer to use the term PA, rather than PAS, to show that the children’s alienation occurred as a result of the other parent’s behavior and to avoid being labeled as a PAS “programmer”).

29. *Id.* at 9–10 (describing ramifications that may follow a diagnosis of PAS, the

B. *The Mischaracterization of PAS*

Since PAS's inception in 1985, scholarship on the subject has grown along with its controversial status.³⁰ Some of these works are based on subtle mischaracterizations or misinterpretations of Gardner's PAS.³¹ For instance, the manner in which Gardner linked false allegations of child abuse with PAS has elicited misleading commentary.³² Some critics suggest that Gardner's theory lends itself to courts treating a child's allegations of parental abuse as a sign that PAS exists.³³ Considering Gardner's recommendation that courts transfer sole custody to the alienated parent only in severe PAS cases,³⁴ this erroneous interpretation of PAS is dangerous where child abuse is substantiated or possibly exists.³⁵ The correlation between unsubstantiated abuse allegations and a finding of PA appears in the court system.³⁶ However, this conceptualization is not what Gardner envisioned as part of PAS.³⁷

Often those who mischaracterize PAS do so because they do not rely on Gardner's own words. Leslie Drozd states that:

Gardner introduced the term "parental alienation syndrome" to describe and characterize situations he believed resulted

most serious of which is a transfer of custody to the alienated parent in severe cases of the syndrome).

30. See generally JONATHAN W. GOULD & DAVID A. MARTINDALE, *THE ART AND SCIENCE OF CUSTODY EVALUATIONS* (2007) (discussing the juxtaposition of behavioral science and family law in child custody disputes); PETER G. JAFFE ET AL., *CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY* viii (2003) [hereinafter JAFFE ET AL., *CHILD CUSTODY & DOMESTIC VIOLENCE*] (focusing on "the complexity" of child custody and domestic violence and "the challenges facing judges, lawyers, legislators, and mental health professionals in developing safe and effective response strategies"); Drozd, *supra* note 12 (exploring the variety of reasons children reject one of their parents following a divorce or separation).

31. See Lorandos, *supra* note 1, at 399–400, 403.

32. See, e.g., Drozd, *supra* note 12, at 406 ("Parental alienation syndrome testimony has been used in attempts to impeach children's testimony about abuse and to affirm that parents have taken an active role in alienating a child from the other parent in a manner that several courts have found inappropriate. Worse, it has been used punitively against parents who, perhaps imperfectly, have been doing their best to protect their children from realistic danger.") (citation omitted).

33. *Id.* at 405 ("In particular, Gardner claimed that the presence of several elements of this supposed syndrome indicated that the child had been induced to hate the alienated parent by the activities of the supposedly alienating parent and that if a child suffering from the syndrome reported being abused by the alienated parent this was very likely a result of alienation.").

34. Gardner, *Introduction*, *supra* note 2, at 10 tbl.1.3.

35. See *id.* at 7 (differentiating between PA, in which the alienated parent's alienation has resulted from his or her own behavior or abuse, and PAS).

36. See *infra* Part III.C

37. See *id.*

from the active alienation of a child from one of the parents by the other parent and a resulting state in the child involving unmitigated hatred of the alienated parent and a *tendency to fabricate or adopt an allegation of abuse against that parent*.³⁸

What Gardner actually stated is that “in families in which there is a custody conflict . . . the possibility of fabrication [of abuse] is increased,” a distinction with serious consequences for the legal system.³⁹ Drozd also asserts that Gardner believed that these two factors always occur in concert: (1) a child rejects one parent after the other parent actively discourages the child’s relations with the rejected parent, and (2) a “child . . . describe[s] episodes of abuse that did not in fact occur.”⁴⁰ However, Gardner and Drozd would agree that the second factor is neither a necessary nor sufficient condition for PAS, and that the possibility of fabrication of abuse is greater when PAS is present than when it is not.⁴¹

Drozd advocates a “more complex view of alienation [that] includes such possibilities as that a violent parent may engage in alienati[on],” that apparently alienating behavior “may [actually] be necessary but poorly considered protective endeavors,” and that the “child’s negative attitude toward a parent [may result] from factors other than any direct or indirect coaching.”⁴² However, Gardner suggested that PAS does not apply where there is actual abuse.⁴³ Therefore, he would not characterize a violent parent as either alienated or alienating under PAS.⁴⁴ Since Gardner saw PAS and PA as two different concepts, a violent parent could engage in alienating under the broad term “parental alienation.”⁴⁵ Thus, the possibility that a child’s negative attitude toward a parent may result from something other than coaching is considered in Gardner’s framework.⁴⁶ In PAS, the alienation must

38. Drozd, *supra* note 12, at 405 (emphasis added).

39. Lorandos, *supra* note 1, at 403–04 (quoting Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, 29 ACAD. F. 3, 3–7 (1985), available at <http://www.fact.on.ca/Info/pas/gardnr85.htm>).

40. Drozd, *supra* note 12, at 406.

41. Lorandos, *supra* note 1, at 403–04.

42. Drozd, *supra* note 12, at 407.

43. Gardner, *Judiciary’s Role*, *supra* note 15, at 40 (“When true parental abuse and/or neglect is present . . . the parental alienation syndrome diagnosis is not applicable.”).

44. *See id.*

45. *See* Gardner, *Introduction*, *supra* note 2, at 6–7.

46. *Cf.* Warshak, *supra* note 16, at 352 (“Mental health and legal professionals generally agree that some children whose parents live apart develop extreme animosity toward or fear of one parent that is not reasonable or consistent with the prior history of the child’s relationship with the rejected parent.”).

be irrational or unreasonable, in other words, not explained by factors other than the alienating parent.⁴⁷

A legitimate flaw that Drozd identified in Gardner's construct is that the alienating parent's motives are not taken into account.⁴⁸ The alienating parent could be acting to protect the child from what she or he considers harmful behavior, even if that behavior does not fit the traditional "abuse" mold.⁴⁹ Under Gardner's model of PAS, unless there is actual abuse or neglect, there is no reason for the alienation besides the alienating parent's conduct.⁵⁰ What constitutes such abuse is ambiguous.⁵¹ As discussed further in Part II.B, this construct causes problems for domestic violence victim parents who have difficulties proving the abuse in court, yet wish to act to protect their children from the abusive parent.⁵²

II. PAS and Domestic Violence in the Legal Context

In addition to raising theoretical problems, the use of PAS in the domestic violence context also poses practical legal problems.⁵³ Although PAS is facially gender-neutral, there is the danger of gender bias when it is applied to custody cases.⁵⁴ The ambiguity regarding what qualifies as a sufficient reason for the child's alienation—besides the alienating parent's coaching—allows courts to interpret the victim parent's behavior as alienating

47. *Id.* at 355 (demonstrating that the irrationality of the alienation is an essential element of PAS).

48. *See Drozd, supra* note 12, at 407 ("Even when it is clear that a parent has actively contributed to a child's negative attitude toward the other parent, the motives for and significance of the parent's behaviors can vary widely.").

49. *See id.*

50. Gardner, *Introduction, supra* note 2, at 6 ("Some claim that the victim parent's behavior has brought about the symptoms. If that is the case, then we are not dealing with PAS, but bona fide abuse or neglect.").

51. *See JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE, supra* note 30, at 38–39 (describing the difficulty of defining and verifying allegations of domestic abuse due to the fact that the victim may not consider his or her experience to be "abuse"); *see also id.* at 39 (noting "[a]ssessors must have a clear understanding of the severity, frequency, and duration of" the various kinds of abuse in order to determine that abuse occurred).

52. *See id.* at 17 ("Many times [domestic violence victims] cannot supply the evidence to support their claim.").

53. *See id.* at 54 ("The strategy of alleging that the victim is psychologically impaired can have a profound influence on how a custody dispute is addressed by appointed evaluators and judges.").

