

**REPRESENTING CLIENTS ACCUSED OF  
PARENTAL ALIENATION BEHAVIOR**

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## REPRESENTING CLIENTS ACCUSED OF PARENTAL ALIENATING BEHAVIOR

### I. INTRODUCTION

Accusations that a parent is attempting to alienate the children against the other parent arise frequently in child custody disputes. The outcome of a dispute will hinge, in part, on how the attorney manages such accusations, whether the claims are true or false, and, if true, the severity of the offending behavior. Statutes or codes of a majority of states include some version of a “friendly parent” provision in a list of best-interests factors. *See, e.g.*, Tex. Fam. Code § 153.134(a)(3) (listing as a best-interest factor, when considering the option of joint managing conservatorship, “whether each parent can encourage and accept a positive relationship between the child and the other parent”). A finding of alienating behavior might result in the court reducing your client’s custodial rights and access to the children.

This paper begins by clarifying the terms most often used in cases that raise claims of alienating behavior. Next the paper describes situations that can be mistaken as evidence of alienating behavior, and offers strategies and tips for defending a client who is falsely accused of such behavior. Finally, the paper describes how to manage a case in which your client is engaging in alienating behaviors, including tips on how to frame the case in order to reduce the adverse impact of such behaviors on your client’s position.

### II. ALIENATING BEHAVIORS VERSUS PARENTAL ALIENATION

At the outset two concepts should be distinguished. *Alienating behaviors* refer to the activities of a parent that can contribute to the child’s rejection of the other parent. *Parental alienation* refers either to the state of the relationship between a child and a parent whom the child rejects without good cause, or to the child’s attitudes and behaviors that reflect an unreasonable aversion to a parent with whom he or she formerly enjoyed normal relations. Even when the child cites genuine negative behavior by the parent as the reason for rejecting the parent, the degree of rejection is out of proportion to the alleged wrongdoing, particularly when considered in the context of the history of the parent’s love and devotion to the child’s welfare.

A parent can engage in alienating behaviors, such as persistently bad-mouth the other parent, without the child becoming alienated from the parent who is the target of criticism. Conversely, a child’s alienation from a parent can arise from factors independent of, or in combination with, the favored parent’s behavior. This paper uses the term *parental alienation* to refer only to a disturbance in which the child’s rejection of a parent is disproportionate to the rejected parent’s behavior. If the child’s experience of the parent reasonably justifies the child’s rejection—such as the child reacting to abuse, gross mistreatment, severe mental illness, witnessing domestic violence, or volatile, erratic behavior due to substance abuse—the term parental alienation would not apply in this paper.

#### A. Levels of Severity of a Parent’s Alienating Behaviors

Alienating behaviors, and a child’s alienation from a parent, fall on a continuum of severity. Mild alienating behaviors are those that occur occasionally, such as incidental bad-mouthing and criticisms of the other parent with no consistent attempt to undermine the child’s overall positive relationship with the parent who is the target of criticism. Even in healthy marriages children will occasionally hear each parent express dissatisfaction and anger toward the other parent. Parents are most apt to expose children to mild alienating behaviors in the immediate aftermath of the parents’ separation. Mild alienating parents are likely to regret their behavior, are open to recognizing the potential harm to their children, and are able and willing to offset their negative behavior by explicitly and effectively supporting their children’s positive relationship with the other parent.

Moderate alienating behaviors are consistent attempts to undermine the child’s relationship with the other parent. These behaviors convey extremely negative themes about the other parent, such as the idea that the other parent is dangerous, does not really love or want the children, and is worthless as a parent. Moderately alienating parents have difficulty recognizing the inappropriateness of their behavior.

Severe alienating behaviors are those that take on the complexion of a hostile campaign: recurring, harsh, and unmitigated criticism. In the extreme, severe alienating behaviors aim for the destruction of the child’s relationship with the other parent. Some alienating parents explicitly require their child’s allegiance and reprimand or punish the child for not expressing sufficiently negative views about the other parent, or for not strenuously refusing contact with the target parent. Severely alienating parents often hold a fixed, rigid negative view of the other parent, and believe, or claim to believe, that the other parent has seriously mistreated the child despite disconfirming evidence. Some severe alienating parents block the other parent’s access to the child and fail to comply in good faith with court-ordered parenting time schedules.

**B. Levels of Severity of a Child's Alienation from a Parent**

A mildly alienated child denigrates and complains about the target of alienation and protests spending time with that parent. But when they are together, and the child is apart from the parent with whom the child appears aligned, the child warms to the rejected parent. The child's negative thoughts, feelings, and behavior abate until the child returns to the orbit of the aligned parent.

A moderately alienated child more strongly resists contact and remains oppositional, withdrawn, or contemptuous when in the target parent's possession. A severely alienated child spews hatred toward the parent and firmly refuses contact, sometimes even to the point of hiding and running away from the parent and threatening to harm the parent.

When a child rejects a parent, the parent accused of alienating behavior usually attributes the problem to the rejected parent's poor parenting or impaired personality, denies any contribution to the derailed relationship, and may claim that the child and rejected parent never enjoyed a good relationship. The rejected parent usually attributes the problem to alienating behaviors by the other parent, denies any contribution, and claims that the parent-child relationship has deteriorated since the parents separated. The case may turn on which explanation the court accepts as most valid.

