

2017

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Recommended Citation

Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQ. 311 (2017).

Available at: <http://scholarship.law.umn.edu/lawineq/vol35/iss2/10>

Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*

Joan S. Meier[†] and Sean Dickson^{††}

Introduction

Catharine A. MacKinnon's genius has been in, among other things, rendering the invisible visible. In *Toward a Feminist Theory of the State*,¹ by identifying the subtle and implicit ways that gendered assumptions drive law and culture, MacKinnon awakened millions to the fundamental gender inequality at the foundations of our legal system and culture.

MacKinnon's insight is profoundly applicable to today's state family courts—civil courts adjudicating child custody. Where MacKinnon pointed out the male-gendered assumptions often hidden within law and culture, an extensive scholarly literature and thousands of reports from the field suggest that men's violence in the family is often rendered invisible by family court practices.

*. Portions of this Article, specifically Part II, have already been reported in Joan S. Meier, *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations*, (2014), http://www.ncdsv.org/GWU_Child-Custody-Outcomes-in-Cases-Involving-Parental-Alienation-and-Abuse-Allegations_4-25-2014.pdf.

†. Professor of Clinical Law at George Washington University Law School; Founder and Legal Director of the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP). My deepest thanks go to my co-author, Sean Dickson, for his superb work in both completing and systematizing the research underlying this study and computing and interpreting the statistical results. Without him, this study would not have seen the light of day. I also wish to thank Rosie Griffin, Esq., who, as a 2L and intern, did the first round of research that launched the study. Finally, I thank my colleagues at the American Association of Law Schools who encouraged me to publish this "pilot" data, and the many law professors, judges, and others who have discussed these results with me during presentations. This Article is dedicated to Catharine A. MacKinnon, whose ground-breaking and paradigm-shifting work provides a north star which guides our work toward gender equality.

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1. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

This Article provides a brief literature survey, focusing on the theory of “parental alienation” which operates as a primary vehicle for making abuse invisible in custody litigation. This Article reports on the co-authors’ pilot study, which begins empirically mapping family courts’ uses of this theory. These pilot results provide preliminary empirical support for the critiques from the field.

I. Invisibilizing Abuse in Family Courts

Although it is common for people to assume that victims of domestic violence are, in the new millennium, well-protected by the courts, the increased awareness and understanding of domestic violence which has triggered positive changes in criminal and some civil courts has never in fact truly been integrated into family courts.² Scholarly and practitioner critiques of courts’ treatment of women and children alleging abuse by fathers are legion. Expert commentators assert that family courts are awarding unfettered access or custody to abusive fathers,³ and increasingly cutting children completely off from their protective mothers.⁴ This has been observed especially where mothers allege child sexual abuse.⁵

2. See Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL’Y & L. 657, 668–71 (2003).

3. SALLY F. GOLDFARB, THE LEGAL RESPONSE TO VIOLENCE AGAINST WOMEN IN THE UNITED STATES OF AMERICA: RECENT REFORMS AND CONTINUING CHALLENGE, UNITED NATIONS 9 (2008), [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20\(Sally%20Goldfarb\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Sally%20Goldfarb).pdf) (“[I]t remains extremely rare for a court to deny a father access to his children, even when he has committed domestic violence.”); LUNDY BANCROFT ET AL., THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 189–90 (2nd ed. 2012); Sharon K. Araji & Rebecca L. Bosek, *Domestic Violence, Contested Child Custody and the Courts: Findings from Five Studies*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 6–2–6–31 (Mo Therese Hannah & Barry Goldstein eds., 2010); Evan Stark, *Rethinking Custody Evaluations in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 296–99 (2009).

4. See AMY NEUSTEIN & MICHAEL LESHER, FROM MADNESS TO MUTINY: WHY WOMEN ARE RUNNING FROM THE FAMILY COURTS AND WHAT CAN BE DONE ABOUT IT (2005); Inter-American Comm’n on Human Rights, *Petition in Accordance with Inter-American Commission on Human Rights*, <http://www.protectiveparents.com/Petition-on-Human-Rights.pdf>, ¶¶ 6–33, 444 (May 11, 2007); Joan S. Meier, *Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen’s Decision Tree*, 7 J. CHILD CUSTODY 219, 228–29 (2010) (describing five cases from different states in which mothers’ and children’s reports of abuse were rejected and penalized by courts, including removal of children from mother in three cases).

5. See NEUSTEIN & LESHER, *supra* note 4; Kathleen Coulborn Faller & Ellen DeVoe, *Allegations of Sexual Abuse in Divorce*, 4 J. CHILD SEXUAL ABUSE 1, 2 (1995) (finding that courts were half as likely to validate child sexual abuse as clinicians, and approximately 20% of parents were sanctioned for raising it); Nancy M. Steubner, *Custody Outcomes for Protective Parents in Cases with Child Sexual*

Experts and litigants alike report that custody courts commonly do not recognize domestic violence and child abuse,⁶ fail to understand their implications for children and parenting,⁷ and turn against mothers and children who insist on pressing claims of abuse by a father in custody litigation.⁸

Simultaneously, domestic violence organizations such as DV LEAP⁹ are being flooded with pleas for help from battered women litigating custody, reporting that court-appointed custody evaluators and judges do not credit their claims of abuse and instead seek to maximize fathers' access to children.¹⁰ Service providers and advocacy organizations specializing in domestic violence report what appears to be a trend toward reversal of custody from protective mothers to allegedly abusive fathers, which has been estimated to occur in up to 58,000 cases per year.¹¹ The

Abuse 73 (Sept. 2011) (unpublished M.A. thesis, California State University, San Bernardino), http://protectiveparents.com/Nancy_Steubner_Thesis_Custody_Out_comes_for_Protective_Parents_in_Cases_with_Child_Sexual_Abuse.pdf (finding that “when mothers reported the presence of child sexual abuse, there was a strong tendency for fathers to be awarded custody”).

6. Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. Ct. J. 57, 62 (2003) (finding that domestic violence is often overlooked by family courts in the decision-making process); Stark, *supra* note 3, at 290 (stating that courts and evaluators have been reluctant to support abuse claims even in cases “where partner violence is dramatic, children are exposed, and police have corroborated a victim’s claims”).

7. Stark, *supra* note 3 at 312 (“children’s exposure in abusive families is multifaceted and continuous”); Jaffe et al., *supra* note 6, at 60 (finding that “[c]hildren exposed to domestic violence may suffer from significant emotional and behavior problems related to this traumatic experience”).

8. NEUSTEIN & LESHER, *supra* note 4, at xiii–xix; Stahly, *supra* note 5; Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 244 (2009). A growing body of journalism is beginning to document these problems. See e.g., Laurie Udesky, *Custody in Crisis: How Family Courts Nationwide Put Children in Danger*, 100REPORTERS (Dec. 1, 2016), <https://100r.org/2016/12/custody-2/> (detailing three cases from different states in which, despite strong evidence of child sexual abuse and child abuse, the mothers lost custody to the abusers); Joaquin Sapien, *For New York Families in Custody Fights a ‘Black Hole’ of Oversight*, PROPUBLICA (Mar. 17, 2017), <https://www.propublica.org/article/for-new-york-families-in-custody-fights-a-black-hole-of-oversight>; Joaquin Sapien, *Call in Congress for Family Court Reform*, PROPUBLICA (Sept. 13, 2016), <https://www.propublica.org/article/call-in-congress-for-family-court-reform>; Jennifer Baker, *The Strange Advocacy for “Parental Alienation Syndrome”*, PSYCH. TODAY (Dec. 17, 2015) <https://www.psychologytoday.com/blog/the-love-wisdom/201512/the-strange-advocacy-parental-alienation-syndrome>.