54. *Id.* at 95 ("The gender bias in . . . [PAS] is overwhelming: One researcher noted that she was unable to find a single reported case where PAS testimony was introduced on behalf of the mother.") (citation omitted).

instead of protective.⁵⁵ Further, despite research showing that children who witness spousal abuse directly or indirectly are negatively affected,⁵⁶ evidence that a child witnessed abuse may be considered an inadequate reason for the child's rejection of a parent.⁵⁷

A. Gender Bias in Applying PAS

According to Gardner, father bias still occurs in the courtroom, although it has decreased over time.⁵⁸ Gardner initially found the legal system very biased in favor of mothers in child custody cases.⁵⁹ Gardner's research found that, from 1985 to 1995, "custodial mothers were the programmers in 90 percent of the cases . . . largely because, for the most part, women had been awarded residential custody."⁶⁰ In the late 1990s, Gardner witnessed "a gender shift" and found that "fathers [had] more access and more familiarity with PAS [and began] frequently program[ming] children into a PAS campaign of denigration."⁶¹ According to Gardner, courts are still biased against the fathers; if the mother is the alienating parent, courts are less likely to transfer custody to the father, but "when the father is the [alienating parent] he is likely to lose the children."⁶²

B. PAS in the Context of Domestic Violence

Some of the symptoms of PAS prove problematic in domestic abuse situations. PAS includes behaviors such as "sharing a distorted, essentially negative perception of the [alienated] parent with the child, and relentless efforts to terminate the [alienated] parent's access."⁶³ In the domestic abuse context, these tireless

55. *Id.* at 53.

56. *See infra* notes 65–66 and accompanying text.

57. *See, e.g.*, Adolphson v. Yourzak, No. A07-2291, 2008 WL 4628722, at *5 (Minn. Ct. App. Oct. 21, 2008) (stating that despite the order for protection, "there did not appear to be a pattern of domestic abuse in the household and . . . there was no evidence that [the child] was affected by the incident that led to the [order for protection]").

58. *See* Jeffery M. Leving, *The Parental Alienation Syndrome and Gender Bias in the Courts*, in THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME, *supra* note 1, at 392.

59. *Id.*

60. *Id.* (citation omitted).

61. *Id.* (citation omitted).

62. *Id.*

63. Leona M. Kopetski, *Commentary: Parental Alienation Syndrome*, in THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME, *supra* note 1, at 382.

attempts to gain sole custody may be protective measures taken by the victim parent to limit the abusive parent's access to the child.⁶⁴

For multiple reasons, considering PAS inapplicable in spousal abuse situations would benefit the child. Spousal abuse is relevant in determining the child's best interests because it affects not only the direct victim, but also extends to children exposed to the violence.⁶⁵ These children experience detrimental cognitive, emotional, behavioral, and physical effects.⁶⁶ Because the father abusing the mother affects the child, spousal abuse should be recognized as a distinct "reason" for rejection that renders PAS inapplicable.⁶⁷ When PA is conceptualized as Gardner understood, no difficulties arise from recognizing parental alienation in domestic abuse cases.⁶⁸ The alienation could be caused by either parent, or neither.⁶⁹ Problems occur when courts construe PA to require an allocation of fault to one parent for alienating the child, particularly if that fault is attributed to the victim instead of the abuser.

In domestic violence cases where the abusive parent is convicted of a crime constituting domestic abuse under Minnesota's Domestic Abuse Act (MDAA),⁷⁰ the statutory presumption is that the non-abusive parent will have sole custody and the abusive parent must show that "custody or parenting time . . . is in the best interest of the child" in order to obtain these

64. JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE, *supra* note 30, at 53 ("A mother's desire to protect her children from possible physical or sexual abuse may be viewed as alienating behavior.").

65. Peter Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, JUV. & FAM. CT. J., Fall 2003, at 57, 61 ("Domestic violence is highly relevant to the determination of child custody by the courts and court-related services.").

66. *Id.* at 60–61; Laurel A. Kent, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 WIS. L. REV. 1337, 1344–47 (2001); *see also* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1055 (1991) (noting that domestic "abuse affects children cognitively, emotionally, and physically").

67. *See, e.g.*, JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE, *supra* note 30, at 115–16 (describing how children may reject a parent "because they are afraid of [that parent], having witnessed his emotional or physical abuse of the other parent" rather than because of improper influence by the abused parent).

68. Gardner, *Introduction*, *supra* note 2, at 6 ("[PA] can be caused by parental physical abuse, verbal abuse, emotional abuse, mental abuse, sexual abuse, abandonment, and neglect.").

69. *Id.* ("[PA] is a *general* term that covers any situation in which a child can be alienated from a parent."); *see also supra* note 24 and accompanying text.

70. Domestic Abuse Act, MINN. STAT. § 518B.01, subdiv. 2(A)(1) (2009).

rights.⁷¹ “If the victim of the crime was a family or household member, the standard of proof is clear and convincing evidence.”⁷²

In domestic abuse cases, whether the victim encourages the abusive parent’s contact with the child is not considered in determining the best interests of the child.⁷³ “[T]he disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child” (commonly known as the “friendly-parent” provision)⁷⁴ is not a factor “in cases in which a finding of domestic abuse as defined in [the MDAA] has been made.”⁷⁵ Domestic abuse, when “committed against a family or household member by a family or household member,” means “physical harm, bodily injury, or assault.”⁷⁶ The statutory language is clear: when there is a finding of domestic abuse, the court must not consider whether the victim parent is promoting contact between the child and the abusive parent.⁷⁷

In passing the MDAA, the Minnesota legislature recognized that domestic violence creates an unequal power dynamic between the abusive parent and his or her victim.⁷⁸ Very real safety considerations make the friendly-parent standard inappropriate to apply to the victim parent.⁷⁹ Battered mothers may be seen as “unfriendly” parents when they seek to protect themselves and their children.⁸⁰ The legislature has acknowledged the difference domestic violence makes in a parenting situation.⁸¹ Separation of the victim and abuser does not necessarily end the abuse.⁸²

71. MINN. STAT. § 518.179, subdiv. 1.

72. *Id.* The definition of “family or household member” includes “spouses and former spouses” and “persons who have a child in common regardless of whether they have been married or have lived together at any time.” MINN. STAT. § 518B.01, subdiv. 2(b)(1), (b)(5).

73. MINN. STAT. § 518.17, subdiv. 1(a)(13).

74. *Id.*; see Nancy Ver Steegh, *The Silent Victims: Children and Domestic Violence*, 26 WM. MITCHELL L. REV. 775, 791 (2000) (“Like many other states, Minnesota enacted a ‘friendly parent’ provision giving custodial preference to the parent most willing to co-parent. Specifically, the Minnesota statute directs courts to consider ‘the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.’”) (citation omitted).

75. MINN. STAT. § 518.17, subdiv. 1(a)(13); see also § 518B.01.

76. MINN. STAT. § 518B.01, subdiv. 2(a)(1).

77. MINN. STAT. § 518.17, subdiv. 1(a)(13).

78. See Ver Steegh, *supra* note 74, at 793.

79. See *id.* at 791.

80. Drozd, *supra* note 12, at 407.

81. MINN. STAT. § 518.179.

82. See JEFFREY L. EDLESON & OLIVER J. WILLIAMS, *PARENTING BY MEN WHO BATTER* 47 (2007); see also Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 411 (2005) (“Batterers use any opportunity or contact to perpetuate the abuse in an effort to maintain their

Contact between parents to exchange children and resolve other visitation issues provides an opportunity “for renewed domestic violence.”⁸³ Abusers use the connection stemming from visitation rights or shared custody to “harass or verbally abuse their victims,” “pressure the victim to return to the batterer,” or as a chance to “continue their physical abuse”⁸⁴

When domestic abuse is present, the statute specifically directs the court to consider “the effect on the child of the actions of an abuser, if related to domestic abuse . . . that has occurred between the parents.”⁸⁵ Studies indicate that children exposed to parental abuse frequently “develop post-traumatic stress disorder, akin to the trauma suffered by war survivors.”⁸⁶ Further, a “[h]igh overlap [exists] between domestic violence and child maltreatment.”⁸⁷ Children of female domestic violence victims “abused by a male partner are at higher risk for being abused themselves by these same men.”⁸⁸ Forty to seventy percent of victim parents’ children experience such abuse at the hands of their mothers’ abusers.⁸⁹

Abusers with a history of partner abuse who use physical force to resolve conflict are “poor role models for children.”⁹⁰ “Poor role modeling occurs even after the parental separation, whether or not parents mistreat their children directly, because when children witness one parent assaulting the other . . . and using threats of violence to maintain control, their own expectations about relationships tend to emulate these observations.”⁹¹ Children exposed to domestic violence exhibit more aggressive and antisocial behaviors and are more likely to experience depression

control.”); Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, 501 (2008) [hereinafter Jaffe et al., *Custody Disputes Involving Allegations*].