**III. ACCUSATIONS OF ALIENATING BEHAVIOR BASED ON FALSE CLAIMS THAT THE CHILD REJECTS THE OTHER PARENT**

When a parent accuses the other parent of alienating the children, the accusation is most often accompanied by a claim that the children are rejecting the parent who makes the accusation of alienation. That is, in place of or in addition to proffering direct evidence of alienating behavior, the offensive behavior is inferred from the state of the children's relationship to the alleged target of alienating behavior. Litigants argue that the children are alienated from them and that the cause of the alienation is the other parent's behavior.

**A. Is the Child Truly Alienated?**

When a litigant accuses a parent of alienating a child it is important to determine whether the child is truly alienated. Some claims that a child is alienated are false. Five factors distinguish irrationally alienated children from those whose behavior superficially resembles parental alienation. A child is not alienated when the child's hostility and apparent rejection:

1. Is temporary and short-lived rather than chronic (not to be confused with intermittent alienation that recedes in the presence of the rejected parent but returns when in the presence of the favored parent)
2. Is occasional rather than frequent
3. Occurs only in certain situations
4. Coexists with expressions of genuine love and affection
5. Is directed at both parents

Some parents and custody evaluators incorrectly label a child as alienated solely because the child expresses a preference for one parent's home. If the child does not simultaneously resist contact with the non-preferred parent, and does not express primarily negative feelings toward this parent, the child is not alienated. Preferring one parent over the other is not, in itself, a sign of alienation. Wrongly invoking the parental alienation label does a disservice to families in which a child is truly alienated; it contributes to skepticism about the concept of parental alienation. Such skepticism, in turn, emboldens those who deny the reality of parental alienation.

**B. Normal Reactions to Parental Separation**

Some children express their anxiety and sadness about their parents' separation by acting defiant and belligerent. Parents who worry about how the breakup will affect their relationship with their child may prematurely conclude that their child's hostility is a sign of alienation. Or a parent may exaggerate the children's behavior to support a false accusation of parental alienation.

Regardless of the accuser's motives, temporary and occasional displays of hostility may be a short-term reaction to the disruption in the family and not a harbinger of alienation. Even a child who once or twice resists leaving one parent's home to be in the other parent's home may be attempting to manage anxiety rather than revealing the deterioration of a parent-child relationship. If the parents mishandle the child's occasional negative behavior, this could contribute to a longer-term problem. Instead of indulging the child's attempts to control the parenting time, the parents should be advised to help the child better manage the feelings that provoke resistance. If your client reports that his or her child resists spending time with the other parent, advise your client to nip the problem in the bud and to document those efforts.

After their parents' separation if children have regular contact with both parents from the outset, this becomes the status quo and the norm. If they lose contact with a parent, they come to regard this as normal. The longer children are apart from a parent, the stronger the negative attitudes, the more resistant to change, and the more difficult it is to reunite children with their rejected parent. The longer the children's will dominates the behavior of adults, the more difficult it will be for the children to appreciate and accept that decisions about contact are not theirs to make.

### C. Separation Anxiety

Children between 15 and 24 months of age are often anxious about separations and resist transitions between parents' homes. Such resistance, though, meets four of the five criteria for non-alienated behavior: It is temporary, specific to the exchanges, coexists with expressions of love and affection when the anxiety abates, and is directed at either parent depending on which one is being left. Parents' reactions to their child's resistance can either help the child move beyond the separation anxiety or serve to entrench the anxiety.

If your client is a mother who leaves her child with a babysitter, help your client recognize that, unless the father is unfit or has been absent from the child's life, her child can handle being apart from the mother while in the care of the father. If she allows her child's normal separation anxiety to interfere with regular contact with the father, this deprives the child and father of important opportunities to build a strong, secure foundation for their relationship.

### D. Difficult, Troubled, and Shy Children

Some children have more than average difficulty adjusting to stress, new situations, or transitions. They protest when asked to shift activities and they do not readily comply when it is time to leave one parent's home to be with the other parent. Other children act withdrawn, irritable, or aggressive as manifestations of mental disorders, such as depression or bi-polar disorder.

The negative behavior of difficult or troubled children meets four of the five criteria for non-alienated behavior: It is temporary, specific to transitions, occurs with both parents, and the child shows affection for the parent after an initial period of adjusting to the transition. If parents do not communicate adequately with each other, each may falsely conclude that the negative behavior occurs only in their home and that their children are becoming alienated.

### E. Children Who Meet a Parent's Emotional Needs

Some children are reluctant to spend too much time away from a parent because the children sense that the parent is lonely without them and needs their emotional support. Benjamin D. Garber, *Parental Alienation and the Dynamics of the Enmeshed Dyad: Adulthood, Parentification and Infantilization*, 49 FAM. CT. REV. 322 (2011). RICHARD A. WARSHAK, *THE CUSTODY REVOLUTION* (1992). If the children spend time with and relate positively to their other parent, they are not alienated. However, a parent who conveys to the children that he or she needs the children's emotional support, and discourages rather than encourages them to spend time with their other parent, may eventually foster the children's alienation. If your client is using the children for emotional support, help the client recognize the problem and find other sources of support.

### F. Situation-Specific Reactions

In some cases a child has a generally positive relationship with a parent but resists spending time with that parent only under certain circumstances. For instance, a teenage girl may welcome spending time with her dad, but does not want to be around the father's girlfriend or new wife. In such a case, the child is not alienated from her father. If the girl's feelings are not handled sensitively, for example, if the mother encourages the girl's resistance, or the father reacts too angrily, the problem could escalate into parental alienation.