9. Joan S. Meier founded and is now the Legal Director of the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP). DV LEAP’s mission is to provide appellate advocacy in cases involving domestic violence or family abuse or of importance to those constituencies. To learn more about DV LEAP’s work, including briefs in numerous custody and abuse appeals, visit www.dvleap.org.

10. Meier, *Getting Real About Abuse and Alienation*, *supra* note 4, at 242–43.

11. *How Many Children are Court-Ordered into Unsupervised Contact with an*

result for children can include ongoing abuse, loss of a secure maternal-child relationship, and at worst, death at their fathers' hands.¹² Although litigants often speculate that this problem is particular to one jurisdiction or another, it has been observed nationwide¹³ and globally.¹⁴ In response, an independent and decentralized movement of "protective parent" advocates and mother-survivors has become increasingly active both locally and nationally.¹⁵

Despite thousands of anecdotal reports, *empirical* support for these reports has been sparse, probably because empirical study of individual courts is extremely time-intensive and requires expertise in both law and empirical research. Most significantly, normal empirical methods, such as reviewing individual case files, are not adaptable to a national study. Therefore, most existing empirical research focuses on particular jurisdictions or courts. These empirical studies have confirmed the foregoing reports in various respects. First, the studies have identified a trend toward favoring fathers, in contrast to widespread assumptions that mothers are favored in custody litigation.¹⁶ More recent studies have elaborated

Abusive Parent After Divorce?, LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE (Sept. 22, 2008), <http://www.leadershipcouncil.org/1/med/PR3.html>; Geraldine Butts Stahly, *Protective Parents Survey*, CAL. PROTECTIVE PARENTS ASS'N, <http://protectiveparents.com/research.html> (last visited Apr. 28, 2017) (describing survey of sixty-six mothers and one father, self-selected as "protective parents," in which 98% felt discredited for trying to protect their children; 67% lost custody in ex parte proceeding; and 59% lost custody in proceedings with no court reporter).

12. See *Child Murder Data, Filicide in U.S. Family Courts: A Snapshot*, CTR. FOR JUDICIAL EXCELLENCE, <http://www.centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/> (last visited Apr. 26, 2017); see also Press Release, Center for Judicial Excellence, 58 Children Murdered By A Parent Who Could Have Been Saved (Dec. 5, 2016), <http://www.centerforjudicialexcellence.org/wp-content/uploads/2016/12/12516-Child-Murder-Release-for-website.pdf>; R. Dianne Bartlow, *Judicial Response to Court-Assisted Child Murders*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 12-1-12-42 (Mo Therese Hannah & Barry Goldstein eds., 2016); Barry Goldstein, *What Can Be Learned From Court-Assisted Murder Cases?*, 5 FAM. & INTIMATE PARTNER VIOLENCE Q. 369, 370 (2013).

13. Jaffe et al., *supra* note 6, at 57–58.

14. See, e.g., International Association of Victims of Parental Alienation, *Discussion*, FACEBOOK, <https://www.facebook.com/groups/249283921943335/> (last visited Apr. 3, 2017).

15. See Stark, *supra* note 3, at 297–98 ("protective mothers are making attempts to call attention to partner abuse directed at themselves or their children"); Lundy Bancroft, *Organizing in Defense of Protective Mothers: The Custody Rights Movement*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 17-1-17-13, (Mo Therese Hannah & Barry Goldstein eds., 2010).

16. Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 748, 825 (1990) (finding that

on a pattern of family court failures to consider evidence of intimate partner violence, disrespectful treatment of battered women, gender biased treatment of mothers, and granting of physical custody to perpetrators of intimate partner violence.¹⁷ Another empirical study found that court preferences for joint custody and the “friendly parent” principle outweighed judicial consideration of abuse claims.¹⁸ More in-depth empirical research has examined the lack of expertise in domestic violence and child abuse—particularly child sexual abuse—among forensic custody evaluators, who are relied on heavily by the courts.¹⁹

despite the pervasive belief that mothers are favored in custody disputes, “[f]athers who actively seek custody obtain either primary or joint *physical* custody over 70% of the time.”) (emphasis in original); WELLESLEY CENTERS FOR WOMEN, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 3 (2002) (reporting that fathers who seek custody are favored over women because “mothers are held to a different and higher standard than fathers.”); Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples With a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 1017 (2005).

17. Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 VIOLENCE AGAINST WOMEN 1367, 1368–69 (2005); Michelle Bemiller, *When Battered Mothers Lose Custody: A Qualitative Study of Abuse at Home and in the Courts*, 5 J. CHILD CUSTODY, 228 (2008); Meier, *Domestic Violence, Child Custody, and Child Protection*, *supra* note 2, at 662.

18. Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father has Perpetrated Violence against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1092, 1101 (Aug. 2005) (noting that in study of six states’ applications of presumption against custody to batterers, in state which also had a presumption in favor of the “friendly parent,” the latter presumption generally trumped).

19. A number of studies have empirically analyzed custody evaluation practices in cases involving domestic violence or child abuse allegations. These studies confirm that many custody evaluators actually lack meaningful expertise in domestic violence and child abuse, and often make recommendations that do not take abuse into account. See DANIEL G. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS’ BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE AND CUSTODY-VISITATION RECOMMENDATIONS 116–25 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf>; MICHAEL S. DAVIS ET AL., CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS, AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS 84–85 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf>; ELLEN PENCE ET AL., BATTERED WOMEN’S JUSTICE PROJECT, MIND THE GAP: ACCOUNTING FOR DOMESTIC ABUSE IN CHILD CUSTODY EVALUATIONS 37 (2012), <http://www.bwjp.org/resource-center/resource-results/mind-the-gap-accounting-for-domestic-abuse-in-child-custody-evaluations.html>. Several other studies have also found that custody evaluators tend to fall into two distinct groups: those who understand domestic violence and believe it is important in the custody context, and those who lack such understanding, are skeptical of abuse allegations, and believe the allegations are evidence of alienation. See Megan L. Haselschwerdt et al., *Custody Evaluators’ Beliefs About Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives*, 26 J. INTERPERSONAL VIOLENCE 1694, 1695–97 (2010); Nancy S. Erickson & Chris S. O’Sullivan, *Doing Our Best for New York’s Children: Custody*