83. Jaffe et al., *Custody Disputes Involving Allegations*, *supra* note 82, at 502; see also EDLESON & WILLIAMS, *supra* note 82, at 48.

84. Greenberg, *supra* note 82, at 411–12.

85. MINN. STAT. § 518.17, subdiv. 1(a)(12).

86. Leslie D. Johnson, *Caught in the Crossfire: Examining Legislative and Judicial Response to the Forgotten Victims of Domestic Violence*, 22 LAW & PSYCHOL. REV. 271, 274 (1998).

87. EDLESON & WILLIAMS, *supra* note 82, at 47.

88. GOULD & MARTINDALE, *supra* note 30, at 279; see also Greenberg, *supra* note 82, at 413 (noting that approximately fifty percent of abusers who batter their partners also abuse their children).

89. See GOULD & MARTINDALE, *supra* note 30, at 279.

90. Jaffe et al., *Custody Disputes Involving Allegations*, *supra* note 82, at 502; see also EDLESON & WILLIAMS, *supra* note 82, at 48.

91. Jaffe et al., *Custody Disputes Involving Allegations*, *supra* note 82, at 502.

and low self-esteem.⁹² Moreover, they are more likely to become “abusers or victims themselves, thus perpetuating the cycle of violence over and over through the generations.”⁹³

In domestic violence situations, the court must consider the impact of the abuser’s actions on the child.⁹⁴ The court’s analysis of the child’s best interest should go beyond whether the child was directly assaulted or directly witnessed the incident.⁹⁵ The court should also closely examine the abusive parent’s behavior and its impact on the child.⁹⁶ PA is irrelevant in these cases because the court cannot consider whether the victim is promoting frequent and continuing contact between the child and the abusive parent.⁹⁷ Where a parent has a domestic violence conviction, the presumption of joint legal custody shifts and the abusive parent bears the burden of proving that any type of custody or visitation is in the child’s best interest.⁹⁸ Where the victim parent is unable to provide sufficient evidence for a domestic abuse conviction, he or she does not fall within the purview of these statutes.⁹⁹ Any protective endeavors toward the victim’s child may be seen as “unfriendly” behavior, resulting in further victimization as he or she is dubbed an alienating parent and stripped of child custody.¹⁰⁰

92. Kent, *supra* note 66, at 1345.

93. *Id.* (quoting DAWN BRADLEY BERRY, *THE DOMESTIC VIOLENCE SOURCEBOOK: EVERYTHING YOU NEED TO KNOW* 121 (2d ed. 1998)); *see also* Johnson, *supra* note 86, at 275.

94. MINN. STAT. § 518.17, subdiv. 1(a)(12) (2009).

95. *Id.* § 518.17, subdiv. 1(a) (listing thirteen factors to consider in a best interest analysis, only two of which pertain to domestic violence); *see* Jaffe et al., *Custody Disputes Involving Allegations*, *supra* note 82, at 509 (outlining factors that should be considered in addition to direct abuse, including the safety and well-being of the victim parents, empowerment of the victim parents, and accountability of perpetrators).

96. JAFFE ET AL., *CHILD CUSTODY & DOMESTIC VIOLENCE*, *supra* note 30, at 65 (noting the importance of considering domestic abuse in custody decisions, especially its emotional effects on children living in the home).

97. *See* MINN. STAT. § 518.17, subdiv. 1(a)(13).

98. MINN. STAT. § 518.179, subdiv. 1; *see also* JAFFE ET AL., *CHILD CUSTODY & DOMESTIC VIOLENCE*, *supra* note 30, at 65–66 (“As of September 2001, 17 U.S. states plus the District of Columbia had . . . creat[ed] a ‘rebuttable presumption.’”).

99. *See* MINN. STAT. § 518.17, subdiv. 1(a)(13) (requiring a “*finding* of domestic abuse as defined in section 518B.01”) (emphasis added); JAFFE ET AL., *CHILD CUSTODY & DOMESTIC VIOLENCE*, *supra* note 30, at 66 (discussing the various standards regarding what evidence is sufficient to trigger the statutory presumption against a parent accused of domestic abuse).

100. JAFFE ET AL., *CHILD CUSTODY & DOMESTIC VIOLENCE*, *supra* note 30, at 45 (“If [mothers] attempt to fight for custody and behave in a protective manner toward their children, they risk being punished by the court system for being ‘unfriendly’”); *see* GOULD & MARTINDALE, *supra* note 30, at 328 (“[B]atterers were successfully posing allegations of PAS in court to obtain custody from mothers

C. *Issues with Using the Term “Syndrome”*

Another practical legal problem posed by PAS is that courts may grant it more credence than is appropriate. Several scholars question the reliability of PAS.¹⁰¹ Jonathan Gould notes that there is no “underlying theory of science, its psychometric characteristics have yet to be demonstrated, there are no established protocols to follow when attempting to measure it, and it has yet to be shown to be falsifiable.”¹⁰² Likewise, Peter Jaffe states that PAS has no scientific support¹⁰³ and “has not been recognized by any major mental health or legal association.”¹⁰⁴ Richard Warshak expresses concern that the use of the term “syndrome”

conveys to the court an established stature and legitimacy that may be more appropriate following the publication of rigorous empirical research. In court, the term may strengthen confidence in the scientific basis of the witness’s testimony and, by implication, in the value and reliability of that testimony.¹⁰⁵

John Myers states that syndromes lie on a “continuum of certainty” and their diagnostic value positively correlates with their probative value.¹⁰⁶ Myers cautions that “[s]ome so-called [psychological] syndromes . . . do *not* point with *any* degree of certainty to a particular cause.”¹⁰⁷

who were not alienating their children, but protecting them from exposure to a battering parent.”).

101. GOULD & MARTINDALE, *supra* note 30, at 326–35 (summarizing the “PAS debate” from the perspective of numerous schools of psychology); *see also* JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE, *supra* note 30, at 53 (acknowledging scholars who critique PAS on the grounds that it is “not validated by empirical studies[,] . . . self-published and not subject to peer review, and . . . grounded in gender biases”) (citation omitted).

102. GOULD & MARTINDALE, *supra* note 30, at 326 (quoting JONATHAN W. GOULD, CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS 173 (1998)).

103. JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE, *supra* note 30, at 34.

104. *Id.* at 52 (citation omitted).

105. GOULD & MARTINDALE, *supra* note 30, at 324–25.

106. *Id.* at 328 (quoting J.E.B. Myers, *Expert Testimony Describing Psychological Syndromes*, 24 PAC. L.J. 1449, 1455 (1993)).

107. *Id.* at 329 (quoting J.E.B. Myers, *Expert Testimony Describing Psychological Syndromes*, 24 PAC. L.J. 1449, 1456 (1993)).