### G. Parent-Child Affinity

At various points in a child's life, the child may feel closer to one parent or have an easier rapport with one parent. If the child continues to relate appropriately to both parents, the child is not alienated. Being less preferred is a far cry from being hated.

If the less preferred parent confuses the situation with alienation, and does not gracefully accept the child's greater compatibility with one parent, this could introduce unnecessary tension in the parent-child relationship. A child who is challenged to defend a preference for one parent may focus on grievances about the less-preferred parent in order to justify the preference. In such a case, if the process that led to the child's focus on grievances is not carefully investigated or understood, a custody evaluator could wrongly leap to the conclusion that the child's predominantly negative reports about the less preferred parent are a sign of irrational alienation. That is, a child who initially merely expressed a preference for one parent's home is pushed into a stance that makes the child look like one who is prone to think negatively about the other parent. If, instead, the basis for the child's preference is understood and accepted, the child will not feel the need to focus on negatives in order to convince others that the preference is reasonable.

If your client is the preferred parent, encourage the client to support the child's focus on the positive aspects of the relationship with the other parent, reassure the other parent that the child's love remains intact, and document evidence of the child's positive regard for the other parent.

## H. Child's Greater Comfort in a Parent's Home

Some parents and custody evaluators mistakenly conclude that any expression of preference to live primarily with a parent means that the child is becoming alienated from the less preferred parent. In addition to feeling a greater affinity for one parent, a child's preference could be a rational response to differences between parents in their relationship styles and in their capacity, motivation, and proclivity to sensitively meet the child's needs on a daily basis.

### 1. Relationship Styles

The less preferred parent may have a relationship style that makes the children less comfortable around that parent. For example, the parent's style may be less warm, creating discomfort in both adults and children. The parent loves the children and meets their physical needs. But compared with the preferred parent, this parent may treat the children with less warmth and may not be as prone to see things from the child's point of view. The contrast between the parents' relationship styles may result in the children perceiving the less-preferred parent as insensitive, rigid, or overbearing. In the past, with both parents in the home, the children were able to forge a rewarding relationship with the less emotionally sensitive parent. The other parent served as a buffer and a resource to meet some of the children's emotional needs and the children were able to gain the benefits that the relationship with each parent offered.

But after the separation the children could express a preference for the warmer parent and initially show some reluctance to spend prolonged periods of time with the other parent. If that parent responds rigidly to the children's preference, such as insisting on equal time with the children, this could drive the children to focus on, and perhaps exaggerate, what they perceive as a less comfortable relationship style. In such a case, the children may appear to be overreacting when they are attempting to amplify their voice in the custody deliberations.

Such problems can be alleviated with careful thought about the structure and schedule of parent-child contacts that would provide the best opportunity for the children to benefit from their time with each parent rather than avoid one parent. In the long run, maintaining loving relationships with both parents will pay dividends to the entire family.

### 2. Emotional Atmosphere in the Home

One parent's home may have more structure and offer greater security and stability. The emotional climate in one home may be more benign or predictable. In one home the children may experience more encouragement and support for their participation in peer and community activities. The non-preferred parent and/or his or her new partner may be less child-focused, more volatile, or may tolerate a degree of chaos that unsettles an anxious child. In the past the non-preferred parent may have suffered a psychological disturbance or abused alcohol or drugs and had been unavailable to consistently meet the child's physical and psychological needs. This could leave the child feeling less secure in this parent's home even if the parent is now sober or the psychological difficulties have been overcome.

In sum, one parent may be better at child rearing—at least with a child of a certain age—or have a more consistent history of providing a healthy environment that fostered the child's sense of comfort and security.

## I. Responding to False Claims of Parental Alienation

If the opposing side falsely claims that a child is alienated, first determine if the child is, in fact, rejecting a parent. And if the child appears to be rejecting a parent, evaluate the child's behavior according to the five factors that distinguish irrationally alienated children from those whose behavior superficially resembles parental alienation. Produce evidence that the child is not rejecting the other parent and relates appropriately to the other parent. This includes evidence of the child's affection for the other parent and enjoyment of time with the other parent.

If the child's negative behavior occurs with both parents, document such behavior toward your client. Encourage your client to maintain and enforce firm expectations that the child will regularly spend time away from your client and with the other parent. Your client should not indulge the child's reluctance to make the transition to the other parent's care, but instead should help the child develop a positive attitude about maintaining regular contact with both parents.

Have your client document his or her efforts to help the children maintain a positive relationship with the other parent. The client should keep photos of greeting cards and gifts that the client helped the children create or buy to celebrate the other parent's birthday and holidays, especially Mother's Day or Father's Day. The client should document incidences in which the children were reluctant to go to the other parent's home but did so at your client's insistence.

Also, your client should convey to the children pleasure at hearing positive things about their time with the other parent, and document the specific fun activities that children report doing while in their other parent's care. The

children's positive comments about their other parent show that the children are not alienated and that they do not feel pressure from your client to reject their other parent. Children who feel such pressure learn to withhold positive comments about the parent whom they are supposed to reject.

#### **IV. ACCUSATIONS OF ALIENATING BEHAVIOR BASED ON VALID CLAIMS THAT THE CHILD REJECTS THE OTHER PARENT**

When your client faces a true allegation that his or her child rejects the other parent, this does not necessarily mean that your client is at fault. The problem could stem from factors other than your client's behavior. The burden is on the litigant who makes the accusation to present evidence to support the claim that the other parent is engaging in alienating behaviors, and that the child's negative attitudes and behavior are the direct result of the alienating parent's influence. Alternative plausible explanations should be considered.