II. Parental Alienation Theory as a Key Factor in the Discrediting of Abuse Claims

A primary mechanism giving evaluators and courts a quasi-scientific rationale for rejecting or ignoring abuse allegations is the theory of “parental alienation (PA),” originally called “parental alienation syndrome (PAS),” and also called “child alienation,” or simply “alienation.”²⁰ PAS is a construct invented and promoted by Richard Gardner to describe a “syndrome” whereby vengeful mothers employed child abuse allegations in litigation as a powerful weapon to punish ex-husbands and ensure custody to themselves.²¹ Gardner claimed that child sexual abuse allegations were rampant in custody litigation, and that the vast majority of such claims are false, designed by the mother to “alienate” the child from the father and drive him out of the child’s life.²² Gardner also characterized PAS as profoundly destructive to children’s mental health and as risking their relationships with their (purportedly falsely accused) fathers for life.²³ Recommended remedies to PAS were often draconian, including a complete cutoff from the mother in order to “deprogram” the child.²⁴ PAS quickly became widely incorporated into custody litigation when any abuse—not just child sexual abuse—was alleged.²⁵

Evaluations When Domestic Violence is Alleged, 23 NYS PSYCHOLOGIST 9, 10–11 (2011). Evaluators in the latter category tend to have “patriarchal” beliefs, which dictate their interpretations of the information they acquire. SAUNDERS ET AL., *supra*, at 11. A New York study found that most custody evaluators’ recommendations in cases with domestic violence were unsafe – in most of these cases the abuse was substantiated. DAVIS ET AL., *supra*, at 5.

20. Joan S. Meier, *Parental Alienation Syndrome and Parental Alienation: A Research Review*, NAT’L ONLINE RESOURCE CTR. FOR VIOLENCE AGAINST WOMEN 6 (2013); JOYANNA SILBERG ET AL., *CRISIS IN FAMILY COURT: LESSONS FROM TURNED AROUND CASES* 14–15 (2013), <http://www.protectiveparents.com/crisis-fam-court-lessons-turned-around-cases.pdf>; Nancy S. Erickson, *Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse*, in *DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES* 201–203 (Mo Therese Hannah & Barry Goldstein eds., 2010).

21. RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* 59–60 (1992) (describing “parental alienation syndrome” as a disorder arising “primarily in children who had been involved in protracted custody litigation.”) [hereinafter *THE PARENTAL ALIENATION SYNDROME: A GUIDE*].

22. RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE* 69–70 (1987).

23. *THE PARENTAL ALIENATION SYNDROME: A GUIDE*, *supra* note 21, at 63–82.

24. *Id.* at 225–30, 240–42.

25. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, *supra* note 8, at 240–50.

PAS was explicitly invented by Gardner as a rationale for denying child sexual abuse reported by mothers; he explained it in part by gender stereotypes such as “hell hath no fury like a woman scorned.”²⁶ As a “syndrome,” PAS lacked any scientific or empirical foundation, and has today been largely—although by no means completely—rejected by experts and scholars, and to a lesser degree, courts.²⁷ Gardner himself committed suicide in 2003.²⁸

However, the discrediting of PAS has not ended courts’ reliance on its concept. Scholars and forensic evaluators continue to give substantial attention to “parental alienation” (PA), which many contend is distinct from PAS.²⁹ Whether PA is really different from PAS, particularly in how it is used in court, is highly contested.³⁰ However, there is not much doubt that parental alienation³¹ remains a dominant issue in many, if not most, custody cases in which a mother has alleged that a father was abusive.³²

PA’s role in custody and abuse cases has been widely decried by the domestic violence field. By re-framing a mother who seeks to protect her child from abuse as a pathological or vengeful liar who is severely “emotionally abusing” her children by falsely teaching them to hate and fear their father, PA theory makes a self-described

26. THE PARENTAL ALIENATION SYNDROME: A GUIDE, *supra* note 21, at 86–87.

27. For a list of authorities rejecting PAS, see Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, *supra* note 8, at 239–40. See also Joan Meier & Andrew Hudson, *Case Studies of PAS in Court*, DV LEAP (2009), <http://www.dvleap.org/Programs/CustodyAbuseProject/PASCASEOverview.aspx>.

28. Stuart Lavietes, *Richard Gardner, 72, Dies; Cast Doubt on Abuse Claims*, N.Y. TIMES (June 9, 2003), <http://www.nytimes.com/2003/06/09/nyregion/richard-gardner-72-dies-cast-doubt-on-abuse-claims.html>.

29. Meier, *Parental Alienation Syndrome and Parental Alienation*, *supra* note 20, at 6. For evidence of the continued attention given to PA as distinct from PAS, see Barbara Jo Fidler & Nicholas Bala, *Guest Editors’ Introduction to Special Issue on Alienated Children in Divorce and Separation: Emerging Approaches for Families and Courts*, 48 FAM. CT. REV. 6 (2010); Janet R. Johnston & Joan B. Kelly, *Rejoinder to Gardner’s “Commentary on Kelly and Johnston’s ‘The Alienated Child: A Reformulation of Parental Alienation Syndrome’”*, 42 FAM. CT. REV. 622, 626 (2004) (“PAS does not meet the American Psychiatric Association’s . . . criteria for a syndrome.”).

30. Erickson, *supra* note 20, at 10; Meier, *Parental Alienation Syndrome and Parental Alienation*, *supra* note 20, at 6.

31. Parental alienation is also spoken of as “child alienation” and “alienation” or “parental alienation disorder”; in referring to “PA” the authors intend to capture all references to “alienation” of a child from a parent in custody and visitation litigation. See Meier, *Parental Alienation Syndrome and Parental Alienation*, *supra* note 20, at 6.

32. See Robert Geffner, *Editor’s Note About the Special Section*, 13 J. CHILD CUSTODY 111, 111–12 (2016) (explaining the editors’ decision to devote two recent issues of the journal to PAS/PAD because, despite the scientific consensus that it does not exist, courts continue to utilize it under one label or another).

“protective parent” *persona non grata*.³³ The PA label diverts courts’ attention away from the question of whether a father is abusive and replaces it with a focus on a supposedly lying or deluded mother or child.³⁴ Anecdotally, evaluators’ characterizations of mothers as “alienators” appear to have a significant impact on courts, leading them to deny mothers’ allegations of abuse, even when the abuse has never been ruled out.³⁵ In some cases, even expert validations of child abuse³⁶ and comprehensive guardian *ad litem* confirmations of the validity of the abuse claims³⁷ have been insufficient to overcome the seemingly irrebuttable presumption of falsity that flows from the label “alienator.” For all these reasons, leading experts have called the use of “parental alienation” claims against mothers in custody litigation “a national crisis.”³⁸

With minimal exceptions, the above critiques of PA have been experiential and anecdotal—not empirical. The exceptions include one small study of eighteen published and unpublished Minnesota parental alienation cases; the author concluded that these courts appear to “exhibit anti-mother gender bias,” that the use of alienation has had an unfair impact on women, and that many of the cases involved switches of custody to the father.³⁹ Another ongoing study holds promise as providing empirical support for the domestic violence field’s claims about parental alienation. Joyanna Silberg and Stephanie Dallam have been analyzing “turned around” cases, that is, cases in which a first court refused to believe alleged abuse and sent a child into unprotected care of an abuser, and a second court subsequently corrected that ruling and validated the abuse.⁴⁰ Silberg’s research to date has indicated that parental alienation labeling plays a significant role in the erroneous and harmful first outcomes in the study.⁴¹

33. BANCROFT ET AL., *supra* note 3, at 169–70; Meier, *Domestic Violence, Child Custody, and Child Protection*, *supra* note 2, at 689–90, n.108.