III. The Minnesota Legal System's Inappropriate Use of PAS

A. Minnesota Attempts to Reject Alienation

Before PAS a civil cause of action existed for alienation of affections. In *Henrikson v. Henrikson*, decided fifteen years before Gardner coined the term PAS, the Minnesota Supreme Court held that a "change of custody was necessary to thwart a manifest purpose of [the mother] and her present husband to alienate the children from the affection and influence of their father."¹⁰⁸ Custody was transferred from the mother to the father.¹⁰⁹ Eight years after this decision, the Minnesota legislature abolished all civil causes of action for alienation of affections.¹¹⁰ Finally, the following year, the Minnesota Supreme Court decided *Bock v. Lindquist*.¹¹¹ The court held that "a right of action by a parent for alienation of a child's affections should not be recognized."¹¹² The court cited "sound public policy," and "the potential for grave abuses, in which a child becomes the object of intra-family controversy and, indeed, a pawn in disputes over monetary matters."¹¹³ The court noted that "[i]n the more usual case of marriage dissolution resulting in deteriorated relationships, a cause of action by one parent against another for alienation of a child's affections would exacerbate the unhappy relationships and become a strategic tool for advantageous use of one family member over another."¹¹⁴ The legislature expressed similar reasons for prohibiting this cause of action: it cited "grave abuses," "intimidation and harassment . . . to innocent persons and . . . the perpetration of frauds."¹¹⁵

Using PAS in court not only sidesteps the Minnesota

108. 179 N.W.2d 284, 285 (Minn. 1970). First recognized in Washington, a cause of action for alienation of affection was "characterized as an intentional tort" and was described as a "direct interference with family relations." *Strode v. Gleason*, 510 P.2d 250, 251 (Wash. Ct. App. 1973) (cited in *Bock v. Lindquist*, 278 N.W.2d 326, 327 n.3 (Minn. 1979)). To establish a cause of action, the complaining party was required to show "(1) An existing family relationship; (2) A wrongful interference with the relationship by a third person; (3) An intention on the part of the third person that such wrongful interference results in a loss of affection or family association; (4) A causal connection between the third parties' conduct and the loss of affection; (5) That such conduct resulted in damages." *Id.*

109. *Henrikson*, 179 N.W.2d at 285.

110. 1978 Minn. Laws 141, ch. 515, § 1; see *Bock*, 278 N.W.2d at 328.

111. 278 N.W.2d 326.

112. *Id.* at 327.

113. *Id.* at 327-28.

114. *Id.* at 328.

115. *Id.* (quoting 1978 Minn. Laws 141, ch. 515, § 1).

Supreme Court's express refusal to recognize this cause of action, it also results in a remedy that was rejected by the court as well: the transfer of custody.¹¹⁶ Thus, in *Bock*, the court does not mention custody transfer as a remedy.

Nothing in this opinion diminishes other remedies for interference with familial relationships, remedies which make actions for alienation of affections unnecessary as well as undesirable. Violations of judicial orders establishing custodial or visitational rights in one parent may in appropriate situations be corrected by habeas corpus or, more commonly, by citation for contempt of court.¹¹⁷

The court envisions habeas corpus and contempt of court as proper remedies, not transfer of custody to the alienated parent.¹¹⁸

B. The Survival of PA Analysis in Minnesota Courts

As the Appendix demonstrates, in part because of PAS, Minnesota courts favor the father in PA cases. Of the eighteen cases containing alienation allegations, fourteen alleged that the mother engaged in PA.¹¹⁹ In thirteen out of fourteen cases, the father made the alienation claim.¹²⁰ In the remaining case, the paternal grandparents asserted that the mother was the alienating parent.¹²¹ In eleven of the fourteen cases, the court actually found that the mother engaged in some type of alienating conduct.¹²² Nine of the cases finding alienation resulted in an unfavorable¹²³ custody ruling against the mother.¹²⁴

116. *See id.*

117. *Id.*

118. *Id.*

119. *See infra app.*

120. *See infra app.*

121. *See Aho v. Aho*, No. C3-96-217, 1996 WL 438795, at *3 (Minn. Ct. App. Aug. 6, 1996); *see infra app.*

122. *See Adolphson v. Yourzak*, No. A07-1871, 2008 WL 4628722, at *4 (Minn. Ct. App. Oct. 21, 2008); *Adler v. Espinosa*, No. A07-1771, 2008 WL 4471303, at *3, *7 (Minn. Ct. App. Oct. 7, 2008); *Pavlovich v. Pavlovich*, No. A07-2291, 2008 WL 2967055, at *3; *Goodyear-PeKarna v. PeKarna*, No. A05-2366, 2006 WL 1738278, at *1 (Minn. Ct. App. June, 27, 2006); *Behnke v. Green-Behnke*, No. A03-1039, 2004 WL 376984, at *2 (Minn. Ct. App. Mar 2, 2004); *Breitenfeldt v. Nickles-Breitenfeldt*, No. C3-02-1569, 2003 WL 1908070, at *2 (Minn. Ct. App. Apr. 22, 2003); *Smith v. Smith*, No. C8-01-648, 2001 WL 1608365, at *1 (Minn. Ct. App. Dec. 18, 2001); *Sharp v. Bilbro*, 614 N.W.2d 260, 264 (Minn. Ct. App. 2000); *Jokippi v. Miller*, No. C7-97-1817, 1998 WL 74289, at *1; *Aho*, 1996 WL 438795, at *3; *Theisen v. Theisen*, 405 N.W.2d 470, 472 (Minn. Ct. App. 1987).

123. "Unfavorable" means either that (1) custody was transferred from the mother to the alienated parent, or (2), that sole legal and physical custody with the mother was modified to joint legal and physical custody.

124. *See Adler*, 2008 WL 4471303, at *3; *PeKarna*, 2006 WL 1738278, at *1; *Behnke*, 2004 WL 376984, at *2; *Breitenfeldt*, 2003 WL 1908070, at *2; *Smith*, 2001

The mother obtained sole custody only if the court found that she did not engage in PA.¹²⁵ In *Bryan-Stephan v. Bryan*, the evidence did not support the contention that the mother was the alienating parent.¹²⁶ The mother ended up with sole legal and physical custody.¹²⁷ In another decision granting the mother sole legal and physical custody, the district court refused to find that the mother was alienating the children.¹²⁸ The court of appeals determined that “any alienation has been the result of [the father’s] conduct rather than [the mother’s].”¹²⁹

Fathers enjoyed more favorable custody outcomes than mothers.¹³⁰ In four of the eighteen cases involving alienation

WL 1608365, at *1; *Sharp*, 614 N.W.2d at 264; *Jokippi*, 1998 WL 74289, at *1; *Aho*, 1996 WL 438795, at *3; *Theisen*, 405 N.W.2d at 472.

125. See *Capra v. Capra*, No. A07-851, 2007 WL 3146810, at *3, *7 (Minn. Ct. App. Oct. 30, 2007) (finding that the father had alienated the children from the mother and affirming the district court’s decision to award the mother sole legal and physical custody of the children); *Geske v. Marcolina*, No. A04-1773, 2005 WL 1740906, at *3 (Minn. Ct. App. July 26, 2005) (“[T]he district [court] refus[ed] to make a factual finding of parental alienation of the children . . . [as the evidence] supports a determination that any alienation has been the result of [the father’s] conduct rather than [the mother’s].”); *Bryan-Stephan v. Bryan*, No. A03-1159, 2004 WL 1244245, at *5 (Minn. Ct. App. June 8, 2004); *Younger v. Lobby*, 1996 WL 104759, at *2 (Minn. Ct. App. Mar. 12, 1996) (affirming the custody order granting the mother sole custody of the children based on the district court’s independent finding that “there was [no] prima facie showing of endangerment,” contrary to the father’s allegations and attempts to alienate the mother from her children). *But see Adolphson*, 2008 WL 462722, at *1, *5 (affirming the district court’s decision to grant the mother sole physical custody, while granting joint legal custody).

126. 2004 WL 1244245, at *5.