The child's rejection could be fully warranted by the behavior of the rejected parent. The degree of rejection could be unjustified and a disproportionate reaction to the rejected parent, but primarily child-driven and independent of the favored parent's behavior. The rejection could have both strong rational and strong irrational components and reflect a mixture of essential contributions from both parents. Or the rejection could be primarily the result of the favored parent's alienating behavior and influence.

##### **A. Justified Rejection of a Parent**

The child's rejection could be a reasonable reaction to the rejected parent's personality and behavior. Children who are chronically mistreated by a parent may welcome their parents' separation as an opportunity to escape mistreatment. When the children get the sense that they no longer have to spend time with an aversive parent, and need not fear retaliation if they reject that parent, they may resist or refuse contact.

When reacting to a sustained pattern of abuse or intimate partner violence, the justification for the child's rejection is apparent. It should be noted, however, that many abused children prefer to remain with an abusive parent, a preference that reflects a strong though unhealthy bond accompanied by the hope that the parent will improve. Less clear-cut are cases where the rejected parent is accused of an isolated instance of abuse or violence, or a pattern of ongoing harsh or insensitive parenting that does not constitute abuse. In the case of insensitive parenting, the basis for a child's rejection is more difficult to determine if the preferred parent overly indulges the children. When this occurs, the contrast between parenting styles may lead the children to avoid the parent who enforces limits. But avoiding contact with a parent who is firm, but does not mistreat the children, is not a reasonable option and is unlikely to serve the children's best interests.

Most but not all instances of unreasonable parental alienation in the family law context occur in the period surrounding and following the parents' separation. If a parent-child relationship has been derailed for a long time prior to the parents' breakup, this may signal relationship problems that are rooted in the child's earlier experiences with the rejected parent and less likely to be unreasonable or caused by preferred parent. However, in some instances even a past good relationship could derail when the quality of parenting substantially deteriorates in the immediate aftermath of a separation. Thus, evidence of a prior good relationship does not automatically discount the possibility that a child's rejection of a parent is justified. For instance, a child might want to avoid a parent who, in the immediate aftermath of the marital separation, relentlessly denigrates the other parent. Although some children join in the campaign of denigrating the parent, and thus become alienated, other children experience the bad-mouthing as aversive and they resent it, a phenomenon termed "blowback." Richard A. Warshak and Mark R. Otis, *WELCOME BACK, PLUTO: UNDERSTANDING, PREVENTING, AND OVERCOMING PARENTAL ALIENATION* (WBP Media 2010), *available at* <https://www.warshak.com/pluto/index.html>.

##### **B. Child-driven Alienation**

A child, especially an adolescent, can develop an aversion to a parent that, while unjustified, is independent of and in some cases contrary to the wishes of the parent with whom the child maintains a positive relationship. For example, a child can become disillusioned upon discovering that a parent has been dishonest, such as engaging in an extramarital affair. The parent's indiscretion, by itself, does not justify the cessation of the parent-child relationship when considered in the context of a lifetime of the parent's love and support.

In cases of child-driven alienation, the favored parent can help the child find a better way to cope, or the parent can exacerbate the problem by supporting the child's overreaction. The favored parent can help the children by explaining why it is wrong to define people by their worst moments, and invite the children to think about why they would not want others to judge them by their worst behavior. The parent can encourage a child to focus on the past loving relationship and the many past moments of fun, affection, and nurturance that characterize all that the other parent has done for the child.

The favored parent can exacerbate the problem by agreeing that the other parent's behavior merits complete rejection and that the child is better off without a relationship with the rejected parent. Or, the favored parent can adopt a laissez-faire attitude by not intervening, and stand by passively while the child makes a poor choice that results in unnecessary and tragic estrangement from a loving parent.

### C. Mixed Contributions to Parental Alienation

Multiple threads form the tapestry of a child's personality, including nearly every psychological disturbance. For instance, facing similar environmental stressors some children will develop an Adjustment Disorder or Posttraumatic Stress Disorder; others will not. Likewise, a child's rejection of a parent results from a combination of factors.

Thus far, this section has described rational rejection of a parent who mistreats the child and irrational rejection of a parent driven primarily by the child's dynamics. In contrast to a problem traced predominantly to the behavior of one parent, or is independent of either parent's influence, some disrupted parent-child relationships reflect a combination of factors none of which clearly outweighs the others.

In such cases, the child's rejection of a parent has both strong rational and strong irrational components. The child holds a combination of realistic and distorted perceptions of the rejected parent, but the perceptions do not warrant the degree of animosity that the child expresses about the parent. To be considered a genuine mixed case, also called a "hybrid" case, both the rational and irrational components need to be strong. All children can find something reasonable to criticize in their parents. Normally this does not result in a complete estrangement. Thus, merely citing some valid complaints about a rejected parent, in a case where the other parent has engaged in alienating behavior, is not sufficient to conclude that the behavior of both parents has contributed substantially to the child's alienation.

In mixed cases of alienation, the rejected parent has acted in some manner that could reasonably disappoint or anger a child to the extent that the child's initial reactions are understandable. But with time, sensitivity from the rejected parent, and proper support from others, the relationship would recover, were it not for the attitudes and behavior of the favored parent. In such cases, the favored parent interferes with and prevents healing.