34. Meier, *Getting Real About Abuse and Alienation*, *supra* note 4, at 227–30.

35. Meier, *supra* note 19, at 10–11.

36. Brief for Defendant-Appellant at 5–6, *Bhatia v. Debek*, A.C. 27995 (Conn. App. Ct. Jan. 25, 2007), <http://www.dvleap.org/Programs/CustodyAbuseProject/Cases.aspx>

37. Brief in Support of Defendant-Appellant (2010) (sealed case) (on file with author Joan S. Meier).

38. BANCROFT ET AL., *supra* note 3, at 168.

39. Rita Berg, *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 LAW & INEQ. 5, 24–25 (2011).

40. SILBERG ET AL., *supra* note 20, at 4.

41. *Id.* at 39.

While some advocates—and the first author—have sought to challenge courts’ misuses of parental alienation theory on appeal, these challenges have yet to be successful.⁴² Ironically, in criminal and civil courts—but not in family courts—PAS has long been ruled inadmissible and unscientific.⁴³ However, the admissibility of PA—as distinct from PAS—has never been adjudicated in any case known to the authors, although its scientific basis is widely challenged.⁴⁴ One reason PA is difficult to challenge in court is that there is fairly wide acceptance of family courts’ use of looser evidentiary standards.⁴⁵ Another is that parental alienation is treated by courts as though it is fact-based and gender-neutral, while also being seen as objective and scientific. Without a principled objective or scientific basis for invalidating the concept altogether—or at least invalidating its application to abuse claims—advocates, scholars, and lawyers have found it difficult to persuade evaluators or courts that using parental alienation to deny valid abuse claims is unlawful.⁴⁶ Rather, claims that PA is misused to mask abuse can seem to court personnel to be nothing more than a complaint that a judge chose not to believe allegations of abuse—a choice judges are free to make.

III. Gulf Between Domestic Violence and Family Court Constituencies

The domestic violence community’s alarms about the failure of family courts to appropriately adjudicate abuse—including

42. See Brief of Appellant, *Jordan v. Jordan*, 14 A.3d 1136 (D.C. 2011) (No. 10-FM-0375; renumbered No. 09-FM-1152), <http://www.dvleap.org/Resources/BriefsCourtOpinions.aspx> (under “E.J. v. D.J.”); Brief for Defendant-Appellant at 5–6, *Bhatia v. Debek*, No. A.C. 27995 (Conn. App. Ct. Jan. 29, 2007), <http://www.dvleap.org/Programs/CustodyAbuseProject/Cases.aspx>

43. See *Snyder v. Cedar*, No. NNHCVO10454296, 2006 WL 539130, at *8 (Conn. Super. Ct. Feb. 16, 2006) (“The court finds that ‘parental alienation syndrome’ has no scientific validity at this time.”); *People v. Fortin*, 735 N.Y.S.2d 819, 819 (N.Y. App. Div. 2001) (affirming the finding in a criminal case that defendant had not met his burden of showing that PAS is generally accepted by relevant scholars).

44. Erickson, *supra* note 20, at 20-2–20-22; Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, *supra* note 8; Meier, *Parental Alienation Syndrome and Parental Alienation*, *supra* note 20.

45. See Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 893 (2010) (discussing the rise of “problem-solving” family courts); Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local”*, 42 B.C. L. REV. 1081, 1131 (2001) (discussing the “evidentiary obstacles” that may actively discredit complaints of domestic violence).

46. See *Jordan v. Jordan*, 14 A.3d 1136 (D.C. 2011); Brief of Appellant, *Jordan v. Jordan*, 14 A.3d 1136 (D.C. 2011) (No. 10-FM-0375; renumbered No. 09-FM-1152), <http://www.dvleap.org/Resources/BriefsCourtOpinions.aspx> (under “E.J. v. D.J.”)

substantiated allegations—appear to have had minimal impact on typical family court and evaluator practices.⁴⁷ Many mainstream family court practitioners, including leading forensic experts, judges, and private lawyers, do not accept abuse advocates' and scholars' views of parental alienation or custody and abuse adjudications as gender-biased or failing to recognize the realities of abuse.⁴⁸ The two professional spheres—domestic violence and protective parent experts and advocates on the one hand, and family court researchers and practitioners on the other—remain largely distinct, and disinclined to trust each other's perspectives.⁴⁹ Consequently, domestic violence and child abuse concerns remain only minimally integrated into standard family court practices.⁵⁰

a. The Pilot Study

Troubled by the apparent stand-off between those who work with abuse survivors and family courts, the first author decided that empirical data was needed to prove (or refute) the critiques of

47. See generally DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, CASE LAW ADDRESSING PARENTAL ALIENATION SYNDROME (2012) http://www.dvleap.org/LinkClick.aspx?fileticket=vCU_jqwlGAI%3d&tabid=935.

48. See Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact With a Parent: Concepts, Controversies, and Conundrums*, 48 FAM. CT. REV. 10, 10–11 (2010).

49. Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437, 440–42 (2008).

50. *Id.* at 442; Meier, *Domestic Violence, Child Custody, and Child Protection*, *supra* note 2, at 664. The main exception to this generalization can be found in the collaborative work of the Battered Women's Justice Project (BWJP) and the Association of Family and Conciliation Courts (AFCC). The two organizations have jointly produced a number of products such as guidelines and training documents to assist courts in identifying, assessing, and accounting for intimate partner violence in custody cases, etc. See Nancy Ver Steegh & Clare Dalton, *Report From the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454 (2008); GABRIELLE DAVIS ET AL., BATTERED WOMEN'S JUSTICE PROJECT, PRACTICE GUIDES FOR FAMILY COURT DECISION-MAKING IN DOMESTIC ABUSE RELATED CHILD CUSTODY MATTERS (2015), <http://www.bwjp.org/resource-center/resource-results/practice-guides-for-family-court-decision-making-in-domestic-abuse-related-child-custody-matters.html>. In addition, the federal government's Office on Violence Against Women has launched a "Family Court Enhancement Project" which encourages courts to work with domestic violence experts (including BWJP) to improve their responses to the issue. Press release, Dep't of Justice, Office of Violence Against Women, Justice Department Selects Four Courts to Identify Promising Practices in Custody and Visitation Decisions in Domestic Violence Cases (Sept. 24, 2014), <https://www.justice.gov/opa/pr/justice-department-selects-four-courts-identify-promising-practices-custody-and-visitation>. It is not clear to what extent any of these initiatives—which are titled in terms of partner abuse—include close attention to *child* abuse as distinct from partner violence. The data reported in the remainder of this article suggest that this may be essential to any meaningful reforms.

PA as a gender-biased vehicle for negating legitimate abuse claims. The remainder of this paper describes the pilot study—so named because, as a result of these preliminary findings, the authors and a team of colleagues received a grant from the National Institute of Justice to expand, deepen, and strengthen the statistical inquiry.⁵¹ This three-year study is expected to be completed by the end of 2017.