127. *Id.*

128. See *Geske*, 2005 WL 1740906, at *3.

129. *Id.*

130. See *Adler v. Espinosa*, No. A07-1771, 2008 WL 4471303, at *1, *7 (Minn. Ct. App. Oct. 7, 2008) (granting father sole physical and legal custody); *Goodyear-PeKarna v. PeKarna*, No. A05-2366, 2006 WL 1738278, at *1 (Minn. Ct. App. June, 27, 2006) (granting father sole physical and legal custody subject to supervised access by the mother); *Behnke v. Green-Behnke*, No. A03-1039, 2004 WL 376984, at *3 (Minn. Ct. App. Mar 2, 2004) (granting father sole physical and legal custody subject to supervised access by the mother); *Breitenfeldt v. Nickles-Breitenfeldt*, No. C3-02-1569, 2003 WL 1908070, at *4 (Minn. Ct. App. Apr. 22, 2003) (granting sole physical and legal custody to the father); *Smith v. Smith*, No. C8-01-648, 2001 WL 1608365, at *1 (Minn. Ct. App. Dec. 18, 2001) (placing the child with the father); *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. Ct. App. 2000) (finding that leaving custody with the mother would endanger the child); *Aho v. Aho*, No. C3-96-217, 1996 WL 438795, at *2 (Minn. Ct. App. Aug. 6, 1996) (awarding sole physical and legal custody to paternal grandparents); *Theisen v. Theisen*, 405 N.W.2d 470, 474 (Minn. Ct. App. 1987) (finding that the trial court did not abuse its discretion by transferring custody to the father); *Lemcke v. Lemcke*, 623 N.W.2d 916, 919 (Minn. Ct. App. 2001); *Younger*, 1996 WL 104759, at *1 (ruling that the father was not the alienating parent). *But see Capra*, 2007 WL 3146810, at *3 (ruling that the father was the alienating parent).

allegations the father was the allegedly alienating parent.¹³¹ In *Younger v. Lobby*, the court did not address the mother's contention that the father was alienating the children from her.¹³² In *Tarlan v. Sorenson*, the court found little evidence of alienation by the father and granted him sole physical and legal custody.¹³³ The court in *Capra v. Capra*, on the other hand, found alienation by the father, and granted the mother sole legal and physical custody of the children.¹³⁴ It found further that the father committed domestic abuse against the mother under the MDA and had "guided the children to replicate his violent behavior."¹³⁵ In total, the court found alienation by the father in only two cases, and only one of those resulted in an unfavorable custody ruling.¹³⁶ Thus, it was less likely that a court would find the father engaged in alienation (and revoke or restrict custody) than if similar allegations were made against the mother.

That the cases so overwhelmingly cast the mother as the alienating parent and often revoke custody is cause for concern. While complicating factors explain some cases,¹³⁷ even where the

131. See *infra* app.

132. 1996 WL 104759, at *1. The court affirmed the district court's decision to allow the children to remain with their mother, which was based on a referee's finding that there had been no "prima facie showing of endangerment." *Id.* at *2.

133. No. C1-00-982, 2001 WL 185098, at *3 (Minn. Ct. App. Feb. 27, 2001) ("The district court found that neither party is currently likely to foster the children's relationship with the other parent, but that [the father] is more likely than [the mother] to overcome the acrimony in these proceedings and foster a relationship with the other parent in the future . . .").

134. 2007 WL 3146810, at *3 (describing how the "father has employed several techniques to alienate [the mother] from the children"); *id.* at *1 (modifying the parents' joint physical and legal custody to grant sole legal and physical custody of the children to the mother).

135. *Id.* at *4.

136. *Id.* at *1, *3 (granting sole legal and physical custody to the mother and finding that the father alienated the children); *Lemcke v. Lemcke*, 623 N.W.2d 916, 918, 922 (Minn. Ct. App. 2001) ("The child had a uniquely close emotional relationship with his father and . . . upsetting that relationship would be detrimental to him. The [district] court also found that although [the father] had initially tried to alienate [the child's] affection from his mother and her family, he now appeared able to put aside his anger and encourage a positive relationship between [the child] and his mother.") (affirming award of sole physical custody to the father).

137. *Behnke v. Green-Behnke*, No. A03-1039, 2004 WL 376984, at *2 (Minn. Ct. App. Mar 2, 2004) (stating that the mother is "personality disordered" and "no longer treating her mental illness with medication or therapy"); *Smith v. Smith*, No. C8-01-648, 2001 WL 1608365, at *4 (Minn. Ct. App. Dec. 18, 2001) (finding that the mother "had anger management problems that would place [the child] in physical danger and that [the mother] did not believe her inappropriate response to anger was wrong"); *Theisen v. Theisen*, 405 N.W.2d 470, 472 (Minn. Ct. App. 1987) (stating that the mother pled guilty to "seven criminal offenses, including Forgery, Theft by Swindle and Theft").

court specifically found that the mother was a good, loving parent it still transferred custody to the father.¹³⁸ It is unclear why more cases end up on appeal alleging alienation by the mother than by the father, but perhaps mothers are less inclined to allege that fathers are alienating the children.¹³⁹ This reluctance may reflect fear of retribution in domestic violence cases.¹⁴⁰ Or perhaps mothers are more willing or easily persuaded to settle these claims outside of court.¹⁴¹ Mothers may also tend to be given temporary custody leading up to the proceedings, placing fathers in a position to assert PA as an offensive maneuver to compensate for their disadvantage.¹⁴² If so, mothers have not been effectively defending themselves against this ever-evolving, amorphous allegation.¹⁴³ In light of Minnesota's commitment to improving gender fairness in the courts and the disproportionate number of cases resulting in adverse custody decisions against mothers, a deeper look into how mothers are treated in child custody cases is required.¹⁴⁴

C. Domestic Violence in PA Cases

Abuse allegations add another dimension to the PA analysis.

138. See, e.g., *Adler v. Espinosa*, No. A07-1771, 2008 WL 4471303, at *1, *5 (Minn. Ct. App. Oct. 7, 2008) (affirming modification of custody) (“[T]he children are bonded to [the mother] and very comfortable in her care . . . [the mother] is a hands-on caregiver who is actively involved in parenting; and . . . she is a devoted mother who makes the children the focus of her life.”).

139. Cf. Richard A. Gardner, *Denial of Parental Alienation Syndrome Also Harms Women*, 30 AM. J. FAM. THERAPY 191, 198 (2002) (discussing how women who assert that fathers are alienating the children against them face resistance from women's rights groups, lawyers, and therapists).

140. See EDLESON & WILLIAMS, *supra* note 82, at 50 (“If the allegations are proven by a preponderance of the evidence, the victim and her children may find safety, provided by recent legal reforms and appropriate community resources. However, if the allegations appear unfounded and are deemed to be malicious, the abuse victim may lose custody. In some of these cases, mothers are accused of willful alienation of the children against the father.”).

141. See *id.* (“Courts want cases settled in a cost-efficient and timely manner by precourt interventions, such as mediation and settlement conferences. Cooperation is highly reinforced and seen to be synonymous with children's best interests. Common wisdom in the divorce field suggests that the parent who is best able to promote a relationship between the child(ren) and the other parent is most appropriate for a custodial role.”).

142. See, e.g., *Smith*, 2001 WL 1608365, at *1 (stating that the mother had temporary custody of the child while the guardian ad litem “explored the parties' custody arrangement”). In this case, the father successfully made a parental alienation claim against the mother and won custody of the child. *Id.*

143. See *supra* text accompanying notes 119–124.

144. See *Preface* to MINN. SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT (1989) (discussing Minnesota's commitment to improving gender equality in the courts).