A previous paper presented nine questions that help distinguish cases of parental alienation primarily linked to one parent's alienating behaviors versus rejection of a parent that is linked to significant contributions from both parents. Richard A. Warshak, *Ten Parental Alienation Fallacies that Compromise Decisions in Court and in Therapy*, 46 PROF. PSYCHOL.: RES. & PRAC. 235, 238 (2015).

1. Did the presumed flaws of the parent emerge just prior to the child's alienation, such as might be the case with a newly acquired closed-head injury, or have the parent's offensive traits and behavior coexisted in the past with cordial parent-child relations?
2. Would the rejected parent's weaknesses result in the child's alienation under normal circumstances regardless of the favored parent's attitudes and behavior?
3. Has the favored parent played a role in focusing the child's attention on the other parent's flaws and mistakes, exaggerating the significance of the mistakes, or encouraging an unsympathetic attitude toward a parent's problems?
4. Given the favored parent's behavior, were the children likely to become alienated even in the absence of the rejected parent's presumed flaws?
5. Does the rejected parent continue to enjoy a normal relationship with the alienated child's siblings or stepsiblings in spite of the personality and behavior that supposedly is the cause of the child's alienation?
6. Is the rejected parent's offensive behavior, such as a temper outburst, a maladaptive reaction to a child's rejection or is it a likely cause of the child's rejection?
7. Does the child appear motivated to improve the relationship, such as engaging meaningfully in therapy interventions, or does the child seem content with the loss of the parent?
8. Does the child show genuine interest in the parent changing his or her behavior, as in the case of a child who wants his father to watch his soccer games rather than being preoccupied with a cell phone, or does the child convey that no amount of change will be sufficient to heal the relationship?
9. Does the child regain affection when the rejected parent modifies the behavior about which the child complained, or does the alienation continue unabated despite improvements in the parent's behavior?

### D. Parental Alienation Linked to Alienating Behavior

When a child's aversion to a parent is unjustified and has no strong realistic elements, and there is evidence of alienating behavior by the parent with whom the child is aligned, it is most likely that the alienating behavior played a key role in the genesis of the child's problem. Such situations are sometimes referred to as "pure alienation" because of the absence of any reasonable basis for the alienation and the presence of sufficient alienating behavior by the favored parent to explain the deterioration of the child's relationship with the rejected parent. In these cases one usually

sees a stark contrast between the child's current alienated relationship and the past normal relationship with the parent who is now rejected.

## V. REPRESENTING CLIENTS WHO HAVE ENGAGED IN ALIENATING BEHAVIOR

Attempting to undermine a child's positive regard for the other parent can weigh against the perpetrator's position in litigation even if the child is not yet showing evidence of identifying with the parent's negative opinion about the other parent. An expert witness may opine that if the child remains exposed to alienating behavior, the child's relationship with the other parent is at risk for deteriorating. The lawyer's challenge is greater if the child has already become alienated and resists or refuses contact with the other parent, denigrates the other parent, or acts irrationally afraid of spending time with that parent.

Attorneys have three tasks when defending a parent whose behavior results in plausible accusations that the parent has or could contribute substantially to a child's irrational alienation from the other parent. First, frame your client's behavior in the most benign light possible. Second, rehabilitate your client so that the court can be assured that the behavior will not continue. Third, demonstrate that the child is better off remaining in your client's custody, particularly in light of the client's recently acquired insight into the harm that could stem from his or her behavior and the positive changes that the client has made with respect to alienating behaviors.

### A. Framing Alienating Behavior in a Sympathetic Light

Alienating behavior is perpetrated to different degrees of intensity, frequency, and duration, and it can reflect different motivations. These differences can mitigate or complicate the impact of the behavior on custody evaluators' opinions and on court decisions.

#### 1. Angry Behavior Typical in the Period Surrounding a Separation

Studies of divorcing parents have reported that in the period leading up to the breakup, and in the immediate aftermath, many spouses experience a toxic brew of an upsurge of anger combined with a decline in self-control. This can result in volatile and aggressive verbal and sometimes physical behaviors that are uncharacteristic of the spouses' normal functioning, but typical for people going through a highly stressful divorce.

A common manifestation of hostility during this period is occasionally denigrating the spouse in front of the children. For the majority of parents, conflict will abate in the first two years post-separation. E.g., Joan B. Kelly, *Paternal Involvement and Child and Adolescent Adjustment After Separation and Divorce: Current Research and Implications for Policy and Practice*, 2 INT'L. FAM. L., POL'Y & PRAC. 5 (2014). Looking back, these parents regret their behavior and are astonished that they acted in such a vindictive manner. One study referred to this phenomenon as "not-me behaviors." E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR WORSE: DIVORCED RECONSIDERED 44 (2002).

Given that such angry behavior predictably will diminish for the majority of divorcing spouses, if a client's alienating behaviors were perpetrated in the immediate aftermath of the separation, the attorney should emphasize that such behavior is typical and transitory. Naturally, this argument will be more effective if your client ceases the offending behavior during the litigation. If your client's negative behavior was not intense, and not persistent, but rather an occasional lapse of judgment, this should be emphasized. If the other parent has engaged in similar bad-mouthing, this should be cited as support for the idea that alienating behavior is mutual, results from the stress of the separation and litigation, and by itself should not determine the outcome of the custody case. Nevertheless, even when both parents engage in some bad-mouthing, if your client is more "successful" in turning the children against the other parent, this may influence the court's decisions.