The pilot study sought to examine whether custody cases involving allegations of parental alienation (with or without allegations of abuse) had gendered outcomes. It further sought to develop an objective, empirical measure of whether and to what extent parental alienation was impacting outcomes in custody cases involving abuse claims.

b. Method

The pilot study was led by the co-authors, a law professor and a law graduate with a master of public health degree and background in empirical social science research. The authors set out to collect and objectively analyze as many published online opinions about custody, abuse, and alienation as could be identified between 2002 and 2013. The second co-author⁵² fed key search terms (“parent,” “alienation,” etc) into two legal databases (Google Scholar and Westlaw), which identified approximately 588 potentially relevant cases from all states and the District of Columbia. Review of these cases resulted in a database of 238 published opinions which met the criteria for inclusion in the study.⁵³ The majority of the included opinions were published appellate opinions; forty-six were trial court opinions reviewing magistrate or lower court decisions; twelve were unpublished (but electronically available) trial court opinions.

51. National Institute of Justice Award, Child Custody Outcomes in Cases Involving Abuse Allegations and Parental Alienation, No. 2014-MU-CX-0859, <https://www.nij.gov/funding/awards/Pages/2014.aspx#>. The three-year study examines child custody cases containing abuse or alienation allegations by one parent against the other. By expanding beyond only cases containing alienation claims, the study will, among other things, be able to compare outcomes where alienation is brought to bear, and where it is not. The study will be completed in December 2017 and results will be published and circulated soon thereafter.

52. We thank Rosie Griffin, Esq., a then-law student and DV LEAP intern, who started the research and the coding, which was then revised and expanded by the second co-author.

53. The study focused on cases involving intra-parental custody litigation in which alienation was claimed. Cases where alienation was just a passing reference but not a subject of litigation, contempt cases, child support cases, and actions by the State or non-parent litigants, were excluded. Three cases were excluded because they involved lesbian partners in a custody dispute and were not suited to this gender analysis.

Each case was coded by the researcher for twenty-six items, including custody status at the outset, which parent alleged alienation and/or abuse, type of alleged abuse, experts' and guardians' opinions, and the court's decision on custody and access. The inquiry sought simply to identify objective facts about the cases, such as what the parties alleged, whether there were experts or guardians *ad litem*, their opinions, what the courts themselves found to be true, and the custody/visitation outcomes they ordered. Importantly, the study was designed to provide a completely objective analysis, in that it *did not question the courts' factual findings*, despite the possibility that, as the critical literature asserts, many courts minimize or reject credible claims of abuse.⁵⁴ The approach of the study was to *accept* courts' own factual findings and analyze their orders given those findings.

The database was created and the analysis performed in Excel. As is explicated further below, the key analyses looked at rates of "win" by each gender and rates at which custody was switched from one parent (usually a mother) to the other (usually a father).⁵⁵ "Winning" was defined as obtaining all or part of the relief requested or rebutting the other party's request, without necessarily obtaining a custody switch.⁵⁶ Finally, we assessed the rates at which courts validated different types of abuse claims and alienation allegations for each gender, and the correlation between different types of abuse allegations and outcomes.

The core statistical tool used was the "odds ratio"—a tool used to assess the relative difference in outcome between two groups. Odds ratios are often used in medical studies to compare the effect of a treatment compared to a placebo. Here, odds ratios were used to compare judicial outcomes for certain types of claims relative to others, e.g., comparing the odds of mothers with the odds of fathers receiving the desired outcome; or comparing the odds of an outcome with different types of abuse allegations (or none).⁵⁷ Critically, odds

54. See *supra* notes 15—19 and accompanying text.

55. For this analysis, the custody switches to fathers that were taken into account consisted of situations in which a father took physical custody of the children from a mother who previously had sole custody; cases in which the father initially had custody or the parents initially shared joint physical custody were excluded. Our assessment of "win" rates, in contrast, includes cases in which joint custody was changed to sole custody, and other victories.

56. For example, if a father moved to switch primary custody from the mother, but was awarded only increased visitation (against the mother's opposition), this would be coded as a "win" because he received part of the requested relief and the mother's position lost.

57. For each odds ratio, the comparison event was labeled and 95% confidence intervals (CI) were calculated to assess statistical significance. An odds ratio was

ratios do not indicate how likely an event is to happen generally; instead, they demonstrate whether the event is more likely to happen in one group than another. The comparative nature of odds ratios facilitates the analysis of gendered differences in court decisions.

c. Results

At the broadest level, the study found, unsurprisingly, that 82% (194) of the alienation claims in the study were brought by fathers. This was consistent with the fact that the majority of parents starting with primary custody (75%) were mothers; it was also consistent with the understanding of alienation as a theory that is primarily—albeit not only—used to refute abuse claims. (Fathers' claims of maternal abuse of children or themselves were miniscule in this database (3%).)

(i) Gender Bias in Alienation Cases

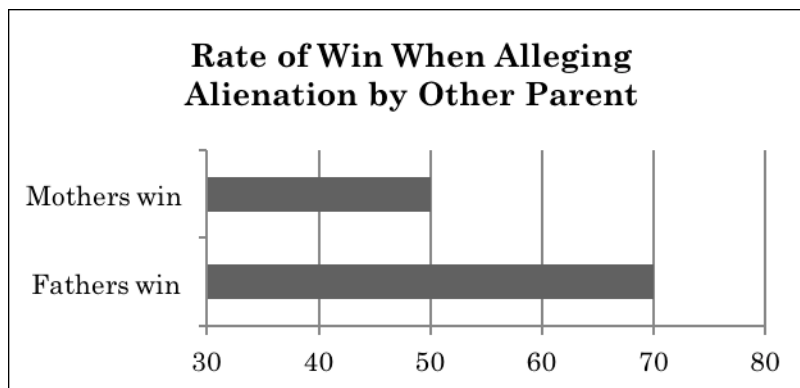
Interestingly, both mothers and fathers' alienation claims were each credited at a rate of 57%. This appears to be a departure from the early days of parental alienation litigation, during which at least one study found that mothers were considered alienating at twice the rate of fathers.⁵⁸

statistically significant at the .05 level (i.e., the results would not have happened by chance more than 20% of the time) if the confidence interval did not include 1; an odds ratio of 1 indicates that each event was equally likely to happen.

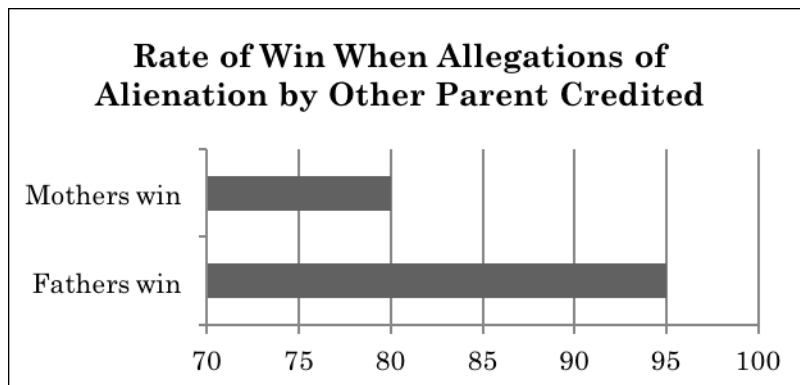
58. Leona M. Kopetski et al., *Incidence, Gender, and False Allegations of Child Abuse: Data on 84 Parental Alienation Syndrome Cases*, in *THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME: CONCEPTUAL, CLINICAL AND LEGAL CONSIDERATIONS* 65–70 (Richard A. Gardner et al. eds., 2006). Note that in this article, alienation was treated as equivalent to false allegations of child abuse. While this remains the dominant use of parental alienation, alienation is also used to attack other behaviors which purportedly undermine the children's relationship with the other parent, especially when it is claimed by mothers against fathers.