Eleven of the eighteen PA cases contained abuse claims.¹⁴⁵ Four of these abuse allegations were substantiated.¹⁴⁶ *Adler v. Espinosa* contained mutual abuse allegations.¹⁴⁷ The court found only the father credible, concluded that the mother was alienating the father, and made an adverse custody ruling against the mother.¹⁴⁸ In *Adolphson v. Yourzak*, the court found abuse against the mother, but not the child.¹⁴⁹ Although the mother was found to be alienating the father, there was no custody change.¹⁵⁰ However, the parties had joint legal custody, which under Minnesota law is not advisable in cases of domestic abuse.¹⁵¹ In cases where domestic abuse as defined in the MDAA has occurred, there is “a rebuttable presumption that joint legal or physical custody is *not* in the best interests of the child.”¹⁵² Despite this, the court of appeals found that “the district court made the required findings for a grant of joint legal custody over the objection of the mother.”¹⁵³

Conversely, in *Geske v. Marcolina*, there was domestic abuse as defined under the MDAA, and the court refused to find PA by the mother, granting her sole physical and legal custody.¹⁵⁴ In *Capra v. Capra*, the court found the father committed domestic abuse and alienated the children from the mother.¹⁵⁵ The mother was granted sole custody.¹⁵⁶ In sum, when the court found domestic abuse by the father, it did not make adverse custody decisions against the mother.¹⁵⁷ This suggests that courts are sensitized to domestic abuse concerns and that substantiated abuse allegations act as an adequate defense to PA assertions.

Mothers fared worse where the abuse allegations were not substantiated. All seven cases with unconfirmed domestic abuse

145. *See infra* app.

146. *See infra* app.

147. No. A07-1771, 2008 WL 4471303, at *5 (Minn. Ct. App. Oct. 7, 2008).

148. *Id.* at *5–6.

149. No. A07-1871, 2008 WL 4628722, at *5 (Minn. Ct. App. Oct. 21, 2008).

150. *Id.*

151. *Id.* at *4 (“Mother argues that the district court did not make a required finding related to domestic abuse, and, as a result, the presumption against joint legal custody where domestic abuse exists was not overcome.”) (citation omitted); *see* MINN. STAT. § 518.17, subdiv. 2 (2009).

152. MINN. STAT. § 518.17, subdiv. 2 (emphasis added).

153. *Adolphson*, 2008 WL 4628722, at *5.

154. No. A04-1773, 2005 WL 1740906, at *3, *1 (Minn. Ct. App. Oct. 18, 2005).

155. No. A07-851, 2007 WL 3146810, at *2 (Minn. Ct. App. Oct. 30, 2007).

156. *Id.* at *1.

157. *See* MINN. STAT. § 518.17(2); MINN. STAT. § 518B.01.

resulted in adverse custody decisions against the mother.¹⁵⁸ In five of these cases the court substantiated the parental alienation claims against the mother.¹⁵⁹ But even in the case without a finding of PA by the mother, the court still awarded joint custody.¹⁶⁰ Is there causation between the unsubstantiated abuse allegations and the adverse custody rulings?¹⁶¹ Gardner did not intend for such allegations to be viewed as symptomatic of PAS.¹⁶² But other scholars have interpreted PAS in exactly this manner.¹⁶³ Even if the court is not using false abuse allegations as a symptom of PA, cases suggest that courts are at least using unproven abuse allegations as further reason to find against the mother.¹⁶⁴

Conclusion

As parental alienation evolved from a common-law cause of action for alienation of a child's affection to Gardner's parental alienation syndrome to parental alienation, it led to several undesirable results.¹⁶⁵ The worst of these results is an unfair impact on women.¹⁶⁶ Minnesota PA cases exhibit anti-mother

158. *Goodyear-PeKarna v. PeKarna*, No. A05-2366, 2006 WL 1738278, at *1-3 (Minn. Ct. App. June, 27, 2006); *Behnke v. Green-Behnke*, No. A03-1039, 2004 WL 376984, at *1 (Minn. Ct. App. Mar 2, 2004); *Breitenfeldt v. Nickles-Breitenfeldt*, No. C3-02-1569, 2003 WL 1908070, at *1-2 (Minn. Ct. App. Apr. 22, 2003); *Tarlan v. Sorenson*, No. C1-00-982, 2001 WL 185098, at *1 (Minn. Ct. App. Feb. 27, 2001); *Sharp v. Bilbro*, 614 N.W.2d 260, 263-64 (Minn. Ct. App. 2000); *Crews v. McKenna*, No. C3-98-75, 1998 WL 373283, at *3-4 (Minn. Ct. App. July 7, 1998); *Aho v. Aho*, No. C3-96-217, 1996 WL 438795, at *1, *3 (Minn. Ct. App. Aug. 6, 1996).

159. *PeKarna*, 2006 WL 1738278, at *1; *Behnke*, 2004 WL 376984, at *2; *Breitenfeldt*, 2003 WL 1908070, at *2; *Sharp*, 614 N.W.2d at 264; *Aho*, 1996 WL 438795, at *3-4.

160. *Crews*, 1998 WL 373283, at *3.

161. See, e.g., *Breitenfeldt*, 2003 WL 1908070, at *2 (“[The mother’s] pattern of making vague reports of abuse and neglect and then denying responsibility for the subsequent Child Protection investigations is of much concern to the evaluator.”).

162. See *supra* note 39 and accompanying text.

163. GOULD & MARTINDALE, *supra* note 30, at 340 (stating that one of the three “organizing beliefs” of an alienating parent is that “[t]he rejected parent is dangerous to the child in some way(s), either violent, physically or sexually abusive, or neglectful”).

164. See *PeKarna*, 2006 WL 1738278, at *1-3; *Behnke*, 2004 WL 376984, at *1; *Breitenfeldt*, 2003 WL 1908070, at *1-2; *Sharp*, 614 N.W.2d at 263-64; *Crews*, 1998 WL 373283, at *3-4; *Aho*, 1996 WL 438795, at *1, *3.

165. See, e.g., JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE, *supra* note 30, at 53 (“The consequences of this theory’s growing popularity and uncritical acceptance are particularly serious for victims of domestic violence A mother’s desire to protect her children from possible physical or sexual abuse may be viewed as alienating behavior.”).

166. See, e.g., *Adler v. Espinosa*, No. A07-1771, 2008 WL 4471303 (Minn. Ct. App. Oct. 7, 2008); *PeKarna*, 2006 WL 1738278; *Behnke*, 2004 WL 376984; *Breitenfeldt*, 2003 WL 1908070; *Smith v. Smith*, No. C8-01-648, 2001 WL 1608365

gender bias.¹⁶⁷ Child custody proceedings in which the court finds PA by the mother consistently yield adverse results.¹⁶⁸ The high proportion of cases where the courts found the mother was alienating and then transferred custody tends to suggest that courts are using PAS as a basis for custody decisions.¹⁶⁹ The court transferred custody from the father in only one case, and it included findings that the father abused the mother and was passing on his abusive behavior to the children.¹⁷⁰ The higher benchmark required before the court transfers custody away from the father indicates a pro-father bias.¹⁷¹ Although Minnesota courts have consistently employed the best interest factors in making custody decisions, the high level of discretion vested in the trial courts in weighing each factor has allowed sufficient room for gender bias to creep into the results.

In recent years, courts have continued efforts to decrease anti-father gender bias in child custody cases.¹⁷² In the interest of remedying a history of favoring the mothers, courts have been quicker to grant fathers custody.¹⁷³ Now, however, the pendulum has swung too far and courts have grown too comfortable with transferring custody from mothers to fathers when that is not the best outcome.

To reduce the adverse impact PA has on mothers, courts should heed the Minnesota legislature's and Minnesota Supreme Court's public policy discussion about the dangers of alienation

(Minn. Ct. App. Dec. 18, 2001); *Sharp*, 614 N.W.2d 260; *Aho*, 1996 WL 438795; *Theisen v. Theisen*, 405 N.W.2d 470 (Minn. Ct. App. 1987).