#### 2. Reactions Endemic to and Exacerbated by Family Law Litigation

Family law litigation arises from conflict and arouses more of it. The sheer volume of work in responding to discovery demands and preparing for a custody evaluation and hearings taxes the coping skills of most litigants. The litigation takes center stage in the minds of the litigants and often bleeds into the home atmosphere.

Courts routinely order parents not to discuss the litigation in front of the children. But rarely do parents shield their children completely from the litigation and the strong emotions it inflames. Each new accusation from the other side begs for a defense. Parents who feel blind-sided by a new and unexpected accusation may fail to exercise the care that they normally would to ensure that the children do not overhear discussions about the latest salvo in the litigation. Constant provocations lead to occasional imprudent responses.

Displays of hostility toward the other parent are not good for children to witness. But occasional lapses of judgment—"I can't believe what your father is demanding of us"—are a far cry from explicitly and persistently involving the child as an ally in the litigation. The latter behavior is perpetrated through maneuvers such as coaching

and rehearsing the child for interviews with the child custody evaluator and amicus attorney, or dictating messages of hate for the child to send to the other parent.

Isolated incidences of a parent portraying the other parent in a negative light, or restrictive gatekeeping, are endemic to high conflict litigation and may abate when the case is resolved. Scheduling one event for a child that occurs during the other parent's scheduled time, while a problem, is not the same as constantly asking a child who is in the other parent's home if she wants to return home prematurely, or consistently burdening a child with communications that express the parent's intense suffering during the child's absence. A few instances of poor co-parenting should be contrasted with a campaign of alienation carried out through persistent bad-mouthing, lying, overlooking positives, and exaggerating and drum-beating negatives.

Nevertheless, isolated relatively mild instances of bad-mouthing or restrictive gatekeeping should not be confused with isolated acts that are so extreme, egregious, and cruel that they merit attention on their own as troublesome alienating behavior. Two examples: a father coached his son to violently attack the mother with a baseball bat while she was sleeping; a physician mother created a solution of poison and instructed her daughter to add the poison to her father's morning coffee. A less extreme example, but still raising significant concern, is the parent who explicitly punishes the child for saying anything nice about or expressing any desire to spend time with the other parent, or the parent who threatens to abandon the child if the child asks to spend any time with the other parent. Most often, what appear to be isolated acts of such psychological abuse are the tip of the iceberg, the most visible evidence of alienating behavior.

### 3. Clarifying Reality when Children Hear Damaging Accusations About a Parent

Parents under a court order not to disparage the other parent face a dilemma when the children repeat negative things they have heard from a parent. For instance, a child may complain that she has to stop her dance classes because, according to her mom, Dad won't pay for the activity. The dad knows that he has, in fact, paid for the dance classes. In such situations, if the accused parent remains silent the children get no help to better understand the accusation and put it into perspective. Silence plays into the hands of the parent who wants the children to think poorly of the other parent. Advice books for parents encourage them to tactfully clarify reality with the children. *E.g.*, RICHARD A. WARSHAK, *DIVORCE POISON: HOW TO PROTECT YOUR FAMILY FROM BAD-MOUTHING AND BRAINWASHING* (2010).

We should distinguish between parents who share with a child gratuitous criticism of the other parent versus parents who try to correct misinformation in order to protect a good relationship with the child. Parents walk a fine line when they respond to false charges repeated by their children. They must try to correct damaging false information without further burdening their children, without undermining the children's regard for the parent who gave the false information, and without leaving themselves vulnerable to the charge that they are disparaging the other parent. There are better and worse ways to correct misinformation: "Your mother is mistaken," versus, "Your mother is nuts." But an occasional poorly handled reaction to a child who repeats something outrageous that the child should never have been told is not tantamount to a campaign to alienate the child.

### 4. Extenuating Circumstances that Trigger Alienating Behaviors

The circumstances of a separation may make alienation behaviors more likely. For instance, debilitating levels of anger may result from your client's discovery that the spouse has had an affair with your client's best friend, thereby resulting in the simultaneous loss of the marriage and the friend on whom your client would normally rely for support in a crisis. Or, your client discovers that his or her spouse has engaged in a pattern of deceit, such as multiple extramarital affairs, or massive financial deception. While such circumstances do not justify exposing the children to harmful communications, the circumstances do help others judge the offending behavior in a more sympathetic light. The attorney can argue that the client was thrown off balance by the stressful circumstances, needed some time to work through the crisis, and the client's normal excellent parenting skills have reemerged. Such an explanation can mitigate the opinions of an evaluator and the consequences imposed by the court for your client's impolitic behavior.

## **B. Client Rehabilitation**

No matter how benignly the attorney frames the alienating behavior, the longer the behavior persists the less likely that attempts to mitigate the behavior will succeed. Helping the client recognize and cease or lessen the alienating behavior is a priority. The attorney may work with the client on these issues or may rely on a mental health professional to help the client recognize and stop perpetrating alienating behaviors.

Attorneys who try to deal with these issues themselves face a risk that is attenuated when the task is delegated to a mental health consultant. In most cases, clients initially will either deny the offending behavior or feel justified engaging in such behavior. Thus, when confronted with the concern about alienating behavior, clients are apt to feel criticized, respond defensively, and question whether the attorney is fully in the client's corner. If a consulting expert assumes responsibility for confronting the client with observations about alienating behaviors, this may help the

attorney retain the client's trust. Clients will feel that it is not their attorney judging them, but the expert sharing observations that require strategic management. The attorney and client can then, together, implement a plan to rehabilitate the client and strengthen his or her position in the litigation.