(ii) Win Rates by Gender

The gender parity evaporated, however, when analyzing the impact of alienation claims on outcomes. First, fathers were more than twice as likely as mothers to win the case when claiming alienation. This represents a statistically significant bias in favor of fathers; a father merely alleging parental alienation was 2.3 times as likely as an alleging mother to receive a favorable decision.⁵⁹

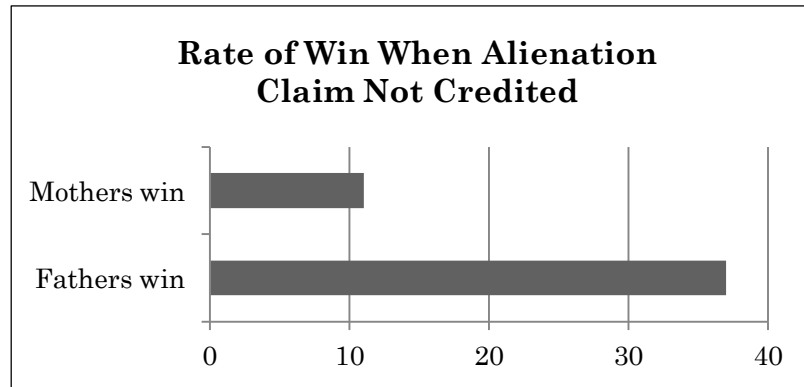


Bias toward fathers was even more evident when alienation was credited. In these cases, fathers won almost every time (95%), while mothers whose alienation claims were credited won only 80% of the time. This was a statistically significant benefit to fathers—they were 4.3 times as likely to win as mothers.



59. CI 1.2–4.5.

Perhaps most striking was fathers' success *even when their alienation claim was rejected by the court*. In these cases, in which the court either found no alienation or chose not to resolve the claim, fathers won 37% of the time, while mothers in comparable situations won only 11% of the time. This again represents a statistically significant benefit for fathers: when the fathers' alienation claims were not credited, they were still nearly five times as likely to win as mothers whose claims were not credited.



(iii) Custody Switches by Gender

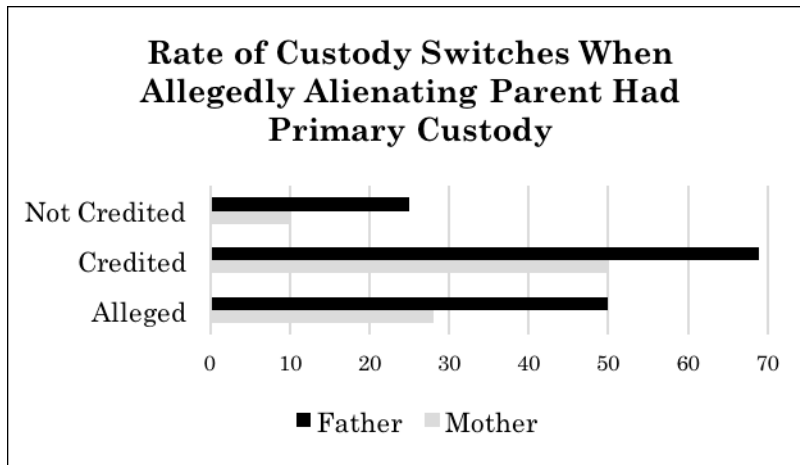
Parental alienation theory encourages courts to impose the dramatic step of removing children from a parent to whom they are bonded, but who has been found to be alienating. While the “win” analysis above includes custody switches from joint custody to primary physical custody with one parent, this section focuses only on the more radical full custody switches from one parent to another. Our findings suggest a gender bias in these custody reversals.

In this database of alienation cases, when fathers merely accused mothers of alienating the children, children were switched from mothers to fathers 50% of the time. Maternal allegations of alienation, in contrast, only resulted in custody switches 28% of the time, meaning that fathers were 2.6 times as likely to receive a custody switch when alleging alienation.⁶⁰ If the father's alienation

60. CI 0.9–7.6; this is not statistically significant because of the small number of cases (18) in which fathers start with primary custody and mothers allege alienation. However, the lower bound of the CI is close to 1 (the threshold for significance) while the upper bound is substantially higher than 1, indicating that a significant difference may be observed in a large sample of cases.

claim was credited, custody switches increased to 69%; when the mother's alienation claim was credited, she received a custody switch 50% of the time.⁶¹

Uncredited alienation claims resulted in custody switches in fathers' favor more frequently than mothers. When fathers' alienation allegations were not credited, mothers still lost custody 25% of the time. When mothers' allegations were not credited, fathers lost custody only 10% of the time.



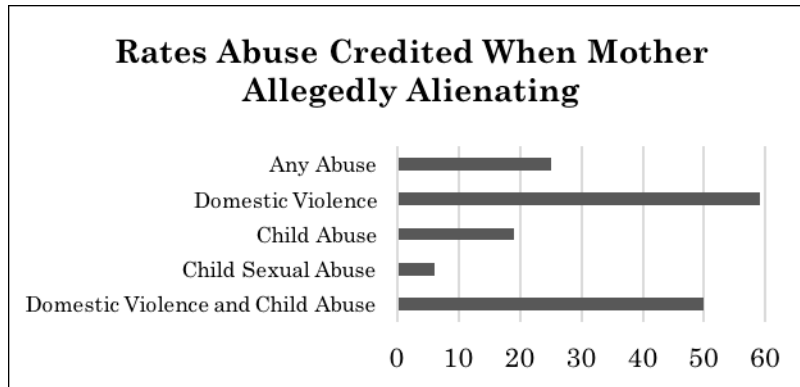
Notably, when mothers had primary custody and raised an alienation claim that was not credited by the court, they were ordered to give up primary custody of the child to the father 80% of the time. While this was a limited sample of only five cases, the outcomes may reflect a punitive response to mothers who raised false alienation claims, construing these claims as a form of alienation itself. There was only one case in which the father had primary custody and his alienation claim was not credited; custody was also transferred to the mother in this case.

61. There were only eight cases in which fathers had initial custody and mothers' alienation claims were credited; four of these cases transferred custody to mothers (50%, compared to 69% for fathers). This suggests that fathers were 2.25 times more likely than mothers to receive a custody switch when alienation is credited, but this result is not statistically significant because of the small number of relevant cases (CI 0.5–9.6).

(iv) Responses to Abuse Allegations:

Rates of crediting of different types of abuse

Overall, abuse claims by mothers alleged to be alienating were credited only 25% of the time. Breaking this down by type of abuse claim, domestic violence claims were credited 59% of the time, child abuse 19%, and child sexual abuse only 6%.⁶² Claims of mixed domestic violence and physical child abuse were credited 50% of the time.