167. Compare *Adler*, 2008 WL 4471303, at *1 (giving custody to the father due to mother's alienation), with *Lemcke v. Lemcke*, 623 N.W.2d 916, 917-18 (Minn. Ct. App. 2001) (giving custody to the father despite finding that he engaged in alienating behavior). See also JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE, *supra* note 30, at 53 ("Gardner's theory is grounded in gender bias with its claim that 90% of alienators are mothers.") (citation omitted).

168. See JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE, *supra* note 30, at 53 (describing the theory's negative impact on domestic violence victims).

169. See *Adler*, 2008 WL 4471303; *PeKarna*, 2006 WL 1738278; *Behnke*, 2004 WL 376984; *Breitenfeldt*, 2003 WL 1908070; *Smith*, 2001 WL 1608365; *Sharp*, 614 N.W.2d 260; *Aho*, 1996 WL 438795; *Theisen*, 405 N.W.2d 470.

170. *Capra v. Capra*, No. A07-851, 2007 WL 3146810, at *3 (Minn. Ct. App. Oct. 30, 2007).

171. Compare *Adler*, 2008 WL 4471303, at *2, *5 (giving custody to the father due to the mother's alienating behavior despite finding that the children "are bonded to [the mother]"), with *Lemcke*, 623 N.W.2d at 917-18 (giving custody to the father despite finding that he engaged in alienating behavior).

172. See Jeffrey M. Leving, *The Parental Alienation Syndrome and Gender Bias in the Courts*, in THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME, *supra* note 1, at 392.

173. See *supra* Part III.B.

that resulted in their rejection of a common-law cause of action for parental alienation of a child's affection.¹⁷⁴ The Supreme Court found this cause of action subject to abuse and recommended other remedies such as contempt of court and habeas corpus.¹⁷⁵

The court should keep its focus on the child. Instead of concentrating on the child's best interests, courts use PA to focus on parental rights.¹⁷⁶ As a result, courts have transferred custody from a parent found to be good and loving to the other parent despite the availability of other remedies.¹⁷⁷ Courts seem to implicitly justify gender bias in the interest of upholding parental rights.¹⁷⁸ By focusing on which custody situation is better for the child, courts will reduce the danger of gender bias while remaining true to court precedents.

174. *See supra* notes 110–115 and accompanying text.

175. *Bock v. Lindquist*, 278 N.W.2d 326, 328 (Minn. 1979).

176. *See, e.g., Adler*, 2008 WL 4471303 (removing a child from a loving home because the court found that the mother engaged in PA).

177. *See id.*

178. *See id.*

**Appendix: Minnesota Court of Appeals Decisions Referring
to Parental Alienation, 1987–Present**

Case Name ¹	Allegations of Abuse	Abuse Allegations Substantiated	Allegedly Alienating Parent	Allegedly Alienated Parent	Custody
<i>Theisen</i> (1987) ²	No	N/A	Mother ³	Father	Father ⁴
<i>Younger</i> (1996) ⁵	No	N/A	Father ⁶	Mother	Mother (not modified) ⁷
<i>Aho</i> (1996) ⁸	Yes ⁹	No ¹⁰	Mother ¹¹	Grandfather	Grandparents ¹²
<i>Jokippi</i> (1998) ¹³	No	N/A	Mother ¹⁴	Father	Joint ¹⁵
<i>Crews</i> (1998) ¹⁶	Yes ¹⁷	No ¹⁸	Mother ¹⁹	Father	Permanent joint physical ²⁰
<i>Sharp</i> (2000) ²¹	Yes ²²	No ²³	Mother ²⁴	Father	Father ²⁵
<i>Lemcke</i> (2001) ²⁶	No	N/A	Father ²⁷	Mother ²⁸	Father ²⁹
<i>Tarlan</i> (2001) ³⁰	Yes ³¹	No ³²	Father ³³	Mother ³⁴	Father ³⁵
<i>Smith</i> (2001) ³⁶	No	N/A	Mother ³⁷	Father ³⁸	Father ³⁹
<i>Breitenfeldt</i> (2003) ⁴⁰	Yes ⁴¹	No ⁴²	Mother ⁴³	Father ⁴⁴	Father ⁴⁵
<i>Behnke</i> (2004) ⁴⁶	Yes ⁴⁷	No ⁴⁸	Mother ⁴⁹	Father ⁵⁰	Father ⁵¹
<i>Bryan-Stephan</i> (2004) ⁵²	No	N/A	Mother ⁵³	Father ⁵⁴	Mother ⁵⁵
<i>Geske</i> (2005) ⁵⁶	Yes ⁵⁷	Yes ⁵⁸	Mother ⁵⁹	Father ⁶⁰	Mother ⁶¹
<i>Goodyear-PeKarna</i> (2006) ⁶²	Yes ⁶³	No	Mother ⁶⁴	Father ⁶⁵	Father ⁶⁶
<i>Capra</i> (2007) ⁶⁷	Yes ⁶⁸	Yes ⁶⁹	Father ⁷⁰	Mother ⁷¹	Mother ⁷²
<i>Pavlovich</i> (2008) ⁷³	No	N/A	Mother ⁷⁴	Father ⁷⁵	Joint legal; split physical ⁷⁶
<i>Adolphson</i> (2008) ⁷⁷	Yes ⁷⁸	Partially substantiated ⁷⁹	Mother ⁸⁰	Father ⁸¹	Joint legal; mother sole physical ⁸²
<i>Adler</i> (2008) ⁸³	Yes ⁸⁴	Yes ⁸⁵	Mother ⁸⁶	Father ⁸⁷	Father ⁸⁸

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1. These cases encompass the appeals in which the court specifically uses parental alienation language.
 2. *Theisen v. Theisen*, 405 N.W.2d 470 (Minn. Ct. App. 1987).
 3. *Id.* at 472 (describing the district court's finding that the mother repeatedly tried to alienate the children from their father).
 4. *Id.* at 474 (affirming the district court's decision to transfer custody from the mother to the father).
 5. *Younger v. Lobby*, No. C1-95-2103, 1996 WL 104759 (Minn. Ct. App. Mar. 12, 1996).
 6. *Id.* at *1 (acknowledging the mother's contention that the father was "attempting to alienate the children from her" and was falsely alleging that she "[was] trying to displace him, [was] no longer showing affection to the children, [was] neglecting the children's hygiene, and [was] involving them in questionable spiritual activities").
 7. *Id.* at *2 (affirming the referee's refusal to modify an order granting joint legal and physical custody to the mother).
 8. *Aho v. Aho*, No. C3-96-217, 1996 WL 438795 (Minn. Ct. App. Aug. 6, 1996).
 9. *Id.* at *1 (noting the mother's allegation that the grandfather sexually abused the child).
 10. *Id.* at *3.
 11. *Id.* ("[The district court] specifically found . . . that [the mother] improperly manipulated the children by accusing [the grandfather] of sexual abuse in front of them.").
 12. *Id.* at *1-2 (affirming the district court's decision to modify the grandparents' custody from joint legal and physical custody to sole legal and physical custody).
 13. *Jokippi v. Miller*, No. C7-97-1817, 1998 WL 74289 (Minn. Ct. App. Feb. 24, 1998).
 14. *Id.* at *1 (noting the district court's finding that the mother alienated the father by "demonstrating hostility toward [the father] and not allowing items from [the father] to come into the home").
 15. *Id.* at *1 n.1 (summarizing the district court's decision to modify custody from "sole physical and legal in [the mother] to joint physical and legal").
 16. *Crews v. McKenna*, No. C3-98-75, 1998 WL 373283 (Minn. Ct. App. July 7, 1998).
 17. *Id.* at *3 (noting the mother's allegations that the father physically and sexually abused the children).
 18. *Id.*.
 19. *Id.* (emphasizing the court-appointed psychologist's finding that "there was nothing to indicate that [the father] was not able 'to interact with his children in a reasonable [sic] supportive and caring manner'").
 20. *Id.* at *4 (affirming the district court's decision to award joint physical custody).
 21. *Sharp v. Bilbro*, 614 N.W.2d 260 (Minn. Ct. App. 2000).
 22. *Id.* at 262.
 23. *Id.* (noting that the mother "pleaded guilty to making false allegations of abuse").
 24. *Id.* at 264 (emphasizing the district court's finding that mother tried to "subvert the father-child relationship").
 25. *Id.* at 265 (affirming the district court's decision to transfer sole legal and physical custody to the father).
 26. *Lemcke v. Lemcke*, 623 N.W.2d 916 (Minn. Ct. App. 2001).
 27. *Id.* at 919 ("[The father] initially attempted to alienate [the son's] affection from his mother . . ."). However, a court-ordered evaluation showed that the

father “had a uniquely intimate bond with the child and appeared to be more settled and more focused on [the child’s] need for stability.” *Id.* at 918.