If the opposing side or a custody evaluator has cited evidence of alienating behavior, the evidence should be explored with the client both to obtain the client's perspective and to raise awareness of the behavior. Expressions of certain global negative attitudes about the other parent raise the most concern about the risk of alienation. Severely alienating behavior commonly portrays the target parent as someone who offers no value to the children, is unworthy of their love and respect, is a danger to them, or does not and never has cared about or loved the children. A client who expresses such negative attitudes should be helped to view the children's need for their other parent in a more balanced light.

Alienating parents vary in how much they are aware of their vindictive and harmful behavior. The lawyer or mental health consultant can review with the client a list of common alienating behaviors to help promote greater awareness of these behaviors. Such a list will also help the attorney identify the presence of the client's alienating behaviors that may not have been apparent at the outset of the attorney-client relationship. The attorney's awareness of such behaviors, especially their pervasiveness and severity, may emerge gradually or may not become apparent until well into the litigation.

The repertoire of potential alienating behaviors is extensive. Following are some types of alienating behavior. For more comprehensive lists see STANLEY CLAWAR & BRYNNE RIVLIN, *CHILDREN HELD HOSTAGE: IDENTIFYING BRAINWASHED CHILDREN, PRESENTING A CASE, AND CRAFTING SOLUTIONS* 29–63 (2013); BARBARA JO FIDLER, NICHOLAS BALA, RACHEL BIRNBAUM, & KATHERINE KAVASSALIS, *CHALLENGING ISSUES IN CHILD CUSTODY DISPUTES* 250–252 (2008); RICHARD A. WARSHAK, *DIVORCE POISON: HOW TO PROTECT YOUR FAMILY FROM BAD-MOUTHING AND BRAINWASHING* 198 (2010).

- Allow the children to decide when and if they will spend time with the other parent
- Repeatedly encroach on the children's time with the other parent by calling and texting frequently or by scheduling enjoyable events for the children that require them to miss or cut short their time with the other parent
- Convey to the children that the parent will be despondent if the children spend time with their other parent and needs them to stay home
- Ask the children to secretly remove items from the other parent's home
- Ask the children to scout for documents in the other parent's home that will assist the alienating parent in the litigation
- Constantly discuss the other parent only in negative terms; focus the children's attention on, and exaggerate, the parent's mistakes and flaws
- Make false statements that taint the children's regard for their other parent
- Convey to the children that the parent is pleased to hear only negative things about the other parent
- Encourage and support the children's rude and defiant behavior toward to the other parent
- Reinforce the children's avoidance of court-ordered contacts with the other parent by rewarding the children with enjoyable activities when they refuse to comply (as opposed to disciplining the children as might occur if the children refused to attend school)
- Coach the children to make false allegations of mistreatment by the other parent
- Refer to the parent by first name when speaking with the children, or tell the children that the other parent is not a "real" parent
- Tell the children that their other parent does not love them
- Tell children that the other parent cares more for his new family than for them
- Tell children that the other parent left "us" instead of reassuring the children that the divorce is between the parents and that the other parent did not abandon the children
- Devalue and minimize the other parent's past involvement with the children
- Suggest to the children that their other parent might hurt them or is incapable of providing a safe environment for the children
- Hide from the children all evidence of the other parent's caring and support, such as greeting cards and gifts, voice mail messages, financial support, and requests to see the children
- Threaten to withdraw love and abandon the children if they express positive sentiments about the other parent
- Reward the children for treating the other parent rudely with callous disregard for the parent's feelings
- Encourage the children to refer to the other parent with a pejorative nickname

A goal in identifying and raising clients' awareness of alienating behaviors is to help them reach the point where they can say that momentarily they allowed their anger about their spouse's affairs, dishonesty, financial manipulations, badmouthing, etc., to color their communications with the children. They now realize their errors and have stopped perpetrating the offending behaviors. They have made amends by communicating with the children the importance of maintaining a loving relationship with both parents. In word and deed they are helping the children to overcome their negative view of their other parent and repair the relationship. Also, they have given the children explicit permission to love and respect their other parent and have convinced the children that they want the children to resume a normal relationship with their other parent.

Clients who lack insight into the harm that their behavior is causing their children and who resist efforts to help them improve may be motivated to reduce alienating behaviors by learning about the blowback phenomenon. Their efforts to alienate the children from their other parent may backfire. Some children resent and turn against the parent whom they perceive is too preoccupied with bad-mouthing their other parent. The children may feel sympathy for and gravitate to an alignment with the parent who is constantly criticized.

The attorney should emphasize that the court is likely to give considerable weight to evidence of alienating behaviors. Regardless of how justified clients feel about the other parent's lack of worth to the children, the clients need to know that their alienating behaviors will create an unfavorable impression with a custody evaluator, amicus attorney, and the court. Clients need to understand the range of possible negative outcomes in court—including loss of custody and imposition of heavy restrictions and perhaps supervision or temporary suspension of their contacts with the children.

### **C. Arguments for Maintaining Client's Rights, Duties, and Parenting Time**

When the evidence indicates that your client has engaged in alienating behaviors, if possible show that the behaviors have been relatively mild, occasional, of brief duration, and also perpetrated by the accuser. Also, frame the behaviors as typical and short-lived reactions to the separation and ensuing litigation. If exceptional mitigating circumstances—such as particularly egregious behavior by the spouse—provoked strong uncharacteristically hostile reactions from your client, present such evidence to the custody evaluator and court. Laying the context for such reactions helps frame the offending behaviors as momentary and understandable reactions rather than part of a chronic campaign to alienate the children.