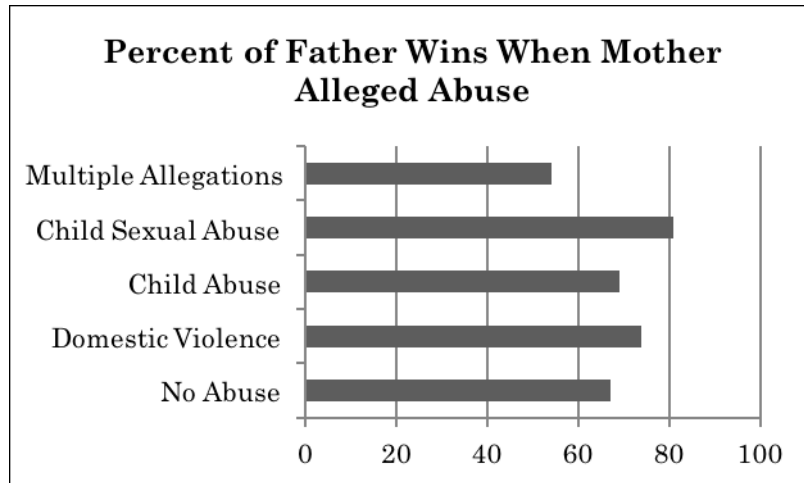
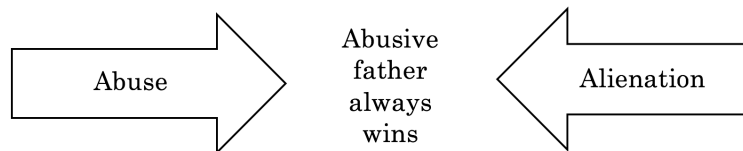


When the mother alleged the father to be alienating as well as abusive, courts appeared more receptive. Overall, these claims were credited 85% of the time, with domestic violence credited 88% of the time and physical child abuse 67%. Of the two mixed cases of domestic violence and child abuse, both were credited; there were no child sexual abuse allegations accompanying an alienation claim against a father.

⁶² When discussing different types of abuse, each category represents cases in which that type alone was alleged; cases with mixed types of abuse are specified.

Win rates when abuse was claimed

Overall, fathers who were accused of abuse and who accused the mother of alienation won their cases 72% of the time; slightly *more* than when they were *not* accused of abuse (67%). When mothers alleged domestic violence, fathers won 73% of the time; when child abuse was alleged, fathers won 69% of the time. Child sexual abuse allegations *increased* fathers' likelihood of winning to 81%. When there were mixed abuse allegations, fathers won 54% of the time.

*Win rates when abuse was validated*

There were twenty-six cases in which abuse was credited and the mother was alleged to be alienating; fathers won ten of these cases (38%). However, in all seven cases of validated abuse in which alienation was credited, the father won—credited alienation trumped abuse. Seven cases met these criteria (five domestic violence-only, one child abuse-only, and one mixed domestic violence and child abuse). In the nineteen cases in which the court credited the abuse but not the father's cross-claim of alienation, fathers won only three (16%). To summarize, in most cases in which abuse is credited, the court believed the mother and her allegation

of abuse, and she won the case. However, when the court believed the abuse *and* the father's claim of alienation, the alienation trumped. As a result, even perpetrators of child abuse won 14% of the time.⁶³

Impact of abuse claims on custody switches—child sexual abuse penalty

The impact of abuse allegations becomes more significant in custody switches.⁶⁴ First, it may surprise some readers to learn that there was little difference in the rate at which mothers lost custody when they alleged paternal abuse (52%) and when they did not (48%). In other words, women lost custody approximately half the time in these alienation cases, *whether or not they alleged the father was abusive*.

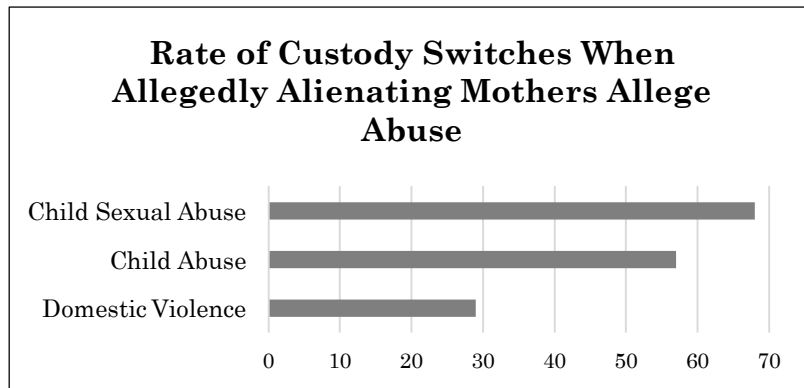
Even more striking are courts' differential responses to different types of abuse allegations. While these differences have been reported anecdotally, the authors did not anticipate finding such clear statistical evidence that alleging child sexual abuse was so high-risk for mothers. The study found that when domestic violence alone was alleged, mothers lost custody 29% of the time. However, courts regularly removed mothers' custody when they made a child sexual abuse allegation—fathers received a custody switch in 68% of these cases. When child abuse alone was alleged by the mother, the children were switched from mother to father 57% of the time. The bias here is statistically significant: fathers were 5.3 times as likely to take custody away from the mother when she alleged child sexual abuse than when she alleged domestic violence.⁶⁵ Custody switches were 3.3 times as likely when mothers alleged child abuse, although this finding was not statistically significant.⁶⁶

63. In the two cases in which child sexual abuse was substantiated, the father lost and the mother either maintained sole custody or the father's visitation was terminated.

64. See *supra* note 55, for a discussion on the study's definition of "custody switch."

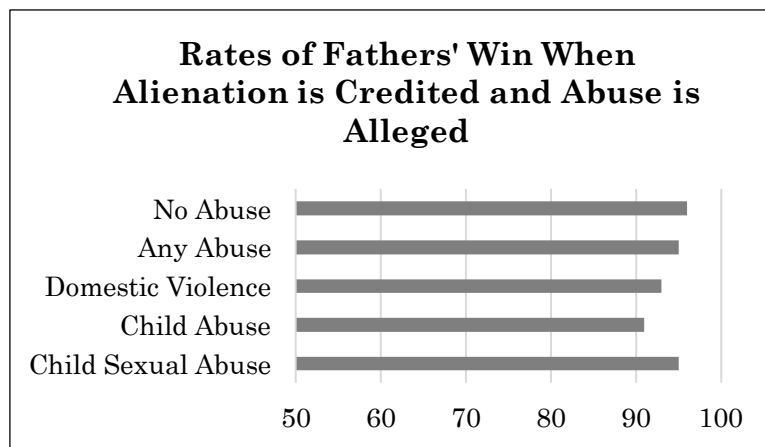
65. CI 1.3–21.5.

66. CI 0.8–12.8. In the smaller population in which abuse was validated and mothers started with primary custody, two out of twenty (10%) resulted in a custody switch. Both of these cases involved domestic violence claims, meaning that fathers received a custody switch 25% of the time when domestic violence was credited (total of eight).