28. *Id.* at 919. Despite the initial alienation, a psychologist also found that the child “loved both parents and was equally bonded to them.” *Id.* at 918.

29. *Id.* at 919.

30. *Tarlan v. Sorenson*, No. C1-00-982, 2001 WL 185098 (Minn. Ct. App. Feb. 27, 2001).

31. *Id.* at *3 (“[The mother] also challenges the lack of finding that this case involved domestic abuse. Even if abuse previously occurred, [the father] has progressed in his therapy and is on medication.”).

32. *Id.*

33. *Id.* (“The district court found that neither party is currently likely to foster the children’s relationship with the other parent, but that [the father] is more likely than [the mother] to overcome the acrimony in these proceedings and foster a relationship with the other parent in the future than [the mother]. The record supports this finding. [The mother] testified that she did not want any contact with the [the father] at any point for any reason and that [the father’s] contributions to raising the children were minimal. [The father], however, stated that he would try to foster the relationship between [the mother] and the children.”).

34. *Id.*

35. *Id.* at *1.

36. *Smith v. Smith*, No. C8001-648, 2001 WL 1608365 (Minn. Ct. App. Dec. 18, 2001).

37. *Id.* at *1 (“The [district] court pointed out that [the mother] . . . alienated [the] daughter’s affections for [the father] . . .”).

38. *Id.*

39. *Id.* (“[I]t would be in [the daughter’s] best interests to be placed with [the father].”).

40. *Breitenfeldt v. Nickles-Breitenfeldt*, No. C3-02-1569, 2003 WL 1908070 (Minn. Ct. App. Apr. 22, 2003).

41. *Id.* at *2 (“[The mother] had accused [the father] of domestic abuse, stalking, neglect of [his son], and an improper relationship with [his daughter from a previous marriage].”).

42. *Id.* The mother demonstrated a “pattern of making vague reports of abuse and neglect and then denying responsibility for the subsequent Child Protection investigations . . .” *Id.*

43. The court did not make any findings that the mother alienated the father from the child. *Id.* However, the mother’s pattern of behavior exhibited factors “associated with parental alienation dynamics.” *Id.* The evidence was used in the court’s findings to satisfy the statutory requirements of custody evaluations. *Id.*

44. *Id.*

45. *Id.* at *8.

46. *Behnke v. Green-Behnke*, No. A03-1039, 2004 WL 376984 (Minn. Ct. App. Mar. 2, 2004).

47. *Id.* at *1.

48. Subsequent reviews by the county and the guardian ad litem in related order for protection proceedings initiated by the mother, Deidre Mosser (formerly Deidre Green-Behnke), concluded that the allegations of abuse against the father were groundless. *In re Mosser*, No. A05-1166, 2006 WL 1390381, at *3 (Minn. Ct. App. May 23, 2006). The court affirmed the district court’s denial of Mosser’s petition for an order for protection and modification of the custody order. *Id.* at *1.

49. The district court described the mother as “well on her way to accomplishing total parental alienation between [the father] and the children.”

Behnke, 2004 WL 376984, at *2.

50. *Id.*

51. The mother was granted sole legal and physical custody upon dissolution, but the decree was modified by the district court to give permanent sole physical and legal custody to the father. *Id.* at *6. The court of appeals affirmed. *Id.*

52. *Bryan-Stephan v. Bryan*, No. A03-1159, 2004 WL 1244245 (Minn. Ct. App. June 8, 2004).

53. *Id.* at *5.

54. *Id.*

55. *Id.* at *1.

56. *Geske v. Marcolina*, No. A04-1773, 2005 WL 1740906 (Minn. Ct. App. July 26, 2005). In this case, the father appealed from four district court orders relating to parenting time and other issues. *Id.* at *1.

57. In an earlier court of appeals decision on the issue of Geske's and Marcolina's dissolution, the court reasoned that the father had displayed "abusive, intimidating, and controlling behavior." *Geske v. Marcolina*, 642 N.W.2d 62, 65 (Minn. Ct. App. 2002).

58. *Id.* at 65.

59. *Geske*, 2005 WL 1740906, at *3 ("[T]he district [court] refus[ed] to make a factual finding of parental alienation of the children."). The court of appeals found that the evidence on record "supports a determination that any alienation has been the result of [the father's] conduct rather than [the mother's]." *Id.*

60. *Id.*

61. *Id.* at *1.

62. *Goodyear-PeKarna v. PeKarna*, Nos. A05-2366, A06-292, 2006 WL 1738278 (Minn. Ct. App. June 27, 2006).

63. *Id.* at *3 (finding claims that the father made sexually inappropriate comments to the children unsubstantiated).

64. In a 2004 order, the district court stated that the mother had "alienated [the father] from the lives of the . . . children to a level of it being emotionally harmful to the children's well-being." *Id.* at *1. In the subsequent dissolution judgment the district court's award of custody "turned on [the mother's] unwillingness to cooperate with [the father] in custodial matters and her repeated attempts to excise [the father] from the children's lives." *Id.* at *3.

65. *Id.*

66. *Id.* at *1.

67. *Capra v. Capra*, No. A07-851, 2007 WL 3146810 (Minn. Ct. App. Oct. 30, 2007).

68. *Id.* at *4 ("[T]he district court found that father committed domestic abuse . . . and is rearing the children to believe that domestic abuse is acceptable.").

69. *Id.*

70. *Id.* at *3 ("The finding that father's current caretaking responsibilities are the result of parental alienation is supported by mother's testimony that, since the dissolution, father has employed several techniques to alienate her from the children, such as demeaning her and insulting her parenting skills in the children's presence and preventing her from talking to the children on the telephone.").

71. *Id.*

72. *Id.* at *1.

73. *Pavlovich v. Pavlovich*, No. A07-2291, 2008 WL 2967055 (Minn. Ct. App. Aug. 5, 2008).

74. *Id.* at *3 (indicating that the son's refusal to see the father was in part due to parental alienation by the mother).

75. *Id.*

76. *Id.* at *1 (denying the father's motion to enforce the parenting-time

schedule and awarding sole legal and physical custody to the mother).

77. *Adolphson v. Yourzak*, No. A07-2291, 2008 WL 4628722 (Minn. Ct. App. Oct. 21, 2008).

78. *Id.* at *1 (noting allegations of the father abusing the mother and that the mother obtained an order for protection).

79. *Id.* at *5.

80. *Id.* at *4.

81. *Id.*

82. *Id.* at *1.

83. *Adler v. Espinosa*, No. A07-1771, 2008 WL 4471303 (Minn. Ct. App. Oct. 7, 2008).

84. *Id.* at *5 (addressing allegations of domestic abuse brought by both parents against each other).

85. *Id.* (“The district court found that [the mother’s] accusations of domestic abuse were not credible and credited [the father’s] accusations . . . because a police report showed that [the mother] admitted to hitting [the father] on the head.”).

86. *Id.* at *3 (explaining how the district court considered parental alienation, in addition to factors such as endangerment and the child’s best interests, in making its custody determination).

87. *Id.*

88. *Id.* at *1.