Allegations that your client has engaged in chronic and severe alienating behavior will be accompanied by efforts to reduce your client's parenting rights and parenting time. This can be countered with evidence of a client's rehabilitation. Present evidence that your client has acquired insight into the harm that could stem from his or her behavior and has made positive changes. This supports the argument that the children are not at risk for becoming or remaining alienated and thus it is unnecessary to reduce the client's parenting time or limit rights and duties as a conservator.

Also, present evidence and arguments that the net drawbacks to the children of reducing their time with your client outweigh the possible gains. In place of proposals to place the children primarily with the rejected parent, if the children are found to be irrationally alienated propose alternative remedies such as parenting coordination, parenting facilitation, and family therapy.

## **VI. COPING WITH ADVERSE MENTAL HEALTH OPINIONS AND TESTIMONY**

If the court orders a child custody evaluation, prepare your client to respond to allegations of parental alienation. Consider the five factors that distinguish irrationally alienated children from those whose behavior superficially resembles parental alienation. If the child is not genuinely alienated, marshal and organize the evidence that supports this observation. Also consider the various reasons other than parental alienation that could explain the child's preference for one parent over the other.

If a child does reject the other parent, consider whether the child's feelings are justified. If the rejected parent's behavior does not merit the child's estrangement, consider whether the rejected parent has nonetheless contributed significantly to the problem. If a child is irrationally alienated and your client's behavior has been a major negative influence, consider the factors that can mitigate the weight that an evaluator or court might assign to the alienating behaviors.

It is best if the custody evaluator takes notice of facts and observations favorable to your client's position *during* the evaluation. Negotiating or going to trial with an evaluation that supports your arguments is preferable to facing the task of impeaching the evaluator's opinions in a cross-examination. Consider retaining a consultant to help organize the information and materials relevant to allegations of parental alienation. Clients need to know what information is important to share with the evaluator even if the evaluator's procedures do not elicit that information.

If the evaluation report is unfavorable to your client's position, consider retaining an expert to review the evaluator's report and complete file. The reviewer's feedback can inform the attorney's deposition and cross-

examination of the evaluator. The reviewing expert might also testify about the problems identified in the custody evaluation. Special attention should be given to the possibility that the evaluator's conclusions about parental alienation failed to take into account the various factors and situations discussed in this paper that offer alternative explanations of a child's apparent rejection of a parent.

The evaluator may have been too quick to label a child as alienated and blame your client for the problems in the child's relationship with the other parent. Some experts see all cases through the same lens. They fail to undertake a nuanced inquiry and analysis of the nature and roots of a problem that looks like parental alienation. Expert witnesses should be challenged to describe the alternative interpretations of evaluation data that they considered, and to show how, why, and at what point during the evaluation they settled on their conclusions and dismissed the alternatives as insufficient to explain the data.

Examine the expert's professional background, knowledge, experience, and record to detect deficiencies in expertise or biases regarding parental alienation. An expert who offers opinions about parental alienation based on a review of case facts, and who did not conduct her own evaluation, should be challenged if the testimony exceeds the bounds of the witness' expertise or lacks a sufficient professional basis for specific opinions in the case. For instance, a psychologist trained as a researcher and not as a clinician lacks the training, supervised experience, and credentials to conduct a custody evaluation. Reports and prospective testimony from such a witness that rely on or refer to the custody evaluation are open to reliability challenges and impeachment. The researcher-expert is not qualified to judge the reliability of evaluation procedures and data and thus lacks the competence to determine how much, if any, weight should be accorded to the evaluator's results. Also, a therapist who sees one or more family members should not make recommendations on ultimate case issues, such as custody arrangements. The therapist generally lacks the comprehensive information available to a child custody evaluator whose data extend beyond patients' reports in therapy sessions.

Examinations of experts and arguments to the court are likely to have the strongest impact when formulated within an organized structure, such as Zervopoulos' PLAN Model. JOHN A. ZERVOPOULOS, *CONFRONTING MENTAL HEALTH EVIDENCE: A PRACTICAL PLAN TO EXAMINE RELIABILITY AND EXPERTS IN FAMILY LAW—SECOND EDITION* (2015). Unfavorable expert opinions that reflect inadequate data and deficient reasoning are best countered with a systematic exposé of the deficits in the expert's qualifications, methods, inferences about data, and recommendations.

## **VII. CONCLUSIONS**

Allegations that a child has been manipulated by a parent to turn against the other parent raise complex issues that present formidable challenges to child custody evaluators and courts. Assessing whether a child is unreasonably rejecting a parent requires a thorough investigation of reasonable alternative explanations of the children's and parents' behavior. It is a difficult, yet essential, task to determine the nature of parent-child relationship problems. When such problems exist, the proposed remedies must be grounded in social science knowledge and not reflect an evaluator's inadequate training and experience, faulty evaluation procedures, or personal biases.

Even when the evidence suggests the presence of alienating behavior, such behavior is perpetrated to different degrees of intensity, frequency, and duration, and it can reflect different motivations. These differences can mitigate or complicate the impact of the behavior on custody evaluators' opinions and on court decisions. Representing clients who are accused of alienating behavior requires a thorough understanding of the nuances of claims that a child is alienated and that the client is responsible for the problem. Armed with such knowledge, the attorney can assist the client in preparing for a custody evaluation, strengthen the client's position in the litigation, and competently defend the client against parental alienation allegations.