Alienation findings drive fathers' wins

Overall, when courts credited that a mother had committed alienation, fathers won almost every time, regardless of whether the mother reported abuse (95%) or not (96%). Fathers won *every case* in which mixed forms of abuse were alleged and the mother was found to be an alienator. When the mother alleged child sexual abuse alone, fathers won 95% of cases; domestic violence allegations alone produced a 93% win rate for fathers; child abuse allegations alone resulted in fathers winning 91% of the time. Most stunningly, as mentioned above, even *proving abuse* did little to help a protective mother; alienation findings trumped in each of these seven cases (five domestic violence, one child abuse, and one mixed; no child sexual abuse).



(v) Brief Discussion

In summary, this pilot study lends empirical support to the reports of advocates and scholars about family courts' negative responses to mothers and children reporting paternal abuse when fathers accuse the mother of alienation. Not only did fathers alleging alienation manage to negate abuse reports from mothers and children in the majority (72%) of cases, they did so in every case but two (36 of 38) when mothers alleged child sexual abuse (in the two cases where fathers lost, the court validated child sexual abuse). Even more unsettling, when courts believed mothers were alienating, they switched custody to the father 69% of the time; and even when the alienation claim was rejected or not decided, they transferred custody of the children to an allegedly abusive father 25–50% of the time. Indeed, it should be noted this study found that in cases with an alienation claim, women *lost their children* half of the time *regardless* of abuse claims. In short, the risk to any mother in family court of losing custody (if the father claims alienation) may be far worse than is well known.

Consideration of whether courts' lack of belief in the truth or significance of mothers' and children's abuse claims indicates gender bias deserves attention, but will not be developed here.⁶⁷ However, overt gender bias was evident in the impact of parental alienation claims: fathers who alleged alienation were more than twice as likely to receive a custody outcome in their favor as mothers who alleged alienation, a statistically significant result. Even when mothers' claims of paternal alienation were substantiated by courts, they won far less often than fathers whose claims of maternal alienation were substantiated. It should not be surprising that a construct designed specifically to protect fathers from assertions of child sexual abuse by mothers has a gendered impact. However, parental alienation in its more recent incarnation is presumed to be gender neutral.⁶⁸ This study indicates that—unsurprisingly—it is not. The original concept of alienation is based on an image of a

67. For a discussion of gender bias in courts, see Molly Dragiewicz, *Gender Bias in the Courts: Implications for Battered Women and Their Children*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 5-2, 5-8-5-15 (Mo Therese Hannah & Barry Goldstein eds., 2010). Given the critical literature, it is possible that courts' validation of only twenty-six percent of all abuse claims signifies denial of substantial amounts of true abuse. This question, however, is outside the scope of this paper.

68. See, e.g., Fidler & Bala, *supra* note 48 (asserting that both fathers' rights and feminist gendered critiques of family courts and alienation proffer relatively simplistic narratives of alienation that do not reflect the highly complex realities of these cases).

vengeful ex-wife who is overly involved with her children. While the idea of a vengeful ex-*husband* also fits perfectly what is known about batterers⁶⁹—and abusive ex-husbands routinely try to turn the children against their mother⁷⁰—the forensic and legal worlds are not well-informed by this reality because the dynamics and realities of abuse are only minimally integrated into those worlds. Hence, the alienating mother is an image which courts accept with little question; the alienating/abusive father has yet to be fully recognized.

In short, this study provides preliminary empirical support for the longstanding critique by advocates, survivors, and scholars that family courts are biased against women who report abuse. It also supports the growing recognition within the domestic violence field and among survivors of abuse that family courts are hostile venues for mothers alleging abuse and that mothers are at significant risk of losing custody. It also generates new information suggesting that courts are especially punitive toward women and children who raise child sexual abuse claims. Apart from the obvious concern this raises about justice and safety for children,⁷¹ this is critical information for prospective litigants, who must now weigh the risks of losing their children to the abuser (if they litigate the abuse) against the ongoing risks to the children from regular contact with a sexually abusive parent (if they do not).

(vi) Limitations

The primary limitations of this study are twofold: first, the search and coding used broad terms and were completed by a single researcher. The federally funded expanded study which is now ongoing employs more granular search terms and substantially more coded variables, analyzes thousands of cases, and cases are partially double-coded by two researchers. While the overall results of the pilot did not surprise the authors, these results should be considered preliminary indications that will be confirmed or refuted with a larger set of cases.

Second, because trial court opinions are usually not published online, the majority of the online opinions analyzed were appeals – although it should be emphasized that it was the *trial court* decisions (as described in the appellate opinion) that were being

69. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, *supra* note 8, at 232–35.

70. Meier, *Domestic Violence, Child Custody, and Child Protection*, *supra* note 2, at 706; BANCROFT ET AL., *supra* note 3, at 80–91.

71. SILBERG ET AL., *supra* note 20, at 20.

coded. This raises the question of whether trial court decisions which are appealed are systematically different from trial court opinions which are not, in a way that might bias the analysis. That is, there may be systematic differences between appealed cases and not appealed cases, but critical question is how—if at all—the analysis of mostly appeals cases might impact the database with regard to abuse and alienation findings and custody/visitation outcomes at the trial level. The larger study includes a larger set of unpublished trial opinions that will provide insight into whether non-appealed cases differ significantly from appealed cases.

One possible bias might be that only more well-funded litigants can afford to take appeals. Since fathers typically are economically better off than mothers after divorce or separation it is possible that more fathers than mothers take appeals.⁷² However, a father-heavy appellant database would presumably be populated by cases in which fathers lost. Given that in our database fathers *won* far more than mothers, if this population is in fact father-heavy, it would indicate only that the broader reality in custody courts is *even more favorable for fathers*. Such a “bias” would reinforce—rather than undermine—the gender analysis of this study.⁷³

Finally, one criticism we have heard during presentations of this data has been that, because appeals are so rare, they are simply not representative of what judges are doing across the board. This may be true with regard to individual judges; but we believe that compiling hundreds (or soon, thousands) of results from courts all over the country and finding patterns in those results provides important and legitimate insights into family court practices generally—even if they are not proof of any one judge’s or court’s practices.

72. The pilot study did not identify which party filed the appeal. Cross-appeals were filed in many of the cases.

73. Another possibility is that in lower-income or poor populations, trial court results differ systematically from outcomes among populations who can afford to take appeals. When one considers potential racial and class biases that are known to operate culturally as well as legally, Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 861 (2015), it is conceivable that poor women of color might actually obtain less destructive results in custody cases because courts may find it easier to believe poor men of color are actually abusers. However, it is also possible that racial and class biases merely reinforce gender biases. A separate examination of this population would be valuable.

Conclusion

Soon, a much larger and more intensive study of thousands of cases across the country will enable us to assess whether these pilot results provide an accurate reflection of the nation's family court practices. The authors hope that such comprehensive, credible, objective data will disprove the troubling findings from the pilot, or, if not, will encourage courts, practitioners, and survivors to come together to work to improve courts' practices so as to protect the safety and welfare of child and adult survivors of abuse.